The Future of the Voting Rights Act
The Future of the Voting Rights Act

David L. Epstein, Richard H. Pildes, Rodolfo O. de la Garza, Sharyn O’Halloran, Editors

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Contributors

DAVID L. EPSTEIN is professor of political science at Columbia University.

RICHARD H. PILDES is Sudler Family Professor of Constitutional Law and codirector, New York University Center on Law and Security, at the New York University School of Law.

RODOLFO O. DE LA GARZA is Eaton Professor of Administrative Law and Municipal Science in the Department of Political Science at Columbia University and vice president for research at Tomás Rivera Policy Institute.

SHARYN O’HALLORAN is George Blumenthal Professor of Politics and professor of international and public affairs at Columbia University.

STEPHEN ANSOLABEHRE is Elting R. Morison professor of Political Science at the Massachusetts Institute of Technology.

THOMAS BRUNELL is associate professor in the School of Social Sciences at the University of Texas at Dallas.

BRUCE E. CAIN is Robson Professor of Political Science and director of the Institute of Governmental Studies (IGS).

GUY-URIEL E. CHARLES is interim co-dean of the University of Minnesota Law School and Russell M. & Elizabeth M. Bennett Professor of Law.

LOUIS DESPIRO is associate professor in the Department of Political Science and the Department of Chicano/Latino Studies at the University of California, Irvine.

LUIS FUENTES-ROHWER is associate professor of law at the University of Indiana, Bloomington.

HEATHER K. GERKEN is professor of law at Yale Law School.

BERNARD GROFMAN is professor of political science and member of the Center for the Study of Democracy at the University of California, Irvine.
Contributors

**Richard L. Hasen** is William H. Hannon Distinguished Professor of Law at Loyola Law School in Los Angeles.

**Samuel Issacharoff** is Reiss Professor of Constitutional Law at New York University School of Law.

**Karin MacDonald** is director of the Statewide Database and Election Administration Center at the Institute of Governmental Studies (IGS).

**Peyton McCrary** is a historian in the Civil Rights Division of the United States Department of Justice. The views expressed in this article may not necessarily reflect those of the Department of Justice.

**Laughlin McDonald** is director of the Voting Rights Project of the American Civil Liberties Union in Atlanta, Georgia.

**Michael P. McDonald** is assistant professor of government and politics at George Mason University and visiting fellow at the Brookings Institution.

**Spencer Overton** is associate professor of law at The George Washington University Law School.

**Nathaniel Persily** is a professor of law and a political scientist at the University of Pennsylvania Law School.

**Christopher Seaman** is a practicing attorney with Sidley Austen LLP in Chicago.

**Richard Valelly** is professor of political science at Swarthmore College.
Acknowledgments

This book began with a conference in New York jointly and generously sponsored by the Columbia University Department of Political Science and the New York University School of Law. Hosted by Rudy de la Garza and Richard Pildes, the conference began the process of coming to terms with the legacy of the Voting Rights Act. Credit for the original inspiration for this gathering belongs to Guy-Uriel Charles and Luis Fuentes-Rohwer. A year later, the Russell Sage Foundation agreed to sponsor a follow-up conference and to produce this book. That support came about through the efforts of David Epstein and Sharyn O’Halloran. O’Halloran received additional research support from the Leitner Fund for Faculty Research at Columbia’s School of International and Public Affairs. We are grateful for all of this support.

The order in which the authors are listed was selected randomly and does not necessarily reflect contributions.
The Voting Rights Act (VRA) is a sacred symbol of American democracy. The act, the most effective civil rights statute ever enacted in the United States, was the last significant stage in the nearly universal formal inclusion of all adult citizens in American democracy. Yet when laws in a democracy take on the status of sacred icons, the risk arises that they will be viewed as appropriate only for reverence, rather than for the public discussion, analysis, and debate that characterize sound and legitimate policy making. That risk is particularly great with the VRA, because that phrase represents and means dramatically different things to different audiences; when discussion of the act takes place, different minds conjure up distinct features of the act. Yet, like many major laws, the act is comprised of varied provisions, some enacted at different times than others, some justified by distinct policy aims than others.

Although the VRA is among the most important and effective enacted statutes, discussion of it over the last twenty-five years has been confined largely to academic specialists and those who must work with the act, such as judges, lawyers, state and federal officials, as well as politically engaged citizens’ groups. But broader public discussion of the act can no longer be avoided. Portions of the act were due to expire in 2007, which has recently forced Congress and the rest of us to consider how to adjust the legislation to the massive demographic, political, and cultural changes of the forty-one years since it was first passed (or the nearly twenty-five years since Congress last revisited it). With a changing Supreme Court, as well as long experience now with implementing the act, this national debate has required, and will continue to require, coming to terms with the experience of various institutional actors, such as the courts and the Department of Justice, in enforcing the act.

This book is titled *The Future of the Voting Rights Act*. To set the stage for considering that future, it is necessary to start with a brief history of the act and its evolution. This history is an important starting point. Consideration of the future of the VRA requires assimilating both the problems to which the act initially responded and the changing context of these issues in the ensuing forty years.

It is startling, in some respects shocking, to recall the nature of American democracy on the eve of the initial Voting Rights Act in 1965. In Mississippi, state laws and manipulative election administration practices had strangled black voter registration to a mere 6.4 percent of eligible voters as late as 1964. In the Alabama county whose county seat is Selma, which became ground zero in the social movement and violent confrontations that helped motivate passage of the act, black residents made up half the voting age population, yet Alabama officials had invented ways to permit only 156 of 15,000 eligible black voters—1 percent—to register to vote. Formal barriers to participation required that those seeking to register pass tests of “good character” or those that required them properly to “understand” and “interpret” various constitutional provisions—tests that election officials could easily manipulate in prac-
tice to exclude particular voters. Poll taxes had to be paid up in full before one
could vote in some states. Felon-disfranchisement laws were jury-rigged to
include crimes for which blacks were more likely to be prosecuted and con-
victed than whites, such as wife beating. Literacy tests for voting were
required in much of the United States, North as well as South, including states
such as New York. These various barriers excluded many poor white and
Latino voters as well as African Americans. In some southern states, blacks
who tried to register or vote were subject to economic reprisals and intimida-
tion; white employers would fire them or, for those who did not directly
depend on white employers, such as black dentists and barbers who serviced
only black customers, white employers would seek to destroy these businesses by
firing their employees who went to politically active black dentists, barbers,
and the like.

In the states of the old Confederacy, these legal barriers had been created in the
late nineteenth and early twentieth centuries and remained in place ever since.
They had been enacted and enforced despite the Fifteenth Amendment, the con-
stitutional culmination of the Civil War, an amendment designed for the express
purpose of barring racially discriminating voting rules and practices. But from
1890 until mid-century, the Fifteenth Amendment was de facto repealed, for all
practical purposes, in the South. As Reconstruction faded in the late nineteenth
century, white elites successfully “redeemed” their control over southern politics
from blacks and poor whites through enactment of massive disfranchisement
schemes throughout the region. The Supreme Court, Congress, and various pres-
idents ignored the amendment or lacked the nerve to enforce it; the Amendment
became the most willfully ignored one in constitutional history. National legisla-
tive efforts to address these issues began to stir only in 1957, when Congress
enacted the Civil Rights Act of 1957, the first civil rights statute of the twentieth
century, in a process orchestrated by Senate Majority Leader Lyndon Johnson and
magisterially described in Robert Caro’s book, Master of the Senate. But this 1957
law had had only minimal effect in opening up American democracy by 1965, on
the eve of the Voting Rights Act.

The original VRA was the most aggressive assertion of federal power over vot-
ing issues since the Civil War and Reconstruction. It permitted the federal govern-
ment to send federal officials into the South to take over the voter-registration
process in recalcitrant areas. For states and local governments that had a history of
racially discriminatory voting practices, the act also directly suspended the use of
various “tests and devices” as prerequisites to registration and voting. And in its
central provision—one that looked to the future and is the focus of much of this
book—the act directly put, and continues to put, the election systems in certain
parts of the country under what is, essentially, a form of federal receivership. The
part of the act that does so is known as section 5.

Section 5 was designed to be limited in time and geographic scope. These limi-
tations reflected the law’s extraordinary structure and justification, a structure
unique in the arsenal of federal civil rights policy. For areas of the country that
Congress concluded had used racially discriminatory voting practices, Congress suspended key existing barriers, such as literacy tests, and banned those areas from putting into effect any new provision or change that affects voting, no matter how large (redesigning election districts) or small (keeping polls open 1 hour later), until the jurisdiction seeking to make the change gets permission from the federal government. In what is known as the preclearance review process, that permission must be provided by either the United States Department of Justice (DOJ) or a specially designated three-judge federal court in Washington, D.C. Preclearance is denied unless the federal government or federal court concludes that the change is consistent with the VRA. The structure of section 5 thus expresses an exceptionally proactive regulatory philosophy: it puts the burden on the local jurisdiction to submit its proposed change to the federal government and to demonstrate to federal officials or judges that the change will not violate the VRA. Until precleared, no change in voting practices can be made. Section 5 embodies strong skepticism about the parts of the country it singles out. Although government is normally presumed to act lawfully, section 5 turns the tables; in the covered parts of the country, any change in voting is, in essence, suspect until the jurisdiction convinces the federal government the change will not impair minority voting rights.

Section 5 and its “preclearance review” process was designed to apply, and continues to apply today, only to selected areas of the country. From its inception, the act also included another central provision that, unlike section 5, applies uniformly nationwide. This provision, known as section 2, consists of a permanent, nationwide ban on voting practices that deny or abridge minority voting rights. In the early years of the act, this provision was not particularly important. When Congress previously revisited and amended the act in 1982, however, Congress substantially strengthened section 2. Since then, section 2 has been a major vehicle for attacking at-large election structures, redistrictings that dilute minority voting power, voting fees that operate much like poll taxes, and many other practices.

The current act is therefore divided into two distinct structures for protecting minority voting rights. Congress concluded that there were two distinct problems that required distinct solutions: proactive federal oversight for certain regions, based on their history, and a more general nationwide set of rules. The difference between these two features of the act is that the nationwide rule of section 2 operates through the ordinary legal system, rather than the unusual preclearance review process; a voter must bring a lawsuit to challenge a voting practice, the practice can go into effect immediately unless a court enjoins it, and the voter bears the burden of proving that a law violates the act. (Outside the areas reached by section 5, there is no general presumption that state officials are acting illegally in regulating voting.) Section 2 is therefore more costly, more time consuming, and substantively more difficult for those challenging a voting practice than is section 5.

Since originally enacted in 1965, the VRA has been amended several times. Among the most important amendments are those that extend similar as well
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as novel protections against discriminatory voting practices affecting Asian Americans, American Indians, and members of language minorities. These amendments extend the nationwide ban of section 2 to forbid discrimination on the basis of membership in specified language minority groups; require the provision of non–English-language ballot materials (section 203) in certain circumstances; and extend the preclearance regime of section 5 to additional jurisdictions based on the presence or effective exclusion of language minorities (which the act did by redefining test or device to include English-only ballot materials, which brought Texas, Arizona, and parts of California within the coverage of section 5). Over time, the VRA has evolved into one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions.

Yet partly because of the scale of this ambition, the Congress that enacted the VRA, as well as the Congresses that have amended it over the subsequent forty years, also recognized that the act had to remain responsive to ever-changing circumstances. That is why, in part, the act was divided into two distinct structures, one designed to be permanent, the other designed to apply to selected regions for a certain period of time. When section 5 was first enacted in 1965, it was designed to be a temporary measure to last five years; in 1970, it was extended for another five years; in 1975, it was extended again until 1982; and in 1982, it was extended for twenty-five years.

That brings us to the present moment. Section 5, due to expire in 2007, was recently reenacted for another twenty-five years. Congress essentially kept much of the same form of section 5 intact while also making a few significant modifications. As we passed the fortieth anniversary of the original VRA, policy makers had to confront the question of how the philosophy and purposes of section 5 should be understood and applied in today’s context, as well as in the coming years. Now that Congress has acted, the courts will have to address whether the renewed section 5 is constitutional, given the current context of minorities and voting rights in today’s America.

Precisely because the VRA is a sacred symbol of American democracy, that will not be an easy or unfrightened discussion. Given the status and practical effects of the act, any discussion of constitutional challenges to section 5 will create understandable anxieties that hard-fought rights will be whittled away. At the same time, the political, legal, and social changes since section 5 was originally enacted in 1965 have been monumental; even in the twenty-five years since Congress previously revisited the VRA and section 5 in 1982, these changes have been substantial. Over just the last generation, these include the dramatic rise of the Hispanic population, which increases the complexity and polycentric nature of minority voting-rights issues today; the emergence of a substantial cohort of minority legislators who now wield political power in local, state, and national offices throughout the country; the fact that the South, which for nearly a century was the home of a one-party political monopoly of the Democratic Party in state and local elections, is now the site of the traditional two-party competition that has long characterized much of the rest of the country, with substantial but uncer-
tain effects of that competition on minority voters; and the kinds of nuts and bolts problems in running elections and counting votes exposed in the 2000 election cycle and, to a lesser extent, in the 2004 elections.

In the face of these changes, or the even more dramatic changes since the original enactment in 1965, Congress recently confronted the urgent question of whether section 5 should be continued. But the national debate thrust upon the country by the recent reauthorization of section 5 also inevitably triggers more general questions about the nature of voting rights, democracy, and minority participation and representation at the start of the twenty-first century. The questions remain pressing. How are the voting rights of all Americans best protected? What is the relationship between that question and the protection of minority voting rights? How should democratic institutions be designed today to strike the appropriate balance between majorities and minorities in the extraordinary heterogeneity of the modern United States?

This book is designed to address these and related issues. The contributors include the country’s leading historians, political scientists, and law professors who work on voting rights and the Voting Rights Act (through both academic scholarship and in practical roles as expert witnesses or lawyers), as well as some of the most experienced practitioners in this field. The approach of this book reflects the much greater complexity surrounding these issues today than in earlier generations. The views of our contributors range from those who believe section 5 should have been substantially strengthened, to those who believe it should have been extended in largely its current form, to others who argue that it should have been extended but limited and contracted in specific ways, to those who believe that it has outlived its usefulness and should have been allowed to expire. Many contributors suggest, for example, that issues previously treated the same under the act should have now been separated out. A prime example is redistricting, which is more visible and more politically charged than more routine issues affecting voting. Our contributors differ, however, over exactly how redistricting should be treated under the VRA. Some believe that a renewed section 5 should have been limited to issues of major consequence, such as redistricting. Others argue that the very fact that redistricting is so highly visible and contentious means that there are adequate political checks on it (as compared to the relocation of polling places) and that therefore section 5 is no longer needed to constrain practices like redistricting. These differences of view emerging today are particularly revealing because many of our contributors have been influential figures in the evolution of the VRA, either through their scholarship or their direct involvement in prior congressional debates over the act; and at these earlier moments, there was much greater consensus among our contributors about the proper direction the VRA should take. We have not tried to impose any artificial unity on these chapters. The result is a book that accurately captures the range of views among experts today about the future of the VRA.

*The Future of the Voting Rights Act* is immediately relevant to the renewal debates over the VRA just completed in Congress, but its importance also transcends those issues. The book contains some of the most detailed and comprehensive empirical
material ever published on the administration of the VRA. The analyses presented here will be of enduring value in understanding the VRA’s ambitious effort to regulate the relationship between majorities and minorities in American democracy.

As the renewed section 5 goes into effect, its operation will have to be tested against the considerations and concerns described in this volume. More broadly, the insight, information, and analyses in these chapters inevitably flow beyond the particulars of section 5 to voting rights and the VRA as a whole. It is impossible to separate the questions section 5 itself forcefully raises—how have conditions concerning politics, demographics, and voting rights changed in the United States in the last generation—from questions about the future of the VRA itself. The renewal debates are, inevitably, a catalyst for assessment of the state of voting rights today and for charting the direction the VRA ought to take in coming years.

The opening chapter of this book, by Richard Pildes, frames those that follow by suggesting that all democracies face the general problem of how to build flexibility into the design of their democratic institutions that enables those institutions to adapt original goals of fair representation to changing configurations of political power over time. Presenting the VRA as America’s effort to manage this tension, Pildes then applies this insight to the balance between political equality and credible commitments to minorities against majoritarian domination reflected in the VRA. He suggests that the political dynamics in Congress are unlikely to lead it to engage these issues deeply and concludes by speculating whether courts, paradoxically, are the only institutions (in the United States and elsewhere) capable of adapting existing political institutions to changing circumstances.

For historical perspective, the chapter by Peyton McCrary, Christopher Seaman, and Richard Valelly then provides the most comprehensive analysis to date of the way the DOJ has administered section 5 from 1965 to the present. This chapter reflects analysis of all the objections the DOJ has lodged over the years under section 5 to proposed voting changes, and what the overall pattern of these objections tells us about the decade-by-decade evolution of the VRA.

The chapter by Guy Charles and Luis Fuentes-Rohwer applies a similar approach to the state of South Carolina, which was the first state to challenge the constitutionality of the original section 5, in 1965, and which remains a focal point of continuing voting-rights issues.

David Epstein and Sharyn O’Halloran explore the changing political context in which the VRA has operated. This chapter provides data, from 1974 to 2004, on the extent to which white voters have been prepared to vote for African American candidates, in different regions of the country, and whether white-black coalitions can be put together that successfully elect African American candidates. The critical finding of this work—that white voters are now more willing to vote for black candidates, with implications for how election districts can be designed that will elect such candidates—has been the focus of much scholarly debate and judicial decisionmaking.

Richard Hasen’s chapter focuses on the constitutional hurdles that the recently renewed section 5 will have to surmount, given the Supreme Court’s more aggressive scrutiny that emerged in the 1990s of Congress’s powers to legislate.
Samuel Issacharoff, who raises the strongest doubts in this book about whether section 5 should have been renewed at all, focuses on two elements of change over the last generation. First, in his view, the DOJ now acts in more partisan ways than in the past, which calls into question the earlier legal strategy of placing primary enforcement responsibility with DOJ. Second, the VRA itself has succeeded in ensuring that black legislators have substantial presence in many legislative bodies and greater ability to protect their interests and those of their constituents than in prior decades of virtually all-white legislative bodies. As a result of these two developments, Issacharoff questions whether section 5 might not only have outlived its usefulness, but become counterproductive.

Bruce Cain and Karin MacDonald examine the mechanism by which the VRA to date has been as effective as it has. They conclude that legislators are extremely risk averse when it comes to losing their control over voting regulations and election-district design to the courts; as a result, legislators strongly internalize the commands of the VRA (indeed, perhaps over-internalize them beyond what the act actually commands) to avoid the risk of litigation and judicial invalidation. Going forward, the fact of legislative risk aversion suggests, in their view, that Congress should have been more accepting of recent Court decisions that incorporate more flexibility for legislative choice into the way the VRA is implemented.

Rodolfo de la Garza and Louis DeSipio explore the limited focus the VRA has given to date to the situation of Hispanic residents and citizens, whose interests with respect to voting rights differ in insufficiently appreciated ways from those of African Americans. They argue, for example, that to maximize Latino voting rights, naturalization procedures should be examined to determine the extent to which they slow naturalization rates, which diminishes Latino voting rights, and that the voting rights of Puerto Ricans who reside on the island should be extended to presidential elections.

Laughlin McDonald, who has litigated voting rights cases for many years, addresses the largely unexplored but disturbing issues facing American Indian voters in areas, such as South Dakota, where those voters are present in significant numbers.

Steve Ansolabehere illuminates the problems with the nuts and bolts of election administration that reached widespread public attention only with the disputed 2000 presidential election—problems with voting technology and election oversight. He collects and analyzes data on whether these problems differentially affect minority voting rights and suggests ways reforms might best address these problems.

Nathaniel Persily suggests approaches that both would have changed section 5 from within, by keeping its essential structure but reshaping it to fit current circumstances, and approaches that would have abandoned section 5’s regionally targeted philosophy for more aggressive, nationwide protections of voting rights. Congress’s failure to incorporate such changes raises questions about how effective the future of voting rights law will be.

Spencer Overton argues that the factors used in previous decades to identify the parts of the country to which the special, federal oversight of voting should apply
are now obsolete. Both to enhance the likelihood that section 5 will be upheld as constitutional, and to craft a coverage formula that identifies those areas that still remain exceptionally suspect with respect to their treatment of minority voters, Overton constructs new criteria that, in his analysis, will appropriately do so today. Overton then applies these criteria and shows which states they would, in practice, cover. Again, the failure of Congress in the recent renewal process to attend to the considerations Overton raises will generate issues about how effective voting rights enforcement will be going forward.

Michael McDonald pursues a similar problem: how should policy identify today the jurisdictions that warrant the exceptional regulatory oversight that section 5 entails? McDonald demonstrates just how difficult that task is.

Heather Gerken proposes an entirely different, “third way,” for implementing the VRA in the future. She seeks to deal with the uncertainty about how the VRA should develop in coming years by enlisting greater citizen participation on that very question. Her aim is to deemphasize the role of the DOJ, and perhaps the courts, by creating a new structure for the VRA that gives community groups representing voters a more central role in determining how the VRA is implemented in different jurisdictions.

Bernard Grofman and Thomas Brunell argue that the congressional process took place in the shadow of the constitutional issues about the act that Richard Hasen’s chapter identifies; as a result, Congress was required not just to settle on what the majority considers ideal policy, but on which policies will also survive inevitable Supreme Court constitutional review. They then suggest a restructured VRA that would have come closest, in their analysis, to meeting both of these constraints.

The future of voting rights and the VRA have just come to the fore as Congress and the country have recently had the first policy discussion in twenty-five years of how the VRA ought to be designed. Even with that initial policy issue resolved, the relationship between majorities and minorities in American democracy will remain an ongoing, essential issue. So too will questions about how the law, through statutes like the VRA and others, can best protect the right to vote. No more distinguished group of scholars and practitioners has been assembled to address these questions concerning the future of American democracy. The diverse perspectives represented here offer no solace of consensus thinking. But by reflecting the genuine complexity of these issues in the twenty-first century, this book should foster discussion and policy debate about these most vital of issues.

Richard H. Pildes, for the editors
Chapter 1

Political Competition and the Modern VRA

Richard H. Pildes

Political equality is often viewed as one of the central political and constitutional values, or even the central value itself, that explains and justifies democratic self-government. Theorists seek to deduce, from the value of political equality, numerous and varied implications for the way democratic processes should be structured. Much of the constitutional law concerning democratic institutions, such as the malapportionment decisions, are justified in the name of judicially enforcing constitutional commitments to political equality. Some of the most important statutes Congress has enacted, such as the Voting Rights Act (VRA), aim to secure values of political equality in the electoral process and in the design of representative institutions. Yet at the same time, application of overly abstract moral or legal ideals of equality to political processes, or the institutional entrenchment of specific and static understandings of political equality at particular moments in time, can interfere with the complex, dynamic processes through which material power is organized effectively in democratic politics. Constitutional, legislative, and moral understandings of political equality must be understood—as they often are not—in light of the way power is organized and exercised in the actual processes of democratic political competition.

POLITICAL EQUALITY, DEMOCRATIC INSTITUTIONAL DESIGN, AND COMPETITIVE POLITICS

A central problem at the moment that new democratic institutions or states are being formed, particularly in societies deeply fragmented by cleavages of religion, race, ethnicity, or culture, is to provide credible commitments that political majorities will not exploit vulnerable minorities. These commitments can take the form of independent courts empowered to enforce Bill of Rights guarantees of equality and liberty. But courts are primarily reactive, ex post institutions better at vetoing exercises of governmental power than at mobilizing power affirmatively. Institutional design mechanisms that build guarantees for minority representation directly into the structure of political institutions are stronger credible-commitment devices than
judicial review. Particularly for groups long excluded from political power, guaranteed representation is an expressively important sign of equal political standing and citizenship, as well as a functional means of securing participation in power. At the moment of institutional formation, concerns for stability and legitimacy, along with risk aversion, often dominate and ensure that representative structures with guaranteed minority representation will be forged. The U.S. Senate is one example.

At the same time, the institutions that result can become problematic for at least three reasons. The first is the paradox of success: if these institutional strategies succeed in creating stable democratic institutions accepted among majorities and minorities, these institutional configurations become less necessary over time. The success of democracy may temper previously deep cleavages and transform them into routine interest group struggles. A pluralist regime of “normal politics” may thus become possible. But democratic institutional designers rarely consider or build in the capacity for representative institutions to be readily redesigned as circumstances change. The static considerations of power and vulnerability at the moment of formation overwhelm any capacity to create ready mechanisms for later institutional self-revision. To make matters worse, one of the iron laws of democratic institutions is that institutional structures, once created, become refractory to change. Identities and interests coalesce around existing institutional arrangements. That the U.S. Senate, in which 500,000 Wyomingites have equal political power with 34 million Californians (Barone and Cohen 2003), or the Electoral College would be structured along precisely the same representational basis today is questionable, even if some form of regional or state-based representation would still be used. (The disparity today between the most and least populous states is 68:1 compared with a ratio of 13:1 in 1790.) Yet though cleavages based on state identities have diminished since the framing, the Senate and Electoral College seem securely entrenched.2

Second, and related, by building these cleavages into the structure of political institutions, those differences risk becoming more deeply entrenched. Studies across many countries show that when political power is allocated based on group identities, political entrepreneurs have incentives to mobilize these identities and harden them in the pursuit of political power (see, for example, Horowitz 2000, 151–96; Laitin 1998; Fearon and Laitin 1996; Laitin 1995, 38–42).3 The identities are often fluid and contingent, rather than primordial and fixed. Embedding group differences in the structure of democratic institutions might be necessary at the moment of institutional creation, but absent institutional permeability to changed identities over time, institutional entrenchment will more firmly lock these identities into place. Though minority representation can be achieved through an array of devices and institutional-design options, some more responsive than others to the possibility of changed group identities over time,4 the framers of democratic institutions (constituent assemblies, ordinary legislators, or referendum voters) rarely recognize this range of options or choose among them with these dynamic considerations in mind.

Finally, at this initial moment of formation, representation often serves a protective and expressive role for vulnerable groups. But politics also involves the
mobilization of group coalitions to exercise effective affirmative power. Initial institutional-design strategies focusing on representation can undermine the capacity of the groups thereby protected to forge the coalitions necessary and possible to exercise effective political power later.

POLITICAL EQUALITY

These considerations form a backdrop to America’s experience with the Voting Rights Act (VRA or the act). The VRA can be viewed as America’s institutional design mechanism for building in commitments to fair representation and political equality with respect to the cleavage of race. In 2003, a sharply divided 5–4 Supreme Court, in Georgia v. Ashcroft (123 S.Ct. 2498), had its most important confrontation in a generation with the act and its animating concerns of race, representation, and political equality. That decision exposed the difficulties of transporting models of equality from other domains into the unique structural context of democratic politics.

The VRA was first enacted in 1965 and last significantly amended a generation ago in 1982 (Issacharoff, Karlan, and Pildes 2002). Key portions of the act sunset in 2007 (42 U.S.C. sec. 1973b(a)(8)). As is well known, in 1965, when blacks were massively disenfranchised throughout the South, the act initiated the full democratization of American politics. Less appreciated is that, though most formal barriers to the franchise had been removed by 1982, two structural features of southern politics remained in place. Congressional and judicial understandings of political equality and fair political representation necessarily took shape within these structural conditions (for further elaboration of these points, see Pildes 2002; for data, see Davidson and Grofman 1994; see also Pildes 1995, reviewing Quiet Revolution in the South). First, even as of 1982, few black officials held elected office throughout the South (see Pildes 1995, 1367–69). Though black voters had access to the ballot box, levels of white polarized voting were so high that few blacks were able to get elected. Overwhelmingly, whites would not vote for black candidates and black majorities were too rare to ensure election of black candidates. Blacks were no longer formally excluded from political participation but were virtually excluded from officeholding. Second, in 1982 the South remained the one-party political monopoly it had been throughout the era of Jim Crow. Although passage of the VRA in 1965 began the process of normalizing the region’s politics, that process remained in its first generation. Because the Democratic Party at that time faced no external competition from a strong alternative party, it had little incentive to respond to claims pressed by recently enfranchised black voters. The Democratic Party remained free to use its monopoly power over state legislatures to retain office while indulging, at no competitive cost, any preferences its leaders might have had to minimize the influence of black voters.

In 1982 the VRA served as a rough but effective tool to destabilize this system of polarization and political monopoly. To similar effect as consociational structures of democracy that directly compel assigned levels of representation for specific
groups (see Issacharoff, Karlan, and Pildes 2002, 1168–72), the VRA indirectly compelled state institutions to incorporate representation of black officials (see Thornburg v. Gingles, 478 U.S. 30, 46–51). An exceptional provision of the act, section 5 (42 U.S.C. sec. 1973c), applies only to selected jurisdictions, many of them in the South (see Issacharoff, Karlan, and Pildes 2002, 556–57). In the 1970s, the Court had construed this provision to preclude any diminishment or “retrogression” in minority voting power (see Beer v. United States, 425 U.S. 130, 140–41). Entering the 2000s, the question was whether this understanding of the act precluded new institutional arrangements that reflected changes in the background circumstances of race and political representation.

Several changes in the larger structural context of democratic politics test whether principles of political equality and fair representation should be understood as general ideals or contingent functions of certain background structural conditions. First, due in part to the VRA itself, a substantial contingent of black elected officials, particularly in the South, now have a seat at the legislative table (see Lublin 1997, 21–28; see also Pildes 2002, 1523–39 on rise of safe minority districts in the 1990s). These black elected officials participate directly in legislative bargaining, including bargaining over issues concerning the design of representative institutions themselves. In the South, black Democrats are a key component of the Democratic Party. Black state legislators range from 31 percent to 45 percent of all Democratic state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina. The southern state political process now cannot avoid engaging black political aspirations and claims; the Democratic Party cannot act without black Democrats playing a central role. Second, white voters are more willing to vote for black candidates than a generation ago; though this change should not be exaggerated and voting is still racially polarized, the level of polarization has diminished (see, for example, Bullock and Dunn 1999, 1237–253; Grofman, Handley, and Lublin 2001, 1407–409; Pildes 2002, summarizing studies). Third, the last generation has finally witnessed the full emergence of a genuine two-party political system in the South as the effects of the VRA and other changes have worked their way through two generations of elected officials. The South now has a robust Republican Party, not strong enough to constitute the inverse of the old, solid Democratic South, but vital enough that a nationalized, competitive two-party system exists for the first time since the Democrats and Whigs battled before the Civil War (see generally Black and Black 2002, 2; Lublin 2004). In contrast to its days as a lazy monopolist, the Democratic Party is now engaged in an intensely competitive partisan struggle for every inch of political terrain.

These circumstances came together to create a perfect storm in Georgia in 2001 and then to test the meaning of political equality two years later in Georgia v. Ashcroft. The contrast with redistricting a generation ago, in 1980, marks the difference. In the 1980s, both the Department of Justice and the federal courts had found Georgia’s redistricting to violate the VRA (Busbee v. Smith, 549 F.Supp. 494, 517). In invalidating that attempt, a federal district court had made the following extraordinary finding of fact regarding the chairman of the Georgia house reapportionment committee:
Representative Joe Mack Wilson is a racist. Wilson uses the term “nigger” to refer to black persons. He stated to one Republican member of the Reapportionment Committee that “there are some things worse than niggers and that’s Republicans.” Wilson opposes legislation of benefit to blacks, which he refers to as “nigger legislation.” His views on blacks are well known to members of the General Assembly. From the House Reapportionment Committee to the Conference Committee, Wilson played the instrumental role in 1981 congressional reapportionment and he was guided by the same racial attitudes throughout the reapportionment process that guided his other legislative work. (Busbee v. Smith, 549 F.Supp. 494)

By 2001, Georgia typified the structure of southern politics, even in the Deep South. The first element in the perfect storm there was the now sizable contingent of black elected officials: about 20 percent of Georgia’s state legislators were black, including about one-third of Democratic legislators (see Georgia v. Ashcroft, 123 S.Ct. 2498, 2506). The majority leader of the senate was black, as was the chair of the senate subcommittee that created the redistricting plan at issue (2506). The second element was that, as in other southern states, Georgia’s Democratic party now faced intense and burgeoning Republican pressure. Democrats were still in control of the state’s political institutions (house, senate, governorship) as redistricting began, but the state was now precariously balanced between the two parties. The state senate teetered on the verge of shifting to Republican control. Because districting is generally still in the hands of existing officeholders largely free to pursue their own partisan ends, the Democrats sought to design districts that increased the likelihood of retaining their majority in the senate. Their aim was to preserve the number of minority legislators, while increasing the number of Democratic senate seats (2505).11 Not a single Republican legislator voted for the districting plan adopted (2506). The third element, then, was that critical leverage in passing the plan was held by Georgia’s black legislators, who almost unanimously joined white Democrats to support the plan.12

The key strategic move involved reducing the black populations of some districts, including some represented by black legislators. That might put the seats of one or two black Democrats slightly more at risk, but would increase the prospects that critical surrounding districts, now bolstered with additional black voters, would elect Democrats. Nearly all of Georgia’s black legislators agreed that the risk was worth running, for the trade-off involved maintaining partisan control of one institution of government. Moreover, the reductions involved were small: both before and after the new plan, thirteen districts had majority-black populations, though three fewer districts had a black majority of registered voters.13 Diminished polarized voting by whites was thought to make this strategy even less risky.14 This approach reflected judgments about the trade-offs between descriptive and substantive representation.15 The question was whether the VRA precluded black and white legislators from agreeing to slightly increase the risk to descriptive representation for the prize of the substantive representation that follows from being part of a winning coalition that controls one of the state’s two representative institutions.
The political judgment in Georgia to accept this trade-off, one made in other states as well, was driven by the experience of the 1990s. During that decade, there had been fractious debates about whether safe minority districts, compelled by the Court’s 1986 interpretation of the VRA (Thornburg v. Gingles, 478 U.S. 30), also had caused a net increase in Republican seats. Although the suggestion of such a trade-off between black and Democratic representation had been met with hostility early in the decade (see, for example, Pildes 1995, 1379), many social scientists soon agreed that such tension existed. Political actors involved in local politics also often agreed. Thus, black-white Democratic coalitions formed in a number of places to make the safe minority districts of the 1990s somewhat less safe. In northern states, the VRA did not preclude white-black coalitions of Democratic officeholders from somewhat reducing black populations in the safe districts that had been created in the 1990s. The question that Georgia tested was whether the South would be permitted to do the same. The “no retrogression” regime, still applicable almost everywhere initially covered in 1965, appeared to stand in the way. Reducing black populations, even marginally in a few districts, and even as part of an effort to maintain partisan control of the senate, constituted impermissible “backsliding” under existing Court decisions (Reno v. Bossier Parish School Board, 528 U.S. 320, 335). That black legislators almost universally supported the plan, and that the justification for the tradeoff was to maintain partisan control of the senate in a southern state, were factors neither within the contemplation of Congress in 1982 nor the Court when its critical interpretations of the VRA had been developed. Treating these considerations as legally irrelevant, the Department of Justice and the lower three-judge federal court had concluded that Georgia’s efforts violated the VRA (Georgia v. Ashcroft, 123 S.Ct., 2515).

What a perversion of the VRA that would have been in Georgia. Here were black and white legislators, willing to make their seats more dependent upon interracial voting coalitions, and yet the act would have imposed on them more racially homogenous constituencies. Here was a large contingent of black legislators who, now that they had entered the halls of legislative power, determined that they and their constituents would have more effective power as part of a Democratic senate; yet the act would have required them to become the minority in the senate for the sake of a marginal potential gain in formal black representation. Here was Congressman John Lewis, his life risked in the Selma march to help get the VRA enacted, his seat not at stake, testifying after nearly twenty years in Congress that “giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made” (Georgia v. Ashcroft, 123 S.Ct., 2516) and that the South has “come a great distance” since a generation ago (Pildes 2002, 1563). And here were black legislators, not demanding safer sinecures for themselves, as officeholders typically do, but taking risks to forge a winning coalition and exercising political agency; yet the act would have denied these politicians the autonomy to make the hard choices at issue, even with partisan control of government at stake.

In a 5–4 decision, the Court permitted the concepts of political equality and fair representation in the VRA to reflect these changed circumstances. Reversing the lower court, the Court concluded that Georgia had latitude to make at least marginal tradeoffs between the safety of black seats and the aim
of marshaling political power effectively to control state political institutions (see Georgia v. Ashcroft, 123 S.Ct., 2512). The act, in the changed context of today, did not require institutional designers to blind themselves to the coalitional mobilization of political power in order to meet the single goal of maximizing electoral prospects of black legislators. Southern states, at least where black legislators play a decisive role, have some of the flexibility other states have to modify, at the margins, the safe-districting regime of the 1990s. Although some might question how much discretion the Court ought to have to take such considerations into account when interpreting a statute, the reality is that, given the relatively open-textured terms of the VRA and the generality of Congress’s original purposes, much of the content of the VRA has always emerged through judicial implementation.

The divided Court did unanimously agree on one new principle that reflected modestly revised understandings of political equality. Academics had argued that the act should recognize a new form of election district, a “coalitional district,” in which black voters might not form a numerical majority, but in which black and white coalitional voting would nonetheless give black candidates a realistic opportunity to be elected (Pildes 2002, 1551–63). As some commentators have put it, this principle is “emerging as the new ‘third way’ in racial redistricting” (Gerken 2004, 2 n.5). The entire Court agreed that coalitional districts are now plausible substitutes for the safe districts of the 1990s when coalitional districts offer the same likelihood of black electoral success (Georgia v. Ashcroft, 123 S.Ct., 2511–12).

But the Court’s 5–4 divide on whether Georgia’s objectives were consistent with the VRA—a familiar, recurring 5–4 divide in VRA and racial redistricting cases—was disappointing. In the perfect storm of Georgia, control of a political body was at stake, a virtually unified black-white Democratic legislative coalition was in charge, and marginal reductions in safe black districts were at issue. If that did not present a context justifying more widely shared support for greater flexibility in prior understandings of the VRA, few contexts would.

At the start of a new decade, it was particularly important that the Court signal that structural changes in partisan competition, black officeholding success, and white crossover voting justified flexibility in legal principles developed in an earlier environment of black exclusion from officeholding within a one-party system. Perhaps this Court, which has been together longer than any other nine-justice Court, has itself become so polarized on issues of race and voting that it could not find unanimity even on the striking facts of Georgia. But the majority went further and embraced a more expansive, still ill-defined conception of other modes of “political influence” that might be attributed to minority voters. These more nebulous modes of influence might also substitute, the Court held, for safe minority-controlled election districts (see Georgia v. Ashcroft, 123 S.Ct., 2511–14). The dissent was right to raise questions, both in principle and in practice, about whether this further flexibility in the VRA is appropriate (2518–20).

The VRA is a form of national, command-and-control regulation for the design of democratic institutions. In the last generation, the act mandated an appropriate, uniform, remedial approach nationwide: safe minority districts for all elections (local, state, and federal) in which voting was racially polarized. That approach
made sense when safe districts were essential to the election of black candidates, when the one-party South had no incentive to respond to black voters, and when there were virtually no black elected officials to participate in negotiation over the appropriate structures of democracy itself. Like all command-and-control legislation, the act did not allow regulated actors latitude to make decisions about how most effectively, in their own diverse contexts, to realize the aims of the act; those actors were the object of the act’s distrust. And like all regulatory statutes, the VRA must contend with the difficulty of statutory updating as political dynamics change. As in many other regulatory arenas, Congress is unlikely to provide a consistent mechanism for responsive updating, for Congress is likely to revisit the statute only episodically. Each new decade does require a new census and new redistricting, and because the courts have given contemporary social-scientific analysis of voting patterns a central role in the act’s implementation, the act’s interpretation has been more responsive to changing circumstances than many statutes (for the role of social science in the act’s application, see Pildes 2002; Issacharoff 1992). Nevertheless, facts must still be interpreted and normative judgments must still be made about the purposes of democratic representation in constantly changing contexts.

Georgia v. Ashcroft, the most important decision in a generation on race and political equality, can be seen as a form of “democratic experimentalism” in the design of democratic institutions themselves (see Dorf and Sabel 1998). The decision replaced a single, mandatory remedial regime with one that defines general objectives but leaves representative bodies, with black participation, more flexibility in choosing the means to realize those aims in varied contexts. How much flexibility state and local political bodies should have, and in what circumstances, will be difficult future questions. In Georgia, the Court could rely on essentially a process-based approach to resolve these substantive uncertainties: given the nearly unanimous support of a large black political delegation and the objective plausibility that black Georgians—who overwhelmingly are Democratic—would be better served by a Democratically controlled senate, Georgia presented a relatively easy case. It is true that the interests of black voters cannot necessarily be assumed to be reflected in the positions that black elected officials take, but the usual concern is that incumbents want to make their own districts overwhelmingly safe regardless of any other consequence. In Georgia, by contrast, black legislators were willing to make their districts less safe if it meant being part of a willing coalition that would control the state senate. But if there is no substantial black participation in the process, or if a black legislative delegation is deeply divided, or if black legislators are at odds with organizations that genuinely represent large numbers of black voters, courts will face more ambiguous process-based signals that provide less clear proxies for substantive judgments. Congress, after a twenty-five year absence, will have to confront these issues when it is forced to decide whether to reauthorize and modify section 5 in 2007 (42 U.S.C. sec. 1973b(a)(8)).

Georgia shows the dangers, in the domain of politics, of borrowing understandings of equality from other constitutional spheres, of regulating politics through deductive analyses of logical concepts of equality, and of viewing equality issues
in the ideological terms they might be thought to present in other arenas. But legal academics and many judges—especially in an era when fewer federal judges have political experience—are better trained to think in terms of rights, participation, representation, and equality than of material issues of political power. In politics, though, equality of groups cannot be effectively realized without recognizing the interdependence of multiple groups in the collective mobilization of material political power. Pragmatic, productive analyses of equality must recognize the distinct role that power plays in this arena. Issues of race-conscious policies in academic admissions, or in government contracting, pose different questions. For that reason, analyses of general principles that transcend these differences, such as “equal concern and respect,” can be misguided or even self-defeating.

Georgia also raises broader questions about the relationship between political competition and the legal understanding of equality. The VRA was a commitment to imposing first-order legal principles of equality on a political order that lacked meaningful partisan competition. With the emergence of such competition in the South, hard questions have arisen, not just about whether that first-order imposition remains necessary, but about whether that imposition will become dysfunctional by frustrating formation of the coalitions and agreements that make success in a competitive two-party regime possible. As the biracial world of the original VRA fully gives way to a multiethnic political landscape, these issues will only become more difficult to manage through a national, command-and-control regime. In a mature political order that involves regular, two-party competition, the principle of representational equality—to be effective—might be largely derivative of whatever is necessary to mobilize winning coalitions. Because groups cannot realize their legislative objectives outside the context of affiliation with a winning political party (absent coalitions forged across party lines), the fates of groups and parties are unavoidably linked. Put in other terms, competition itself creates the incentives and provides the checks that most effectively realize representational equality. When the Democratic Party was a monopolist, it suffered no penalty from ignoring constituent groups. But in a competitive environment, both parties are disciplined to maximize partisan advantage through accommodations and trade-offs among claims of constituent groups. Perhaps that competitive process ensures the regime of normal, pluralist interest group politics to which the VRA aspired.

All this might suggest that the judicial role, in a mature regime of intense partisan competition, should shift from the first-order imposition of representational equality to the second-order task of securing the conditions of effective partisan competition itself. If that competition is an effective means of realizing representational equality, and if first-order mandates of equality can undermine competition and hence effective equality itself, courts would best ensure equality by policing the background conditions of competition. Courts would have a justified role in limiting the inevitable tendencies toward self-entrenchment and partisan manipulation of the institutional framework of competitive democracy. But if courts (and other institutions) minimize partisan gerrymandering and other anticompetitive practices, judicial deference to the outcomes of that competition, as in Georgia, might not only be justified, but might also be more effective at ensuring
equality itself. Just as courts and legislatures no longer protect rights in the economic sphere through first-order imposition of “just price” principles, but instead through second-order securing of the competitive structure of the market, a functional analysis of democratic politics must consider the extent to which courts can best oversee political processes in similar ways. Democratic representation, of course, serves multiple aims, and effective competition might be better at realizing certain aims than others. But mobilizing effective legislative power to make law (or to resist law) surely must be a central aim of well-designed representative institutions, particularly for vulnerable minorities. This perspective is not meant to endorse specific solutions for future applications of the VRA. Instead, it is meant to offer a general framework for organizing analysis of the way legal ideas of rights and equality must be modified to account for the larger structural environment within which politics takes place.

INSTITUTIONAL MECHANISMS

What institutional mechanisms exist for enabling democracies to address the need to revisit structural issues concerning political representation in the face of continually shifting contexts? This is a profound but not fully appreciated problem not only regarding America’s VRA, but also in the design of democratic institutions throughout the world. In the last generation, in this new age of democracy in which we live, more new democracies, all constitutional ones, have been forged than in any comparable period. In regions ranging from South Africa, to the former Soviet Union, to Latin America, to Afghanistan and parts of the Middle East (see Saikal and Schnabel 2003), the renewed rise of democratic institutions has been a defining political development of the era. Since 1985, this wave has doubled the number of recognized democracies (see Marshall and Gurr 2003, 17). These new democracies are being formed in the midst of considerable heterogeneity, whether of religion, culture, ethnicity, linguistic differences, or other powerful cleavages. Democratization in the world today often involves institutional design in the midst of group conflicts and differences even more explosive than the American experience with race. Democratic bodies must be designed at moments of extreme fragmentation and distrust, yet the original representational structures do not contemplate, and may actually impede, mechanisms of transition beyond that moment. Are there means that enable both recognition of the need to address group differences through specific institutional structures at the moment of state formation, but also enable those structures to be revisited as a democratic state matures and group differences take on different meanings and consequences over time?

The original VRA of 1965 was enacted at what can be understood as a moment of state formation in the United States. After slavery and decades of exclusion from political participation, African Americans in the South at last began the process of becoming fully effective citizens and full participants in democratic life. In the early stages of that process, the need to express commitment to that transformation, and to signal security to previously excluded groups, required a commitment, not just
to formal access to the right to vote, but to direct, visible representation in the halls of democratic bodies. Four decades later, with robust partisan competition between the two parties throughout the country, including the South; with African American constituents constituting one of the largest constituency groups within one of the parties; and with significant African American participation, of both elected officials and citizens, in the partisan contest for effective electoral power, the question is whether modifications in the earlier institutional approaches to addressing group conflicts in the United States ought to be revisited in some way.

In theory, the VRA itself, through section 5, provides an ideal institutional mechanism for updating and reassessing whether such modifications are now appropriate. In theory, Congress is the appropriate body to confront these difficult questions, and the sunset provisions of Section 5 require Congress to focus on these questions. But I think it unlikely that Congress will actually engage these serious questions, except in the most formal way, despite its need to consider whether to reauthorize section 5 and in what form. The Court’s recent, momentous decision in Georgia v. Ashcroft might be thought exactly the catalyst that would require Congress to decide whether to endorse, reject, or modify the Court’s approach. But for two reasons, even this is not likely to be sufficient. First, Georgia v. Ashcroft will still be too new, its meaning still too uncertain, when Congress confronts the renewal process for section 5. Some members of Congress will no doubt think that any modification at all to the previously prevailing approach—the “no retrogression” standard of Beer v. United States, established in the 1970s—is a mistake. Overturning Georgia v. Ashcroft will thus be an objective for those members. But for those in Congress who believe that some modification to the approach of the 1970s might be warranted in light of changes in the context of race and politics today, the perfect storm of Georgia v. Ashcroft—on the specific facts presented there—is likely to suggest at least one precise context in which such modifications might be justified. But how narrowly or broadly Georgia will be applied, in what contexts, will remain unknown. Given this uncertainty, and given how unlikely it will be that a majority will emerge that would consider the principle of Georgia wrong in all contexts, Georgia will present too elusive a target for Congress to engage in any precise way.

Second, it is now widely accepted that, in the redistricting context, Republicans benefit politically from the VRA’s mandate to create safe minority election districts (when certain factors are present). Whether or not updating the VRA in the context of redistricting might be desirable as a matter of policy, Republicans have no political incentive to change the status quo. And though at least some Democrats do have that incentive, there is simply too great a risk that raising questions about whether the VRA should continue in the form it has had since 1982, about such core issues as political representation, will be seen as an attack on a statute that is viewed as sacred by important constituencies in the Democratic Party. Unless voting-rights activists, community leaders, and others pave the way by going first in making the case that minority voters and the Democratic Party would be better off with some modifications in the redistricting context to section 5, Democratic members of Congress are not likely to take the lead in raising these questions.
The Future of the Voting Rights Act

Serious changes to the status quo regarding the way section 5 currently distributes political power among groups during redistricting are therefore not likely to emerge in Congress. Most likely, Congress will either simply reaffirm the status quo on this critical issue or adopt a vague, “totality of the circumstances,” multi-factor formula to address it that leaves enormous discretion with the courts. Either way, the institutional mechanism American politics has generated for managing the transition from the early moments of state formation to a more mature stage of political development will, most likely, fail effectively to play this role. For better or worse, that task will therefore inevitably fall back on the courts. With the experience of forty years of the VRA in the United States and the democratic histories of other countries, it is now easier to recognize that managing the transition from the group conflicts at critical moments of state formation to later stages of political development is a critical, though until now largely neglected, task in democratic institutional design and theory. Perhaps it will fall to courts in many systems to become the central agents in managing this transition. Unless other institutions can be designed to address these issues, that might be the reality we face. But surely it is a sobering and discomforting one.

APPENDIX: STATUTES AND REGULATIONS LIST


NOTES

1. According to the first official census, in 1790, the largest state was Virginia, with 747,610 people. The smallest was Delaware, with 59,094 (U.S. Census 1793, 3).

2. The design defect in the Constitution is not necessarily the Electoral College itself, but the document’s failure to build in any ready capacity to modify that structure over time through national political processes, particularly in light of the material disincentives that individual states have to change their own allocation rules for electors.

3. In Iraq today, for example, observers report that Shi’ite and Sunni identities became more firmly entrenched in response to material incentives created by the immediate postwar instability and the need for organizational forms of self-protection in the absence of a centralized authority with a monopoly on violence. “The Coalition, specifically the United States, played a major role in the rapid emergence of denominational identities in the immediate postwar period. The United States did not invent those identities, nor did it intentionally reify them; but it produced an environment in which it was necessary for Iraqis to invent them” (Feldman 2004, 79).

4. For analysis of different institutional structures and instruments for taking group differences into account in design of democratic institutions, see Pildes (2004). As one example, constitutions can directly allocate executive or legislative power along identified group bases, as in consociational structures. This approach allows little change,
other than through constitutional amendment itself, if identities shift over time. Another
approach is districted-election systems, where election districts can be assigned once a
decade on the basis of empirical facts regarding whether voting behavior in recent peri-
ods reveals strong group-based identities. Yet another approach is voting systems, like
cumulative voting, in which voters choose election by election with which group iden-
tities they prefer to affiliate. Federalism has one underappreciated advantage as a tool
for institutionalizing group differences that might be powerful at the moment of state
formation; if mobility is free, federalism need not as strongly embed group identities,
which can be eroded from within over time if mobility is exercised.

5. These facts are described in Court decisions upholding extraordinary remedial provi-
sions of the VRA: as the Court concluded, “the constitutional propriety of the Voting
Rights act of 1965 must be judged with reference to the historical experience which it
reflects” (South Carolina v. Katzenbach, 383 U.S., 308; see also Oregon v. Mitchell, 400
U.S. 112, 131–34, upholding the VRA’s nationwide ban on literacy tests).

6. As leading researchers put it in 1992:
Unpalatable as it may be, the simple truth is that at the congressional and state leg-
islative level, at least in the South, blacks are very unlikely to be elected from any dis-
tricts that are not majority minority, and most majority-black legislative districts and
all majority-black congressional districts now elect black officeholders (Grofman,
Handley, and Niemi 1992, 134; citing Grofman and Handley 1991, 111, 112–18, showing
no decline in racially polarized voting in the South between 1965 and 1985).

7. On the partisan structure of southern politics in the early 1980s, see Earl Black and

8. The seven states originally covered by the 1965 act’s triggering formula for special-
coverage provisions were Alabama, Alaska, Georgia, Louisiana, Mississippi, South
Carolina, and Virginia; twenty-six counties in North Carolina were also covered origi-
nally, as well as three in Arizona, one in Hawaii, and one in Idaho.

9. These data are based on composition of state legislatures in 2000 and are taken from
Morgan Kousser (2003, 30).

10. For a general discussion of the history of Georgia’s redistricting, see Laughlin
McDonald (2003, 167–73); and Pamela Karlan (2004, 22–24). Some of this history is
also described in Georgia v. Ashcroft, 123 S.Ct., 2506.

11. Indeed, the plan was such an aggressive partisan gerrymander that the federal courts
later held it unconstitutional in a decision the Supreme Court summarily affirmed.
(See Cox v. Larios, 124 S. Ct. 2806 [mem.]).

12. More specifically, “ten of the eleven black Senators voted for the plan” and “thirty-
three of the thirty-four black Representatives voted for the plan” (Georgia v. Ashcroft,
123 S.Ct., 2505).

13. In the three districts at issue, the black voting age population dropped from 60.58 per-
cent to 50.31 percent, from 55.43 percent to 50.66 percent, and from 62.45 percent to
50.80 percent. In all three, “the percentage of black registered voters dropped to just
under 50%” (Georgia v. Ashcroft, 123 S.Ct., 2507–08). Testimony indicated that these
decreases were likely to affect the candidates elected only marginally (2515).

14. See Georgia v. Ashcroft, 195 F.Supp.2d 25, in which the three-judge court recognized
that “African American candidates may garner sufficient white crossover votes in some
contexts to win elections” (94), which decision was *vacated and remanded*, 123 S. Ct. 2498. See also Karlan explaining that “in communities where white voters were willing to support the black community’s candidates of choice, it might be possible for black voters to elect more representatives” under a plan similar to that proposed in Georgia (2004, 27). In addition, the plan reduced large black voting-age populations of over 60 percent in four districts while maintaining them as majority-minority districts (Georgia v. Ashcroft, 123 S.Ct., 2506). Compared to the earlier 1997 plan that formed the actual benchmark for retrogression analysis, the new plan *increased* the number of districts with a majority black voting-age population by three and increased by five the number of districts with a black voting-age population of between 30 percent and 50 percent (2506).

15. The terms trace to Hanna Pitkin (1967, 60–91, 112–43). Descriptive representation is that in which the representative personally mirrors the relevant characteristics of those represented; substantive representation refers to whether the substantive political and policy preferences of those represented are effectively realized.

16. See, for example, Page v. Bartels (144 F.Supp.2d 346, 353–54), describing New Jersey state legislators’ attempt to reduce “wasted” excess minority populations in majority-minority districts in order to bolster party support in other districts.

17. “The concentration of minority Democrats, especially African Americans, in majority-minority districts undercut the Democratic base in adjoining districts and aided the Republicans. Moreover, it provided an incentive for whites to run as Republicans as the number of districts favorable to white Democrats declined” (Lublin 2004, 23, see also 104–06, providing detailed case study of redistricting in Georgia).

18. See, for example, Page v. Bartels (144 F.Supp.2d, 353, 369), upholding a New Jersey redistricting plan that reduced black voting age populations in certain districts from 53 percent to 28 percent; 57 percent to 48 percent; and 48 percent to 39 percent. For a comparison of the New Jersey and Georgia redistrictings, see Samuel Issacharoff (2004). Ironically, as more large states with sizable minority populations came under Republican control in the 2000s, Shaw v. Reno might have benefited the partisan interests of the Democratic Party; Shaw constrains the extent to which the redistricters can concentrate minority voters into election districts regardless of the design of those districts. See, for example, Lublin, noting that “over the long term, this shift [caused by Shaw] will probably aid Democrats [in the South]” (2004, 23) and that “the Supreme Court has aided the Democrats, though not necessarily black and Latino Democrats, by striking down many majority-minority districts as racial gerrymanders” (109).

19. See, for example, Page v. Bartels (144 F.Supp.2d, 362–66) holding that the VRA allowed New Jersey to reduce black populations in safe districts.

20. The VRA creates a mechanism for jurisdictions to bail out from inclusion as a covered jurisdiction, but the criteria that had to be met, particularly as interpreted by Court decisions, were originally so stringent that few jurisdictions bailed out. On the criteria, see City of Rome v. United States (446 U.S. 156, 162–69) and Gaston County v. United States (395 U.S. 285, 293–96). In 1982, Congress amended the law to make bailout easier, but even so, only eleven counties bailed out between 1982 and 2006.
21. The Court, accepting these principles, remanded for a determination whether a full record permitted Georgia to act on this legal understanding of “retrogression” (Georgia v. Ashcroft, 123 S.Ct., 2517).

22. The court concluded that “the prudential objective of § 5 is hardly betrayed” by allowing coalition districts (Georgia v. Ashcroft, 123 S.Ct., 2518).

23. What was the net result of this saga when actual elections took place? First, Georgia Democrats were right to think that they were captaining a sinking ship. In 2002, a Republican was elected governor for the first time since 1868. After the 2004 elections, the state also had two Republican U.S. senators. Second, the plan the Supreme Court upheld was never used in an actual election, though a similar plan was. That similar plan worked largely as Democratic legislators, black and white, had intended. Despite the new statewide Republican majority in the governor’s race, the Democrats retained the senate on general election day in 2002, winning a 30–26 majority. See Georgia General Assembly at http://www.legis.state.ga.us, listing current officeholders. None of the black incumbents whose seats the plan put marginally more at risk lost. But then, in a state that now had a Republican governor and that was trending Republican, four Democratic senators shifted parties after the election. The senate thus ended up with a 30–26 Republican majority.

24. In commenting on Georgia v. Ashcroft, Lani Guinier rightly notes that leaving districting in the hands of state legislatures “creates the dangerous moral hazard that those already privileged may seek only to reproduce themselves” (“Saving Affirmative Action: And a Process for Elites to Choose Elites,” Village Voice, July 2–8, 2003, p. 46). That argument, to which I am sympathetic, is an indictment of all districting done by self-interested elected officials, though not an indictment of the Court’s decision in Georgia. Although Professor Guinier would prefer to make elections a product of “the voters’ freely given choice,” that change would not resolve the issue in Georgia either way, nor does Professor Guinier suggest it would. The choice in Georgia was whether the Georgia legislature, with decisive black participation, would draw the districts or whether the courts would do so through application of the centralized commands of the VRA. Neither option directly reflected the “freely given choice” of Georgia residents in 2001. Even were Georgia to adopt an independent districting commission, such a commission would still involve mediated citizen participation. Professor Guinier might have cumulative voting systems in mind. I am supportive of cumulative voting systems for local elections, but more skeptical about whether they make sense for state or congressional elections (see generally Pildes and Donoghue 1995). But even cumulative voting systems, which give voters a greater range of choice, must still be structured; they require prior decisions about how many votes and seats will be used in jurisdictions that must still somehow be defined. In general, a collective will must be organized before it can be expressed.


27. The covered jurisdictions at issue must still comply with the act’s general, nationwide requirements. By its own terms, Georgia addresses section 5 of the VRA and does not
directly extend to the interpretation of the nationwide provisions of section 2 (42 U.S.C. sec. 1973). The Court has repeatedly made clear, including in Georgia itself, that sections 2 and 5 have different purposes and impose different duties (see Georgia v. Ashcroft, 123 S.Ct., 2510–11). Functionally, reading more flexibility into section 5 than into section 2 could be justified, given that section 5 is designed to be an extraordinary, temporary remedy (see Reno v. Bossier Parish School Board, 520 U.S. 471, 477–79, describing the “limited purpose” of section 5). But the central decisions on which the Court relied in Georgia involved separate concurring opinions in earlier section 2 cases, which suggests the possibility that the Court will extend Georgia to section 2 cases should that question arise. See Georgia v. Ashcroft (123 S.Ct., 2511–16), citing thirteen times Justice O’Connor’s opinion concurring in the judgment in Thornburg v. Gingles (478 U.S. 30).

28. The state’s expert testified that approximately 90 percent of black voters in Georgia voted for Democratic candidates (see Karlan 2004, 25 n.38).

29. There might be some means of imposing norms of representational equality that affect different political parties the same way and thus impose no competitive disadvantage on any one party. Laws in some countries that impose obligations of gender equality on the parties, such as the French parite laws or Scandinavian requirements that party lists contain fixed percentages of women candidates, might be examples. Mala Htun (2004) catalogues ethnic and gender quota and reservation provisions across the world and discusses different remedies appropriate for the representation of different identity groups. These mandates are legislatively imposed. Any such mandates must be attentive to whether they disadvantage particular parties. Legislatures are more likely to make these calculations accurately than are judges, who are trained to think in terms of more abstract concepts of rights and equality.

30. One of the questions a full analysis would have to consider is the extent to which the competitive context of politics today is a product of the VRA itself. The VRA has helped establish the large contingent of black legislators in Georgia. If section 5 were not reauthorized, it is unclear how levels of black political representation or influence would be affected. Changes of this sort can certainly not be assumed to be likely to return southern politics to the status quo that existed in 1982, when the current version of section 2 was adopted and the act was last amended. Today, two-party competition exists and black citizens are a critical component of the Democratic Party. Those factors would continue to be true, even without section 5. But precisely how repeal of section 5 would affect political dynamics in the South remains uncertain.

31. For an attempt to periodize the formation of democracies into three distinct eras, see Samuel Huntington (1991, 13–26). Huntington’s first wave of democratization began in the year 1828 with the extension of the franchise in the United States and continued until around 1926 (26). During this period, some twenty-nine democracies came into being (17). The reversal of the first wave began in 1922 with the accession of Mussolini to power in Italy and lasted until about 1942, when the number of democracies in the world had been reduced to twelve (16–18, 26). Huntington’s second wave began during World War II and reached its peak in the early 1960s, when the number of democracies had risen to thirty-six (18–19, 36). The reversal of the second wave between approximately 1958 and 1975 brought the number back down to thirty (16, 19–21, 26). In Huntington’s analysis, a third wave of democratization began in 1974 in
Portugal and spread through southern Europe during the 1970s, Latin America and Asia during the late 1970s and early 1980s, and eastern Europe beginning in 1988 (21–24). As of The Third Wave’s publication, more than thirty new democracies had been added in this most recent period (26). Some scholars have taken issue with Huntington’s periodization, arguing that it rests on a poorly specified definition of democracy and fails adequately to take into account changes in the number of independent countries (see Doorenspleet 2000). After refinements in the data analysis to take these considerations into account, Renske Doorenspleet concludes that only Huntington’s “third wave” is accurately supported by the data (398–99).

CASES CITED

REFERENCES
**The Future of the Voting Rights Act**


Political Competition and the Modern VRA


Chapter 2

The Law of Preclearance: Enforcing Section 5

Peyton McCrary, Christopher Seaman, and Richard Valelly

In August 2007, several special provisions of the Voting Rights Act (VRA) of 1965—the “preclearance” requirement set forth in section 5 of the act, the authority of the Department of Justice to use federal examiners and observers, and protections for the voting rights of language minorities—will expire, unless extended by congressional action. Of the provisions due to expire, the most important for the protection of minority voting rights over the years has been the preclearance requirement. Jurisdictions covered by section 5, for the most part states of the former Confederacy, must obtain federal approval of voting changes, either through a declaratory judgment action before a three-judge panel in the District of Columbia or from the Department of Justice, before these changes become legally enforceable. To secure preclearance of desired changes, covered jurisdictions have over the years removed barriers to registration and voting, as well as eliminated election structures that dilute minority voting strength. Preclearance requires proof by the jurisdiction that the submitted change, in the language of the statute, “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” (42 U.S.C. sec. 1973c; Days 1992, 52–53).

Before January 2000, the definition of discriminatory “purpose” under section 5 was understood as synonymous with the term’s meaning in constitutional cases: a practice designed by a covered jurisdiction to restrict access to registration or voting, or to dilute minority voting strength, in violation of the Fourteenth or Fifteenth Amendments, was thought to be prohibited by the purpose requirement of section 5 (Blumstein 1983, 685; Posner 1998, 80, 100; McCrary 2003, 693). For a decade after the Voting Rights Act was adopted, federal courts assessed discriminatory effect under section 5 by the same standard used in a constitutional challenge. However, in a key 1976 decision, Beer v. United States (425 U.S. 130, 141 [1976]), the Supreme Court bifurcated the statutory and constitutional effect standard by announcing that in the section 5 context a voting change likely to produce a racially discriminatory effect prohibited by either the Fourteenth or Fifteenth Amendments was entitled to preclearance unless it would make matters worse for minority voters than the existing plan, an effect the Court referred to as “retrogression” (141).
Retrogression remains the standard for assessing the effect of a voting change, but on January 24, 2000, the Court fundamentally redefined—and weakened—the purpose requirement under section 5 in Reno v. Bossier Parish School Board (Bossier II) (528 U.S. 320). Under the new standard announced in Bossier II, a voting change with an unconstitutional racial purpose, no matter how strong the evidence of discriminatory intent, would have to be precleared unless the evidence demonstrated that the change was also intended to make matters worse for minority voters than under the status quo—thus limiting the prohibition on purposeful discrimination to what the Court termed “retrogressive intent” (326). As subsequent events made clear, Bossier II effectively minimized use of the purpose prong as a weapon for protecting minority voters from discrimination.

Determining the impact of this doctrinal change on section 5 enforcement by the Department of Justice (DOJ) is the central focus of this essay. The key evidence on which we rely is found in the 996 letters from 1968 through 1999—and the forty-one after the Bossier II decision—in which the assistant attorney general for civil rights explained the basis for objections to voting changes. These objection letters, unlike court opinions regarding preclearance, do not set forth the full body of evidence on which the department relies in making each decision, and thus do not provide a basis for evaluating the accuracy of the department’s fact finding. The letters are, however, the official record of the legal bases asserted for each objection and thus constitute the essential starting point for an analysis of the department’s preclearance policy.

Our analysis reveals that by the 1990s the intent, or purpose, prong of section 5 had become the dominant basis for objections to discriminatory voting changes. During that decade an astonishing 43 percent of all objections were in our view, based on discriminatory purpose alone (see table 2.2). Thus a key issue for Congress in determining how to deal with the preclearance requirement of the act due to expire in 2007—assuming it seeks to restore the protection of minority voting rights that existed before January 2000—is whether to revise the language of section 5 so as to restore the long-accepted definition of purpose thrown out by Bossier II. We believe that the analysis in the following pages provides critical evidence for the debate over reauthorization and revision of section 5.

**JUDICIAL AND ADMINISTRATIVE REVIEW UNDER SECTION 5**

During the first three years after adoption of the act in 1965, the preclearance requirement set forth in section 5 was rarely invoked (Derfner 1973, 578, n. 244). During that time, however, southern legislatures, faced with the prospect that black voters might cast a majority of the ballots in some single-member districts, often shifted to at-large election systems, numbered place or runoff requirements, or gerrymandered district lines to minimize the number of black-majority districts (Derfner 1973, 553–55, 572–74; Lawson 1976, 329–52; McDonald 2003, 130–36; Parker 1990, 34–77). Active enforcement of section 5 to deal with such changes
awaited the 1969 ruling in Allen v. State Board of Elections (393 U.S. 544). In that decision, the Supreme Court determined that all changes affecting voting, including measures with the potential to dilute minority voting strength as well as procedures for registering or casting votes, required preclearance under section 5 (569).10

In this preclearance review the department provides a quicker and less expensive alternative to litigation and is to function as a “surrogate” for the District of Columbia trial courts.11 The attorney general has from the start delegated responsibility for preclearance decisions to the assistant attorney general (AAG) who heads the Civil Rights Division. Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights. The new Voting Section then provided the factual investigation for preclearance reviews and made detailed recommendations to the AAG for Civil Rights. Prodded by liberal critics in Congress, the department developed detailed guidelines for enforcing section 5 that were, in turn, endorsed by the Supreme Court. Other Supreme Court decisions over the next decade interpreted the scope of section 5 expansively and strengthened the department’s enforcement powers (Days and Guinier 1984, 164, 167–80; MacCoon 1979).

The Supreme Court, however, agreed to hear arguments and issue opinions in only a few cases. As a result, the District of Columbia trial courts who hear preclearance lawsuits by the jurisdictions played a major role in shaping section 5 case law. Often the Supreme Court declined to hear oral argument and summarily affirmed the trial court’s decision. Although summary affirmances simply endorse the lower court’s decision and not necessarily its reasoning, they are binding precedents for the lower courts and the Department of Justice until contradicted by a future Supreme Court decision.13

PURPOSE AND EFFECT UNDER SECTION 5

Section 5, like the Fourteenth and Fifteenth Amendments, has both a purpose and effect prong. The Supreme Court made it clear as early as 1975 in City of Richmond v. United States (422 U.S. 358) that assessment of purpose under section 5 was to follow the constitutional standard. “An official action, whether 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” (City of Richmond v. U.S., 422 U.S. 358, 378 [1975]). Even justices who opposed a strong Voting Rights Act seemed to agree: “it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation” (City of Rome v. United States, 446 U.S. 156, 210). That was the approach consistently followed by section 5 courts in the District of Columbia—until the Bossier Parish litigation in the 1990s. When the Beer majority redefined the section 5 effect standard in 1976 it coined a term—retrogression—that does not appear in the text of the statute at all and seems contrary to congressional intent (Katz 2001, 1179). The Court relied for its view of legislative history on a passage from the 1975 House report on extension
The Law of Preclearance

of the Voting Rights Act, which in turn simply reprinted a characterization of section 5 from a little-known 1972 oversight committee report. The oversight report was based on detailed consideration of the administration and enforcement of the VRA in Mississippi during 1971, when twenty-six counties in Mississippi undertook to reregister voters, and the subcommittee cautioned that “the observations and conclusions contained within this report are based upon and limited to that study” (U.S.Congress 1972, iii, emphasis added). To us, this appears a slim basis for an assessment of legislative intent in 1965, or later. Neither this 1972 subcommittee nor any congressional committee in 1975 ever made a systematic investigation of the legislative history of section 5. Nevertheless, problematic voting changes often could not satisfy the retrogression standard, especially in the early years.

THE RESEARCH DESIGN

To assess the legal basis asserted for objections by the Department of Justice, we examined the 996 letters interposing objections to voting changes before Bossier II and the forty-one objection letters since that critical decision. Where a single letter included objections to changes affecting more than one governing body (both school board and county commission in the same jurisdiction, for example, or both state house and state senate redistricting plans), we have treated this as two objections. On the other hand, if a letter itemized objections to several different features of a proposed change (such as objections to at-large elections, a numbered post requirement, staggered terms, and a majority vote requirement), we treated this as a single objection where only a single governing body was involved. To simplify the analysis we divided voting changes into five groups: ballot access; at-large elections and multimember districts; enhancing devices; redistrictings; annexations and consolidations (see table 2.1 below).

We did not code an objection as one based on purpose unless the letter cited at least some specific evidence of the sort set forth by the Supreme Court in Village of Arlington Heights v. Metropolitan Housing Corporation (429 U.S. 252), such as the historical background, the sequence of events leading to the decision, the views of decision-makers on related issues, whether the procedures followed were consistent with usual practice, and the likely impact of the decision. (Arlington Heights, 265–66). Where the letter referred to the exclusion of minority group members from the decision-making process, the refusal to accommodate requests from the minority community, the awareness by decision makers that the adopted change would have a racially discriminatory effect, the departure from standard decision-making procedures or criteria, or the use of pretextual arguments to justify the change, we took that as evidence that the objection was based on purpose (Posner 1998, 100–01). This was especially clear where the letter indicated reliance on court decisions based in part on intent.

In order to have a consistent standard for the entire period, we coded objections as based on retrogression when the Beer definition was satisfied, both before and after the Supreme Court decision in that case. Where the letter made clear that
the objection was based on the change’s discriminatory effect—before Beer—but the effect did not appear retrogressive, we coded it as simply an effect objection. In either case, assessing changes with the potential for diluting minority voting strength required the Voting section to determine whether the jurisdiction’s elections revealed a pattern of racially polarized voting. Where the attorney general interposed objections, we assume the decision was based on a finding of racial bloc voting (recall that we are not assessing the accuracy of the department’s fact finding but rather the legal basis for the objection). For example, all changes from single member districts to at-large elections, from straight at-large elections to a numbered place or residency district requirement, from a plurality rule to a majority vote requirement, and from concurrent to staggered terms would necessarily be retrogressive in effect, if objectionable. Where the department objected to annexations, deannexations, or consolidations that reduced the city’s minority population significantly, we classified the objections as retrogressive, recognizing however that such changes could subsequently be precleared where accompanied by a fairly drawn district election plan (28 C.F.R. sec. 51.61(c), following City of Richmond v. United States).

In the 1980s, after Congress revised section 2 of the act to create a statutory results test, the department revised its guidelines to require objections where the new practice would clearly violate the new results test. Where objection letters specifically used language referring to a “clear violation of section 2,” we identified this as a third type of section 5 effects test. The department’s letter often provided evidence of racial purpose as well as retrogressive effect or a clear violation of section 2; where that was true, we coded the objection as having two legal bases (both purpose and effect).

On occasion, voting changes were found objectionable because they would violate the minority language protections of the act (28 C.F.R. sec. 51.55(a)). Finally, some objections were based on the failure of the submitting authority to provide the information necessary to determine whether the change was entitled to preclearance. These were considered technical objections, and the change was often precleared once the jurisdiction supplied the necessary evidence (28 C.F.R. secs. 51.40, and 51.52(c)).

THE CHANGING LEGAL BASIS OF OBJECTIONS

To grasp the larger patterns at work in the department’s objection decisions, a few simple quantitative observations are necessary. Table 2.1 summarizes the types of voting changes to which objections have been interposed, by decade. During the 1970s, at-large elections and enhancing devices together were denied preclearance 292 times, 59 percent of all objectionable changes, but only 86 redistricting plans (17 percent) were the subject of objections (see table 2.1). By the 1980s, the picture presented by table 2.1 is more mixed: the department interposed objections to 150 at-large election plans and enhancing devices (35 percent of objectionable changes) and denied preclearance to 165 redistricting plans (38 percent). In the 1990s, at-large elections and enhancing devices were the subject of objections only
104 times, 26 percent of objectionable changes, but the department denied preclearance to a striking 209 redistricting plans (52 percent)—over half of all changes to which objections were interposed (see table 2.1). The increasing proportion of redistricting objections was, to some extent, a direct consequence of the decline in the number of at-large systems resulting from earlier departmental objections.

The most striking characteristic of our findings regarding the legal basis of the department’s decisions to object (see table 2.2) is the consistent increase over time of objections based on the purpose prong of section 5, and the consistent decline of objections based on retrogression. During the 1970s the department rarely cited intent in its objection letters. We identified only nine objections (just 2 percent) as based entirely on purpose, and only twenty-two more (6 percent) were based on a combination of intent and retrogressive effect. The vast majority of the objections (297, or 77 percent) were based on retrogression.27

By the 1980s, eighty-three objections (25 percent) were based entirely on the intent requirement, and another seventy-three (22 percent) were seen as both retrogressive and purposefully discriminatory. Only 146 (44 percent) relied on the retrogression standard alone. A new basis for objecting was available in the 1980s, when it was possible to object because the proposed change presented a clear violation of the new section 2 results test. In our judgment, however, the department only interposed two objections (1 percent) on this basis alone in the 1980s, and only seventy-three letters (22 percent) cited both purpose and section 2.

In the 1990s, fully 151 objections (43 percent) were based on purpose alone. In contrast, retrogression alone was the basis for only seventy-three objections (21 percent), and only one relied entirely on section 2. Another sixty-seven objections (19 percent) relied on a combination of purpose and retrogression, and forty-one (12 percent) on both purpose and the need to comply with section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade. In contrast, a determination of retrogressive effect was involved in only 40 percent of objections in the 1990s and section 2 in only 14 percent.

### TABLE 2.1 / Change Types to Which Objections Were Interposed

<table>
<thead>
<tr>
<th>Change Type</th>
<th>1970s</th>
<th>Percentage</th>
<th>1980s</th>
<th>Percentage</th>
<th>1990s</th>
<th>Percentage</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annexations</td>
<td>34</td>
<td>7%</td>
<td>47</td>
<td>11%</td>
<td>24</td>
<td>6%</td>
<td>105</td>
</tr>
<tr>
<td>At-large</td>
<td>110</td>
<td>22%</td>
<td>57</td>
<td>13%</td>
<td>31</td>
<td>8%</td>
<td>198</td>
</tr>
<tr>
<td>Enhancing devices</td>
<td>182</td>
<td>37%</td>
<td>93</td>
<td>22%</td>
<td>73</td>
<td>18%</td>
<td>348</td>
</tr>
<tr>
<td>Districting</td>
<td>86</td>
<td>17%</td>
<td>165</td>
<td>38%</td>
<td>209</td>
<td>52%</td>
<td>460</td>
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<tr>
<td>Ballot access</td>
<td>77</td>
<td>15%</td>
<td>64</td>
<td>15%</td>
<td>56</td>
<td>14%</td>
<td>197</td>
</tr>
<tr>
<td>Other changes</td>
<td>9</td>
<td>2%</td>
<td>5</td>
<td>1%</td>
<td>9</td>
<td>2%</td>
<td>23</td>
</tr>
<tr>
<td>Totals</td>
<td>498</td>
<td>100%</td>
<td>431</td>
<td>100%</td>
<td>402</td>
<td>100%</td>
<td>1331</td>
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Note: In this and the following tables, the column headed “1970s” is actually the period 1968–1979, but few objections were interposed until 1970. The number of change types to which objections were interposed is greater than the total number of objections, because numerous objection decisions affected two or more change types.
Looking just at objections to redistricting plans, we observe similar patterns (see table 2.3). Objections based on purpose alone increased from seven (11 percent) in the 1970s to seventy-five (44 percent) during the next decade and 112 (58 percent) in the 1990s. The intent prong, in combination with retrogression, was involved in only five redistricting objections in the 1970s, but increased to forty (24 percent) in the 1980s, sagging a bit to thirty-three redistricting objections (16 percent) in the 1990s. Although inconsequential in the 1980s, the combination of intent and section 2 concerns provided the basis for twenty-seven objections (14 percent of redistricting objections) in the 1990s.

The principal difference between redistricting objections and objections as a whole was that a substantially lower proportion of redistricting objections were based on retrogression than was case for objections as a whole. In the 1970s, only thirty-seven redistricting plans (40 percent) were retrogressive (see table 2.3), compared with 297 (77 percent) for all objections (see table 2.2). In the 1980s, thirty-five redistricting plans were rejected on retrogression grounds (23 percent), but retrogression was the basis for 146 objections (44 percent) for all change types (see tables 2.2 and 2.3). In the 1990s retrogression provided the sole basis for only twenty redistricting objections (only 10 percent), but 73 (21 percent) for all change types (see tables 2.2 and 2.3).

These results make clear that the likely effect of striking down the department’s authority to object to voting changes when they present a clear violation of section 2 (see Reno v. Bossier Parish School Board 1997 [Bossier I]) was inconsequential. On the other hand, the effect of redefining purpose under section 5 as extending only so far as an “intent to retrogress” (see Bossier II) was to reduce the potential number of objections substantially from the level found in the 1990s.

### TABLE 2.2 / Legal Bases for Objection Decisions

<table>
<thead>
<tr>
<th>Legal Bases</th>
<th>1970s</th>
<th>Percentage</th>
<th>1980s</th>
<th>Percentage</th>
<th>1990s</th>
<th>Percentage</th>
<th>Totals</th>
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<td><strong>Exclusive categories</strong></td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>Intent</td>
<td>9</td>
<td>2%</td>
<td>83</td>
<td>25%</td>
<td>151</td>
<td>43%</td>
<td>243</td>
</tr>
<tr>
<td>Dilution</td>
<td>34</td>
<td>9</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>34</td>
</tr>
<tr>
<td>Retrogression</td>
<td>297</td>
<td>77</td>
<td>146</td>
<td>44</td>
<td>73</td>
<td>21</td>
<td>516</td>
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<tr>
<td>Technical</td>
<td>17</td>
<td>4</td>
<td>15</td>
<td>5</td>
<td>1</td>
<td>0</td>
<td>33</td>
</tr>
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<td>Section 2</td>
<td>—</td>
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<td>1</td>
<td>6</td>
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<td>8</td>
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THE PATTERN OF OBJECTIONS AFTER BOSSIER II

The impact of the Supreme Court’s decision in Bossier II was dramatic, as measured by the number of objections interposed by the department in its wake. Since the Court’s decision of January 24, 2000, the department has interposed only forty-one objections, compared with 250 during a comparable period a decade earlier—between January 26, 1990, and June 25, 1994. This is not to say that there would have been approximately 250 objections after January 2000, had Bossier II not eliminated the long-standing section 5 purpose standard. Years before Bossier II, the number of objections dropped precipitately after the Supreme Court’s criticisms of the department’s section 5 policy beginning with Shaw v. Reno (509 U.S. 630) and continuing through Miller v. Johnson (515 U.S. 900).28 Between 1995 and 1999, the department objected to a total of only forty-six changes, fewer than in 1994 alone (49), and substantially fewer than in each of the preceding three years (seventy-four in 1991, seventy-eight in 1992, and sixty-seven in 1993). It is plausible to view that drop in objections in part as the department’s adjustment to changes—changes it had not anticipated—in section 5 case law. That said, the gap between forty and 250 is substantial, and likely cannot be explained by this factor alone.29

Virtually all objections after Bossier II were based on a finding of retrogressive effect; at most two of the forty-one objections were based on the elusive concept of retrogressive intent. One of the two objections based on retrogressive intent involved a retrogressive policy of selective annexation in the town of North, South Carolina. Although the objectionable annexation would have added only two white people to the town’s voting age population, there was evidence that

TABLE 2.3 / Legal Bases for Objection Decisions, Redistrictings

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<td>164</td>
<td>99</td>
<td>209</td>
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</table>

Note: Totals do not always equal 100 percent, due to rounding.
a large number of black persons living just outside the town’s borders had unsuccessfully sought annexation. Granting the requested annexation would have swung the town from a white to a black population majority. Town officials had routinely assisted whites in complying with annexation requirements but made no effort to disseminate information about annexation procedures to nearby black applicants. “The test for determining whether or not a jurisdiction made racially selective annexations,” wrote the department, “is whether the annexation policies and standards applied to white areas are different than those applied to minority areas,” and the town failed that test (Objection Letter to City of North, September 16, 2003).

The other objection based only on retrogressive intent involved a redistricting plan for Cumberland County, Virginia. There was a small reduction in the black percentage of the voting age population in the county’s one black-majority district—but the change was only from 55.7 to 55.2 percent—leaving the district still arguably viable for minority-preferred candidates. However, the county apparently went to great lengths to reduce the black proportion in the district because, as the department put it, “given the demographics in the area, it was virtually impossible to devise an illustrative plan which did not increase the district’s black population percentage.” The areas moved out of the old district were, moreover, those black neighborhoods “from which the black-preferred candidate in District 3 drew substantial support in the 1995 and 1999 elections,” leading the department to conclude that the plan reflected a retrogressive intent, if not effect (Objection Letter to Cumberland County, Virginia, July 9, 2002).30

Most objections involved straightforward cases of retrogression. In roughly a third of the forty-one objections in table 2.4 the department also concluded, following an Arlington Heights analysis, that the submitting jurisdiction intended to make matters worse for minority voters. Of course, in those instances the change would not have been legally enforceable even without the purpose finding.
CONCLUSION

Because Bossier II was the most transformative decision regarding section 5 of the Voting Rights Act since the 1976 opinion in Beer v. United States, the story we have told in the preceding pages focuses on its impact on enforcement of the preclearance requirement by the Department of Justice. We examined in some detail the legal basis on which the Department of Justice objected to voting changes of all types, and provided a systematic quantitative analysis of how the legal bases for objections evolved over time.

Our principal finding was that by the 1990s, the purpose prong of section 5 had become the dominant legal basis for objections. As a result, the jurisprudential change likely to have the greatest impact on the incidence of objections by the late 1990s was to eliminate the purpose prong of section 5. That is, in effect, what the majority opinion in Bossier II accomplished. By overturning the long-standing view that the purpose standard under section 5 was identical to the purpose test in a Fourteenth Amendment challenge, in favor of the view that under section 5 the purpose test was limited to whether the jurisdiction had a retrogressive intent—a view dismissed by the Supreme Court as recently as 1987—the majority in Bossier II guaranteed that the number of objections would be very substantially reduced.

When Congress turns its attention to deciding the future of section 5, which is set to expire in 2007 if not extended, there will doubtless be calls for amendments to narrow (or increase) its scope, to narrow (or increase) its geographical coverage, and the like. Whatever changes Congress makes should, of course, be designed in light of the evidence as to the current threats facing minority voters. We believe there can be no more important change for the cause of minority voting rights than to restore the traditional purpose requirement that guided enforcement of the preclearance requirement for the quarter century preceding Bossier II. The Court’s decision in that case turned in many respects on what its author, Justice Antonin Scalia, saw as the garbled syntax of section 5—syntax that had left the Supreme Court untroubled for thirty-five years. It does not seem too much to ask Congress to revise the provision’s language so as to make clear that the purpose standard under section 5 is identical to the way in which discriminatory purpose is assessed in Fourteenth Amendment cases.

APPENDIX: STATUTES AND REGULATIONS

28 C.F.R. sec. 51.19 (1971)
42 U.S.C. sec. 1973c
52 Fed. Reg. 486 (Jan. 6, 1987)
Objection Letter to City of Charleston, Charleston County, South Carolina (Oct. 12, 2001)
Objection Letter to City of North, Orangeburg County, South Carolina (Sept. 16, 2003)
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Objection Letter to Cumberland County, Virginia (July 9, 2002)

We are grateful for the advice of friends who have read and commented on earlier drafts: Ted Arrington, Joaquin Avila, Bob Berman, Jim Blacksher, Chris Coates, Richard Dellheim, Anita Earls; Julie Fernandes, Heather Gerken, Jon Greenbaum, Gerry Hebert, Ellen Katz, Morgan Kousser, Laughlin McDonald, Steve Mulroy, Spencer Overton, Steve Pershing, Rick Pildes, Mike Pitts, Gaye Tenoso, and Brenda Wright. We are, however, responsible for any errors that remain.

NOTES

1. This is clear in the trial court decision in Beer v. United States (374 F.Supp. 363, 379), relying on Allen v. State Board of Elections (393 U.S. 544, 548, 556), and South Carolina v. Katzenbach (383 U.S. 301, 308–09). In an earlier section 5 decision, the Court had observed that “Congress intended to adopt the concept of voting articulated in Reynolds v. Sims . . . [to] protect Negroes against a dilution of their voting power” (Perkins v. Matthews, 400 U.S. 379, 390). Note that we focus on the definition of the term effect in constitutional cases. We do not address here the question of whether courts were required prior to 1976 to make a finding of discriminatory intent in order to strike down an election practice as unconstitutional.

2. Even so, the Court in Beer recognized that the concept of purpose was to be defined the same way under both section 5 of the act and the Constitution. The purpose of the plan was not among the issues presented to the Supreme Court by the parties in Beer, but the Court observed that a change motivated by racially discriminatory purpose was not entitled to preclearance: “an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution” [emphasis added]. The analysis is developed at length in McCrary, Seaman, and Valelly (2006), from which this chapter is adapted.

3. The Court’s initial opinion, Reno v. Bossier Parish School Board, 520 U.S. 471—Bossier I—decided a related issue, but remanded to the lower court certain questions regarding the purpose prong of section 5, which were ultimately resolved in Bossier II.

4. The notion that purpose under section 5 was limited to retrogressive intent was first proposed in a Supreme Court opinion—in dissent—in City of Pleasant Grove v. United States (479 U.S. 462, 474). This view only received the support of three justices. In fact, the author of Bossier II, Justice Antonin Scalia, voted with the Pleasant Grove majority to reject this definition.

6. Two resourceful studies of section 5 objection policy, Hiroshi Motomura (1983) and Mark Posner (1998), have previously utilized these letters as a major resource. Neither, however, have undertaken a comprehensive quantitative analysis of the legal basis asserted by the Department for its decisions.

7. Memoranda that present the factual evidence and legal basis underlying each objection, the more appropriate analogue to formal court opinions, are restricted internal documents. In the course of his official responsibilities, the senior author has examined many memoranda recommending objections. Because it is important for any social science analysis to be replicable, and because these memoranda are internal documents of the Department of Justice, we have not relied on these memoranda in our analysis.

8. The Department of Justice has at the time of this writing taken no position regarding revision of the preclearance requirement.

9. Four cases, three from Mississippi and one from Virginia, were consolidated in Allen. The voting changes at issue included shifts from district to at-large elections, a switch from elected to appointed school superintendents, and restrictions on independent candidates. The Mississippi laws at issue in Allen were racially discriminatory in both intent and effect: “Clearly the Court could not stand by while southern whites in covered states—states with dirty hands on questions of race—altered electoral rules to buttress white hegemony” (Thernstrom 1987, 4).

10. The Court based its decision in Allen on its reasoning in the Alabama reapportionment case Reynolds v. Sims (377 U.S. 533, 555), for the proposition that was at the heart of the Court’s expansive interpretation of the Voting Rights Act: “the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot” (Allen v. State Board of Elections, 566; McCrary 2003, 687–89).

11. The responsibility to act as a surrogate for the D.C. court, 28 C.F.R. sec. 51.52(a), was set forth in the department’s original Section 5 guidelines, 28 C.F.R. sec. 51.19 (1971).

12. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 Fed. Reg. 18, 186. The guidelines, which have been revised several times over the years, are found at 28 C.F.R. pt. 51. The Supreme Court found the regulations “wholly reasonable and consistent with the Act” (Georgia v. United States, 411 U.S. 526, 541). On the development of the procedures for enforcing section 5, see Howard Ball (1982, 66–73, 91–93) and Steven Lawson (1985, 162–78).

13. “Lower courts are bound by summary decisions by this Court ‘until such time as the Court informs [them] that [they] are not’” (Hicks v. Miranda, 422 U.S. 332, 344). “A summary affirmance by the Supreme Court has binding precedential effect” (Picou v. Gillum, 813 F.2d 1121). On the other hand, the precedential value of a summary affirmance has distinct limits: “We have often recognized that the precedential value of a summary affirmance extends no further than ‘the precise issues presented and necessarily decided by those actions’ (Anderson v. Celebrezze 1983, 786, n. 5). Additionally, “because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below [but does] prevent
lower courts from coming to conclusions on the precise issues presented and necessarily decided by those actions” (Mandel v. Bradley, 432 U.S. 173, 176).

14. We use the terms purpose and intent—and the terms result and effect—interchangeably here.

15. The Court took the same view in Johnson v. De Grandy(512 U.S. 997, 1019), City of Pleasant Grove v. United States (479 U.S. 462, 469, 471 n. 11, 472), and City of Port Arthur v. United States(459 U.S. 159, 168).

16. “The prohibited ‘purpose’ of section 5 may be described as the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection” (Mississippi v. United States, 490 F.Supp. 569, 583). “Simply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of discriminatory purpose” (Busbee v. Smith, 549 F.Supp. 494, 516–17).


18. Bossier II compounds this inventive but problematic reading of congressional intent in Beer by reinterpreting the purpose prong of section 5 to mean no more than retrogressive intent. “Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine Beer, that policy does not demand that recognized error be compounded indefinitely, and the Court’s prior mistake about the meaning of the effects requirement of § 5 should not be expanded by an even more erroneous interpretation of the scope of the section’s purpose prong” (see 362–63). The idea that the 1965 Congress saw the preclearance requirement as limited to retrogression strikes critics as thoroughly counterintuitive. As Justice Breyer pointed out in a separate dissent, there were some jurisdictions in 1965 where “historical discrimination had left the number of black voters at close to zero,” and as a result “retrogression would have proved virtually impossible where § 5 was needed most.” As an example he pointed to Forrest County, Mississippi, where as of 1962 only one percent of the black voting-age population was registered to vote, due to the discriminatory application of the state’s registration requirements. When the Fifth Circuit Court of Appeals enjoined the registrar from discriminatory processing of registration applications, Justice Breyer observed, the state legislature enacted a “good moral character requirement,” which the Supreme Court characterized as “an open invitation to abuse at the hands of voting officials.” To Justice Breyer, “it seems obvious, then, that if Mississippi had enacted its ‘moral character’ requirement in 1966 (after enactment of the Voting Rights Act), a court applying § 5 would have found ‘the purpose . . . of denying or abridging the right to vote on account of race,’ even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the black voting age population of Forrest County to register.” As Justice Breyer wryly noted, this change “would result in maintaining—though not, in light of the absence of blacks from the Forrest County voting rolls, in increasing—white political supremacy,” and thus, under the majority’s reading of the section 5 purpose requirement, an intentionally discriminatory change would have been entitled to preclearance (Bossier II, 374–76).

19. To identify letters we have relied on the “Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965,” now available on the Voting section
The observations in this document are objection letters, which sometimes affect two or even three governing bodies. Our count is 1,074 objections to specific governing bodies from 1965 through 1999. For the period since January 1, 1980, these objections and all other submitted changes are identified in the department’s Submission Tracking and Processing System (STAPS). STAPS is a database used to track the thousands of submissions (containing tens of thousands of changes) that the department receives annually, and provides data on each voting change submitted and the type of determination made. For the discussion of legal standards in the current guidelines, see 28 C.F.R. pt. 51, especially 28 C.F.R. secs. 51.52, 51.54–61. These legal standards were first set forth in the Revision of Procedures for Administration of section 5 of the Voting Rights Act of 1965 (52 Fed. Reg. 486). In addition to the department’s guidelines, our analysis is guided by the briefs filed by the parties in section 5 declaratory judgment actions, and by section 5 case law.

20. We began with a larger number of initial categories: for example, requirements for numbered places, runoffs, and staggered terms, as well as changes in the size of the governing body and changes from appointive to elective procedures (or vice versa) were all tallied separately, but were eventually collapsed into the category enhancing devices. The category annexations includes deannexations and consolidations between local jurisdictions. We put into the ballot access category all changes related to registration or voting, candidate qualification requirements, or the timing of referenda, primaries, or other elections. The at-large election category includes multimember districts, as well as the use of at-large seats, in mixed plans.

21. This is consistent with the department’s approach (see 28 C.F.R. sec. 51.57). A special problem arises where there is no clear benchmark for comparing the new plan: “Where at the time of submission . . . there exists no other lawful practice or procedure for use as a benchmark (for example, where a newly incorporated college district selects a method of election) the Attorney General’s preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups” (28 C.F.R. sec. 51.54(b)(4)). There is in most objection letters boilerplate language setting forth the legal burden of the jurisdiction to show that a change has neither the purpose nor the effect of discriminating on the basis of race. Because such language was included in the vast majority of letters, regardless of the actual basis for the objection, we do not view such language as substantively significant.

22. Among the most frequently cited were section 5 decisions Wilkes County v. United States (450 F. Supp. 1171) and Busbee v. Smith(549 F. Supp. 494); a Fourteenth Amendment decision, Rybicki v. State Board of Elections(574 F. Supp. 1082); and a section 2 decision, Garza v. County of Los Angeles(756 F. Supp. 1298).

23. This approach is in a sense ahistorical, because the department could not have based its decision on retrogression because the retrogression standard did not yet exist. Based on our reading of the letters, we think that before Beer the department understood the effect prong of section 5 to be identical to the constitutional effect standard.
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25. In some cases, language in the objection letters referencing section 2 appeared to be no more than boilerplate, restating the requirements of 28 C.F.R. sec. 51.55(b)(2). Initially we were inclined to view this language as substantively insignificant, as we did with similar boilerplate references to the section 5 purpose requirement. Discussions with present and former Voting Section attorneys persuaded us, however, that this boilerplate language was used only when the fact that the proposed plan would clearly violate section 2 played at least some role in the decision to object. Consequently, we coded all letters that referred to section 2 of the Act as falling under this category. This approach introduces a bias in favor of finding numerous section 2 objections, but even so we found only a small number (see table 2.2). In Reno v. Bossier Parish School Board (520 U.S. 471), the Supreme Court ruled that this was an improper basis for objections.

26. Note that the data presented in table 2.1 are the number of change types to which objections were interposed, and are somewhat more numerous than objection decisions (the data presented in table 2.2).

27. A small number were technical objections, where the jurisdiction failed to supply the information required by the department’s guidelines, making a proper assessment of the change impossible. Although always small in number, technical objections were more common in the 1970s (5 percent) than in the 1980s (4 percent), and disappeared altogether by the 1990s.

28. The Supreme Court invalidated majority-black or majority-Hispanic congressional districts in several Southern states under a new constitutional standard thus far applied only to the creation of majority-minority districts: Miller v. Johnson (515 U.S. 900) in Georgia; Vera v. Bush (17 U.S. 952) in Texas; Shaw v. Hunt (517 U.S. 899) in North Carolina. The same conservative majority also upheld a court-drawn congressional plan in Georgia that decreased the number of black-majority districts from three to one: Abrams v. Johnson (521 U.S. 74).

29. Changed political circumstances may also have played a role. Where the Democratic Party controlled the legislature after the 2000 census, for example, the increased role of minority officeholders in the decision-making process in covered jurisdictions, due to earlier successes in enforcing the Voting Rights Act, may also have occasioned fewer objectionable changes. Even in Georgia v. Ashcroft (539 U.S. 461), two of the three plans at issue—the congressional and state house plans—were precleared without contest, and the facts in dispute in regard to the state senate plan at trial were quite limited (see Karlan 2004).

30. One objection was based on the concept of future retrogression. The city of Charleston, South Carolina, reduced the number of black-majority districts from six to five (out of twelve in the benchmark plan), but the department recognized that as a result of demographic changes in the city this was necessary to meet one-person, one-vote requirements, and was thus preclearable. One of the city’s black-majority districts, however, had been combined with a new, up-scale residential development on
Daniel Island, part of a neighboring county annexed to the city some years earlier. The city conceded that the development “will have mostly white residents in the future,” so that in a few years the district would no longer afford African-American voters an opportunity to elect candidates of their choice (Objection Letter to City of Charleston 2001).

31. Retrogressive effect was by far the most numerous basis for objections in the 1970s (72 percent) and still numerous in the 1980s (45 percent), but had shrunk to only 20 percent of all objections by the 1990s. Objections based only on the “clear violation of section 2” rule were trivial in number throughout.

CASES CITED

City of Richmond v. United States, 422 U.S. 358 (1975).
City of Rome v. United States, 446 U.S. 156 (1980).
Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal., 1990), aff’d, 918 F.2d 763 (9th Cir. 1990).
Hicks v. Miranda, 422 U.S. 332 (1975).
Picou v. Gillum, 813 F.2d 1121 (11th Cir. 1987).
REFERENCES


Chapter 3

Rethinking Section 5

Guy-Uriel E. Charles and Luis Fuentes-Rohwer

It is hard to believe that section 5 of the Voting Rights Act (VRA) was once the crown jewel in one of the most successful regulatory schemes ever promulgated by Congress.1 In the twenty or so years that have elapsed since Congress last extended section 5, the provision has lost some of its luster to the point that scholars, politicians, and activists are debating seriously whether it has outlived its usefulness. In this vein, some commentators have argued that Congress should not renew section 5 because voters of color in covered jurisdictions no longer need the assistance of the Department of Justice (DOJ), as they are capable of adequately defending themselves in the political process. Others have argued instead that the preclearance provision is still necessary to guard against the continued blight of racial discrimination.

Though the debate over the continued utility of section 5 is important, unfortunately, this debate is often conducted in an empirical vacuum. The debate over the continued relevance of section 5 is missing a systematic assessment of the actual preclearance practices of the DOJ. In order to understand whether section 5 has outlived its usefulness, we must first understand whether there is anything left for the DOJ to do under section 5.

This chapter undertakes that project. More specifically, we have examined objection letters from the DOJ to all covered jurisdictions. From those letters, we created a database in order to explain how the DOJ understands the provision’s purpose; how it administers the provision; the types of changes it refuses to preclear; the number of objections it has interposed; and the factors it considers in rejecting preclearance submissions.

This chapter presents our findings for the state of South Carolina. Our findings are mixed. For the first three decades of the DOJ’s administration of section 5 in South Carolina, 1970-1995, the DOJ interposed a fair and steady number of objections to proposed changes. But starting right after 1995, we found a sharp decrease in the number of objections. This decrease appears to support the contention of opponents of renewal that few objectionable matters exist and so section 5 is no longer necessary. However, as we discuss in this chapter, we are unable to conclude that the drop in objections to preclearance requests is due to the fact that there are significantly less objectionable such requests.
We also found that throughout the period covered by our study, the DOJ had a very broad conception of section 5’s purpose and its own role in enforcing that purpose. Put simply, DOJ acted more as an agent on behalf of communities of color, viewing its task not always as ferreting out racial discrimination but as enforcing a broad norm of political participation.

OVERVIEW OF DOJ PRECLEARANCE PRACTICES IN SOUTH CAROLINA

Section 5 of the VRA requires those jurisdictions included within its coverage formula to preclear with the U.S. attorney general any change in a “standard, practice, or procedure with respect to voting” (42 U.S.C. sec. 1973(c)). The attorney general may not grant preclearance if the proposed change has the “purpose . . .[or] effect of denying or abridging the right to vote on account of race or color” (42 U.S.C. sec. 1973(c)). A covered jurisdiction may additionally and alternatively file suit in the United States District Court for the District of Columbia seeking judicial preclearance.

Number of Objections by DOJ in South Carolina

The DOJ interposed its first objection to a preclearance request from South Carolina on March 6, 1972. This was to be the first of forty objection letters that the DOJ wrote to South Carolina officials in the 1970s. Table 3.1 contains the number of objections that the DOJ interposed in the four decades that it has administered section 5 of the VRA in South Carolina alone. The numbers in parentheses represent the total number of objection letters, including objection letters to resubmissions and requests for new information.2

As one might expect, the majority of objections occurred in the first two decades after the DOJ assumed the administration of section 5. The objections declined steadily between 1980 and 2000, but dropped sharply in the first decade of the

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</tr>
</tbody>
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Source: Authors’ compilations.
In fact, as we will discuss, that decline started in the second half of the 1990s. From 1990 to 1995, the DOJ interposed twenty-nine total objections. From 1996 to 2000, the DOJ interposed only five. The question raised by these numbers is whether the decline in objections is a reflection of the submissions themselves and the changed behavior of the covered jurisdictions, or whether other plausible explanations exist.

Submissions to Which DOJ Objected

A review of the types of submissions that elicited objection letters from the DOJ presents a similarly stark picture. Table 3.2 provides a general summary of the types of submissions that the DOJ found objectionable. We classified the objectionable submissions into five major types: objections to voting systems or mechanisms—this includes objections to at-large election systems, numbered posts, staggered terms, and majority vote requirements; objections to proposed submissions that sought to change the form of government from elective office to appointive, partisan to non-partisan, decrease the number of elected officials, and the like; objections to elections procedures—which include, among other things, changes of polling places, residency requirements, registration changes; objections to redistricting submissions; and boundary changes—which includes primarily annexations and de-annexations.

As the table 3.2 reveals, the DOJ’s objections were mainly to the types of pre-clearance requests in South Carolina that sought changes in the electoral structures such as voting systems and redistricting. For example in the 1970s the DOJ objected seventeen times to submissions that proposed using at-large election systems. Similarly, the DOJ objected to eighteen submissions that proposed using majority vote requirements. Notice also the large percentage of the DOJ’s objections to preclearance requests in South Carolina involved changes in voting systems in the 1970s; about 60 percent of the objections in the 1970s involved voting systems. By contrast only about 25 percent of the objections in the 1980s involved objections to changes in voting systems.

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<tbody>
<tr>
<td>Voting Systems</td>
<td>50</td>
<td>15</td>
<td>3</td>
<td>2</td>
<td>70</td>
</tr>
<tr>
<td>Form of Government</td>
<td>15</td>
<td>13</td>
<td>12</td>
<td>4</td>
<td>44</td>
</tr>
<tr>
<td>Procedures</td>
<td>13</td>
<td>22</td>
<td>7</td>
<td>0</td>
<td>42</td>
</tr>
<tr>
<td>Redistricting</td>
<td>4</td>
<td>7</td>
<td>17</td>
<td>4</td>
<td>32</td>
</tr>
<tr>
<td>Boundaries</td>
<td>2</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>84</td>
<td>62</td>
<td>43</td>
<td>12</td>
<td>201</td>
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</tbody>
</table>

Source: Authors’ compilations.
Factors the DOJ Considered

To best understand the utility of preclearance, it is important to appreciate the specific factors the DOJ considered when it denied a request for preclearance. From our review of the data, we were immediately struck by the variety of factors that the DOJ took into account in deciding whether a standard or practice has the effect of or purpose of abridging the right to vote on the basis of race.4

Table 3.3 lists, in decreasing order of occurrence, the factors that the DOJ considered in its objection letters when it decided to deny requests for preclearance from South Carolina public officials from 1970 and 2005.5 The numbers in parentheses represent the number of times that objection letters noted the variable in question as the DOJ decided to deny the request for preclearance. As table 3.3 shows, over those thirty years, the DOJ considered a number of factors including the existence of racial bloc voting, the fact that the submitting authority did not sufficiently take into account the size of a minority population, the use of at-large districts for elections, the use of majority vote requirements, as well as other structural devices that may minimize the political power of minority voters.

For ease of analysis as well as for theoretical purposes, we have categorized the reasons suggested by the DOJ for acting negatively on a preclearance request into two categories. One category consists of objections interposed on the basis of structural features of a proposed change. This category includes eight such types of objections; in particular, these are objections interposed in part on the basis that the proposed change involves an at-large election system, numbered posts, majority vote requirements, staggered terms, single-member districts, multimember districts, residency requirements, and anti-single-shot provisions.

The second category consists of objections interposed on the basis of what we shall call process-based deficiencies with the proposed change. This includes objections based on a failure of the submitting entity to account for a significant minority population, the existence of racial bloc voting, the submitting authority rejected available alternatives, the fact that the submitting authority could not provide a nonracial reason for adopting the proposed change, the submitting

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TABLE 3.3 / Top Ten DOJ Reasons for Denying Preclearance—1970 to 2005 South Carolina

<table>
<thead>
<tr>
<th>Reason</th>
<th>Count</th>
</tr>
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<tbody>
<tr>
<td>Racial bloc voting</td>
<td>65</td>
</tr>
<tr>
<td>Minority population</td>
<td>64</td>
</tr>
<tr>
<td>At-large districts</td>
<td>41</td>
</tr>
<tr>
<td>Majority vote requirement</td>
<td>36</td>
</tr>
<tr>
<td>Limits opportunity to elect candidate of choice</td>
<td>34</td>
</tr>
<tr>
<td>Rejected available alternatives</td>
<td>33</td>
</tr>
<tr>
<td>Absence of nonracial explanations</td>
<td>29</td>
</tr>
<tr>
<td>Opposition by minority communities</td>
<td>29</td>
</tr>
<tr>
<td>Past failure to elect minority candidates</td>
<td>28</td>
</tr>
<tr>
<td>Use of staggered terms</td>
<td>22</td>
</tr>
</tbody>
</table>

Source: Authors’ compilations.
authority was not responsive to minority input or did not seek it, opposition by minority communities, the jurisdiction has a history of not electing minority candidates, and the proposed change limits the opportunity of the relevant minority community to elect its preferred candidate.6

Figure 3.1 presents in graphic form the reasons noted by the DOJ for denying preclearance to submissions from South Carolina from 1970 to 2005 using the two categories explained. As the figure shows, there has been a marked decline in the number of times the DOJ has objected to proposed changes because, by the DOJ’s own admission, the proposed change is structural. Between 1970 and 1980, objection letters stating structural concerns for refusing to preclear declined precipitously. By the 1990s these types of objections were about 15 percent of what they were in 1970, likely because states stopped submitting changes that included these structural features. To the extent that the absence of objections or significant decrease in objections reflects success, one can say that the DOJ has been fairly successful in South Carolina in addressing the problems associated with structural changes. As figure 3.1 shows, the DOJ seemed to have paid particular attention to the potential impact of electoral structures on voters of color and it achieved relative success over a very short period.

This interpretation of the data is well supported by the letters themselves. Take for example an objection letter from Assistant Attorney General Drew Days III to a county attorney in South Carolina with respect to the county’s proposal to change the system of electing its school board members from a districting system to an at-large system. The assistant attorney general noted:

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

\[ \text{Source: Authors’ compilations.} \]
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. The DOJ also seemed particularly concerned with the combined impact of structural electoral devices on the political rights of minority voters. Consider the DOJ’s first letter objecting to a submission for preclearance from South Carolina, dated March 6, 1972. The letter from Assistant Attorney General David Norman referenced South Carolina’s redistricting plans for its state senate districts:

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 district in Plan B are multi-member. We note that in these districts candidates must run for numbered posts. It is our understanding also that South Carolina requires a majority of votes to win primary elections. A substantial number of multimember 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 abridgment of minority voting rights in South Carolina.

By contrast to the decline in objections based upon structural changes that the submitting authority sought to implement, objections based upon process continue to reflect a source of concern. Figure 3.1 also tracks the number of times that the DOJ expressed process-based concerns for interposing an objection to a proposed change. As the figure also demonstrates, though these types of objections have decreased steadily, they have not disappeared. One suspects that structural changes are easier for the DOJ to police. Conversely, process-based factors are more manipulable by the state and more difficult for the DOJ to determine their impact on the voting rights of minorities.
These process-based factors are also more difficult for states to resolve satisfactorily. Covered jurisdictions can address the DOJ’s concerns with the impact of electoral structures on the electoral prospects of minority voters by changing structures—for example, getting rid of at-large districts. But it is less easy for covered jurisdictions, for example, to respond to the objection that covered jurisdictions are not adequately responsive to the input of minority voters. Who among the community must be responded to? Assume that the relevant individuals are identified, should their views be outcome-determinative? Should their views be determinative all of the time or only some of the time? It is not surprising that these process-based factors are recurring concerns and difficult to resolve definitively.

Local Governments as Culprits

Last, the objection letters also identify which level of government was the primary violator of section 5. Commentators often focus on state legislatures as the primary violators of section 5. But our study of South Carolina indicated otherwise. Table 3.4 identifies the level of government responsible for implementing a proposed change and the number of objections against each level.

As table 3.4 shows, most of the objections were interposed 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 (see also Pitts 2005, noting the need to pay attention to the behavior of local officials in the preclearance debate). It may not suffice to know how many elected officials of color there are in the legislature. One must also pay attention to the composition of school boards and city and county offices. These are the locus of significant political power, particularly in the South.

IS SECTION 5 STILL NECESSARY? TWO MODELS

In table 3.1, we chronicled the number of objections the DOJ interposed to preclearance submissions in South Carolina between 1972 and 2004. One of the remarkable observations from table 3.1 is the drop in objections interposed by the

<table>
<thead>
<tr>
<th>Table 3.4 / Objections by Level of Government, South Carolina</th>
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<tbody>
<tr>
<td>State</td>
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<tr>
<td>County</td>
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<tr>
<td>City</td>
</tr>
<tr>
<td>School district</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Source: Authors’ compilations.
DOJ, particularly from 2000 to 2004, the last decade of DOJ supervision. In view of the sharp decline in the number of objections interposed by the DOJ, one could tell a plausible story of section 5’s obsolescence. But that story might be too facile. Whether one concludes that section 5 has outlived its purpose depends in great part on one’s understanding of the purpose of section 5.

For analytical purposes, consider two models. One, perhaps the dominant one, understands section 5’s purpose as eradicating, to the extent possible, racial discrimination from the political process. We call this the negative model of racial discrimination. Here section 5 provides a negative right—to borrow from Isaiah Berlin—to be free from racial discrimination in the political process.

A second and alternative model understands section 5’s purpose as reflecting a normative commitment to political participation by voters of color notwithstanding the existence of racial discrimination in the political process, \textit{vel non}. We call this the positive model of political participation. Here section 5 provides a positive right; a right to consequential autonomy by voters of color in the political process. This takes as its starting point the importance of political integration, equality, involvement by citizens of color in the political process. It is not motivated by racial discrimination, but the fact of inequality or lack of participation itself regardless of the cause.

### Racial Discrimination Model

The renewal debate presupposes that the only purpose of section 5 is to protect against racial discrimination in the political process. Undoubtedly, when Congress first passed the act, Congress was concerned with combating pervasive instances of racial discrimination as commonly understood. This view is amply supported by the legislative history of the act. The record in 1965 was replete with evidence that jurisdictions were depriving blacks of the right to vote on account of race. These were “exceptional conditions,” the Supreme Court explained in South Carolina v. Katzenbach (383 U.S. 301), which “can justify legislative measures not otherwise appropriate” (334).

Chairman Celler opened the House hearings on March 18, 1965, by noting that “the time is here for action. This committee will consider a strong bill that will guarantee to Negroes the inalienable right to vote, and to safeguard that vote as guaranteed by the Constitution” (U.S. House 1965, 1). Moments later, he remarked that “freedom to vote must be made meaningful. The legalisms, stratagems, trickery, and coercion that now stand in the path of the Southern Negro when he seeks to vote must be smashed and banished” (1). He soon repeated this point in connection to the Fifteenth Amendment, “namely, that no one shall be denied the right to vote because of race or color—in any election, be it Federal, State, or Local” (2).

Congress examined the Act and its sunset provisions again four years later, in the summer of 1969. And the general story, while markedly improved, was all too familiar. Mrs. Frankie Freeman, a testifying member of the Civil Rights Commission, told the Senate on July 9 that “hostility and resistance to Negro voting have not ended
in the South. Our political participation report documents many reports since the Voting Rights Act of physical and economic intimidation in connection with the voting activities. The incidents continue” (U.S. Senate 1969, 46). Chairman Celler similarly remarked on June 26, during the House hearings, that “the testimony recounts how various devices continue to be used in those States to dilute the newly gained voting strength of Negroes” (U.S. House 1969, 217). In this vein, he explained that “access to the ballot box, without discrimination on the basis of race or color, was the goal of the Voting Rights Act of 1965. It remains our national commitment” (218). On the strength of these further findings, Congress extended the life of the Act for another five years.

In recent months, commentators have mounted their attacks by returning to the original justifications for the Act as the “exceptional conditions” that sustained the enactment and extension of section 5. As these “exceptional conditions” have clearly waned, they argue that the special provisions of the Act must be allowed to expire on their own accord.10 This argument is supported in part by our analysis of the objection letters. As we discussed earlier, the DOJ interposed fewer objections to electoral structures in the last two decades of its administration of the Act than in the first two decades. If there is nothing for the DOJ to object to, there is no reason for Congress to force covered jurisdictions to bear what some perceive as the tremendous burdens that come with preclearance.

However, we are reluctant to reach the conclusion that the decline in objections is an indication that there is nothing left for the DOJ to vindicate. Two reasons are worth exploring here. First, though there has been a decline in the number of objections, the decline has not been uniform in all categories. From our examination of

FIGURE 3.2 / Objections South Carolina, Dilution and Retrogression

Source: Authors’ compilations.
the objection letters that the DOJ interposed in South Carolina from 1970 to 2004, we determined that the DOJ used three legal standards to determine whether a proposed change should be precleared. It refused to preclear when the proposed change: diluted the votes of minority voters, was purposefully discriminatory, or was retrogressive. Figure 3.2 represents the number of objections the department interposed to preclearance requests from South Carolina on the grounds that the attorney general could not conclude that the proposed change was dilutive and that the proposed change was retrogressive.

Figure 3.2 shows a sharp decline in the number of DOJ objections from 1975 to 1985 based on the ground that the proposed change was dilutive. The figure also shows a sharp rise in the number of proposed changes objected to on the ground that the change was retrogressive, depicting the effect of the retrogression standard promulgated by the Supreme Court in the 1976 case of Beer v. United States. In Beer, the Supreme Court concluded that the DOJ can refuse to preclear a proposed change on the ground that the change would have a discriminatory effect only where the change “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise” (141). Figure 3.2 nicely demonstrates the impact of Beer and the standard that Beer sought to replace.

Figure 3.3 is instructive for two reasons. First, it displays the number of objections made on the grounds that the proposed change was discriminatory and retrogressive. As it also shows, the DOJ objected to a large amount of proposed changes on the ground that they were purposefully discriminatory. This point is remarkable because an important assumption of the regulatory structure of the VRA is that purposefully discriminatory changes would be difficult to detect. Thus, the expectation—not borne out by this data—was that the effects prong of section 5 would do most the work.
This assumption served as a contextual background for the Court’s decision in Beer. Beer was understood by almost all commentators as narrowing the reach of the DOJ under section 5 both because retrogression is a narrower standard than vote dilution and because the effects prong was expected to do the heavy lifting under section 5. Ironically, to the extent that the Supreme Court in Beer attempted to narrow the reach of section 5, the Court may have had the exact opposite effect; retrogression simply became an additional tool in the DOJ’s arsenal.

Second, figure 3.3 clearly indicates an unmistakable decline in the number of objections that DOJ interposed. One way of reading figure 3.3 is to suggest that section 5 need not be renewed because there are few violations worth policing. However, the data do not permit us to arrive at that conclusion. Two reasons support our reluctance to do so.

First, notice that notwithstanding the decline in total objections and to objections on the basis of discriminatory purpose in South Carolina, objections on the basis that the proposed change was retrogressive stayed steady and even demonstrated a slight uptick between 2000 and 2004, the time period during which the decline in objections has been greatest. Thus, though there were less objectionable submissions between 2000 and 2004, the DOJ concluded that nine proposed changes from South Carolina were retrogressive. To the extent that the DOJ continues to find some proposed changes retrogressive, the preclearance process continues to have some vitality. Consequently, proposals in favor of permitting section 5 to sunset might be premature.11

Second, the decline in total objections by the DOJ may not be an indication that fewer reasons exist for objecting. Recall that earlier we noted that though the DOJ interposed thirty-four total objections in the 1990s, twenty-six of those were made between 1990 and 1994. Three were made in 1995. Between 1996 and 2000, the DOJ interposed only five objections.


The question then is what accounts for this precipitous drop. One possibility is that there were fewer objections to be made. This first possibility is supported by the data. As table 3.2 showed, from 1990 to 2004 the DOJ objected the most to submissions involving redistricting. As it turns out, submissions to preclear districting changes follow the same pattern for the 1990s that we observe for objections by the DOJ for the 1990s. If we look at total submissions involving request for redistricting preclearances—that is all covered jurisdictions, not simply South Carolina—the total submission for the 1990s is 3,456.12 But when you compare the numbers for 1990 to 1994 against those for 1995 to 1999, you notice, not surprisingly, that the number of submissions for redistricting preclearance requests for the first part of the 1990s—2,890 between 1990 and 1994—dwarf the number of submissions of the same type for the second part of the 1990s—566 submissions.13
It is probable that a large part—though not all—of the drop can be accounted for by the decline in submissions for requests for redistricting preclearances.

Another possibility is the existence of an intervening variable. Commentators have pointed to the Supreme Court’s decisions in the Bossier Parish cases as important explanatory variables for the decline in objections. In Bossier Parish I (520 U.S. 471), the Court held that the DOJ cannot refuse to preclear a proposed change under section 5 of the VRA on the ground that the change would violate section 2 of the VRA, which precludes vote dilution on the basis of race. To hold otherwise, the Court stated, would be “to shift the focus of § 5 from nonretrogression to vote dilution” (480). In Bossier Parish II (528 U.S. 320), the Court concluded that the DOJ cannot refuse to preclear a proposed change that does not have a retrogressive effect, though it may have a discriminatory (though nonretrogressive) purpose.

Both cases undoubtedly had some impact on the number of objections the DOJ interposed. As figure 3.3 depicts, a fair amount of objections interposed by the DOJ in South Carolina were interposed on the ground that the proposed change had a discriminatory purpose. Removing discriminatory purpose as a basis for objecting to preclearance submissions was certain to have an impact on the absolute number of objections.

However, one should not be so quick to attribute the decline in objections to the Bossier Parish cases. Two reasons are worth mentioning briefly. First, the Court decided Bossier I in 1997 and Bossier II in 2000. Neither case can account for the drop in objection letters from South Carolina that we see right around 1995.

Notably, figure 3.3 depicts the same pattern as figure 3.4. After 1995, objections on the ground that the proposed change is purposefully discriminatory drop dramatically. This drop occurs four years before the Court held in Bossier II that discriminatory purpose cannot be the basis for objecting under section 5.

Source: Authors’ compilations.
Second, as we intimated, though the singular fact of the Court’s interpretation of the VRA is sure to have some impact on the DOJ’s behavior, the impact may be less than one might suppose. Recall once again figure 3.3 and the Court’s unsuccessful attempt in Beer to narrow the reach of section 5. This is because, as administrative law scholars remind us, an important determinant of an administrative agency’s interpretation of a statute is more than simply a clarification of the underlying legal standard by a higher court: significant variables include the frequency of judicial review and the level of scrutiny of the administrative agency’s decisions.

From this perspective, a better candidate is the Court’s opinion in Miller v. Johnson (515 U.S. 900). In Miller, the Supreme Court chastised the DOJ for having a preclearance standard that was too demanding and for engaging in an “insupportable” “policy of maximizing majority-black districts” (924). Miller has been read by most observers as a stinging rebuke of the DOJ itself and its preclearance practices (see McDonald 1996, 158). Miller represented unprecedented searching scrutiny of the DOJ’s preclearance practices and called into question the DOJ’s good faith to faithfully interpret the VRA.

If this interpretation of Miller is correct, it is clearly possible that the DOJ’s failure to object to preclearance requests after 1995 may reflect a skittishness on the part of a department thoroughly chastised by the Court. Again, the point here is not simply that the Court sought to clarify the legal standard, but that, in Miller in particular, it went after the DOJ itself.14

In sum, the dramatic decline in objections by the DOJ can be explained on at least two grounds. First, one could argue that the data clearly indicate that there is very little to object to. Under this view, section 5 clearly has outlived its purpose of making sure that voters of color in covered jurisdictions are free from discrimination.

Second, one could argue that the DOJ was much more restrained in its interpretation of section 5—perhaps, even more restrained than is warranted by the Court’s understanding of what section 5 requires—simply to avert further scrutiny by the Court.

Thus, even though the drop in objections from submissions in South Carolina may indicate that there is very little discrimination to protect voters of color from, that conclusion is warranted only where the drop in objections reflects the actual level of objectionable practices and is not an artifact of a self-imposed interpretive constraint by the DOJ.

There is, however, a third option. It could also be that the DOJ was enforcing a different—participatory—model of section 5 that the Court obviously did not share (see Pildes 1996). Starting with Beer and followed by Miller a decade later, the Court issued a corrective to force the DOJ to enforce what the Court viewed as the correct—discrimination—model of section 5.15 Whether one believes that section 5 has outlived its usefulness depends in part on which model of section 5 one favors. Similarly, whether one approves of the DOJ’s role or of the corrective the Court has applied, depends in great part on which model of section 5 one finds more persuasive. To fully assess the alternative, we now turn to the participatory model.
Participatory Model

In lieu of the discrimination model, one can approach the renewal debate from what we have called a participation model. This views section 5 as making a normative commitment to political participation by voters of color. It does not depend on the existence of discrimination but is concerned with ensuring consequential political involvement by voters of color. Under this model, it is not enough that covered jurisdictions refrain from erecting barriers to political participation by voters; the model also supposes that minority voters can make positive demands on the state. This includes, for example, a requirement that covered jurisdictions would remove barriers to political participation; would be responsive to the needs and concerns of voters, or would enact changes that will make it easier for voters of color to elect their preferred candidates.

There is some evidence in the legislative history, though not an overwhelming amount, in support of the participation model. Although the early legislative history of section 5 supports the discrimination model, Congress moved away in subsequent years, if only modestly so, from that and toward a model of voting rights grounded in a positive commitment to political representation and broad political participation. Congress, that is, worried less as time went on about racial discrimination and far more about “open[ing] the city of hope to all people of all races, because all Americans just must have the right to vote, and we are going to give them that right” (Johnson 1988, 641). We recognize that these views are not independent of one another; in attacking racial discrimination, Congress would concomitantly expand the political community. Racial discrimination mattered, to be sure, but expanding the political community and ensuring substantive political participation for people of color mattered even more.

The 1975 extension debates offer an unenviable window through which the Act and its accomplishments could be examined and ultimately measured. Ten years after passage of the Act, the gains were many and critics could confidently assert that the health of the republic had reached appropriate levels. And they argued exactly that. Senator James Allen complained, for example, that

somewhere along the line, if Congress does not recognize that it cannot continue to legislate based on a presumption on facts that existed in 1964, but which do not exist now, then we are going to reach a situation where even Congress will not feel that it has the power to act on a 1964 situation. (U.S. Senate 1975, 25)

A. F. Sumner, attorney general of Mississippi, similarly contended that “the act has accomplished its purpose” (U.S. Senate 1975, 187). For this reason, “certainly Congress should reexamine its own purpose in continuing to keep a State in harness for another 5 or 10 years or perhaps in perpetuity” (188).

Supporters of extension knew that these arguments must contend with the clear gains in registration and black office holding of the last ten years. Without question, the numbers were impressive, as documented by many witnesses. But they were hardly enough. Representative Edwards argued, for example, that “by any
standard one wishes to use, the struggle to achieve equal political rights for all of our Nation’s citizens is not over” (U.S. Senate 1975, 887). And early during the Senate hearings, Senator Bayh similarly remarked that “as a result of this legislation, much progress has been made towards including our black citizens in the political process, but much remains to be done” (3).

Although the heart of the debate in 1975 was about discrimination, in a very important sense it was also about achieving “full and fair participation in the political process” (U.S. Senate 1975, 8). Arthur Fleming put this point the following way: “The right to vote guaranteed by the 15th amendment is more than the right to be registered, it is also the right to cast an effective ballot, to have the ballot counted, and to have one’s vote weighed equally with that of every other citizen of a particular jurisdiction” (74). He continued, in language worth quoting at length:

national citizens are still vulnerable to overt and covert efforts on the part of whites to prevent them from fully exercising their constitutionally guaranteed right to vote. A key factor contributing to this persistent vulnerability is the continuing political dependence of minorities on whites. Whites retain control of the political process in almost every jurisdiction studied by the Commission, despite the presence of substantial minority populations.

Whites control decisions about who will work as election officials, what offices will be elective and when elections will be held; whether there will be districts for representative bodies and how district lines will be drawn. That is, whites continue to control the procedures that often determine the outcome of elections. (U.S. Senate 1975, 75)

From this perspective, the problem was not merely a problem of registering disenfranchised minority voters, but far more difficult than that: it was a structural problem, a problem of representation and accountability. How to ensure that access to the ballot would translate into real representation and meaningful political power?

There is much support from the objection letters that the DOJ understood its task not simply as protecting black voters from discrimination but also as facilitating their full participation into the political process. Put into strict doctrinal terms, the DOJ was not simply content with making sure that South Carolina did not enact procedures that were retrogressive; it was also concerned that minority voters in South Carolina were free to enjoy maximum political equality through the aegis of the VRA. We now examine two contexts that support the relevance of the participation model to the manner in which the DOJ has interpreted section 5.

THE DOJ’S BROAD CONCEPTION OF ITS ROLE

From our reading of the objection letters, it appeared that in dealing with these various government officials, the DOJ broadly conceived the purpose of section 5. The objection letters reflect a department concerned with protecting broad
political participation by minority citizens in South Carolina. The DOJ appeared to have focused more on removing any and all barriers to full political participation and access and less on overt discrimination.

We present two examples. The first is an objection letter from Assistant Attorney General William Bradford Reynolds to a county attorney with respect to a preclearance submission that would require county employees to resign before running for office:

With regard to the resignation requirement, we note from the 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 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.18

The second example is a 1990 objection letter from Assistant Attorney General John Dunne to South Carolina’s assistant attorney general. The letter referenced a submission for a change in the qualifications for probate judges:

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 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 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.19

These letters exemplify how broadly the DOJ conceived of its role of administering section 5 and the purpose of the preclearance requirement. A noticeable number of objections were not specifically based on any allegation that the proposed submission was racially discriminatory. The DOJ seemed instead to be concerned that the proposed changes were not enough to further significant political autonomy among black voters.

To be sure, one might argue that this concern is too vague, amorphous, and perhaps even outside of the concededly loose and flexible limits of the statute. But one must underscore here the importance of section 5’s burden shifting device. Part of the reason that the DOJ was able to so broadly interpret section 5 is because the section places the burden of proving that a submitted change did not have a discriminatory purpose or effect on the submitting authority. The importance of this burden shifting is evident even in a cursory examination of the objection letters but is also reflected by the number of times the DOJ relied on Georgia v. United States (411 U.S. 526), which upheld DOJ regulations that placed the burden of proof on the submitting authority. If the DOJ did not think that the proposed change furthered the political interests of black voters, it simply stated that the submitting authority failed to meet its burden. Consequently, Georgia v. United States was the most cited case between 1970 and 1990.

ACTING ON BEHALF OF MINORITY CITIZENS

In examining the objection letters, we were also struck by the DOJ’s conception of its role in administering section 5 and its understanding of the purpose of section 5. In many respects, the DOJ acted as advocates interceding on behalf of voters of color or as mediators between voters of color and government officials. The point is well illustrated in 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 adjacent locales. The objection referenced the existence of “an area of concentrated black population immediately contiguous to the town” that was not included in the preclearance submission:

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 discussion 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 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.20

Mr. Pottinger noted that his office had been informed that the mayor of McClellanville would be meeting with black leaders “to more clearly determine the desire 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.” He further noted that the DOJ would be open to a request for reconsideration of the objection after the meeting, presumably should the town so desire, if the town provides 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.”21

At the very least, the objection letters reveal that the DOJ clearly relied upon leaders and citizens of color for information and a sense of local political realities. Consider another objection letter from the DOJ to South Carolina’s assistant attorney general, which referred to a preclearance submission that would abolish an elective county superintendent’s office and remit the office’s function to the county board of education, an appointive entity:

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 persuaded and must therefore interpose an objection.22

The letters provide a strong impression that when black citizens objected to a proposed change, the DOJ appeared to listen. Consider in this vein another objection, from Assistant Attorney General J. Stanley Pottinger to his counterpart in South Carolina, referencing a previous objection in which the DOJ objected to a submission that included staggered terms, residency requirements, and an at-large electoral feature. The DOJ had objected to the staggered terms and residency requirement but not to the at-large feature. Following the previous objection—which failed to object to the at-large feature—Mr. Pottinger wrote 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 the face of such “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 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, 1974.23

Figure 3.5 reflects the number of objection letters that explicitly state opposition by black communities or the failure to be responsive to black communities as a consideration for denying preclearance.24

As is clear in figure 3.5, the DOJ has relied on black communities throughout the four decades that it has administered the act in South Carolina. Out of forty-eight objections that the DOJ interposed in the 1970s in South Carolina, eight explicitly stated opposition by communities of color and three mentioned the covered jurisdiction’s failure to be sufficiently responsive to African American communities as considerations for interposing an objection. Similarly, out of thirty-two submissions that were denied preclearance in the 1990s, thirteen explicitly noted opposition by
black communities and six remarked that the submitting authority failed to be responsive to the concerns of black communities as a consideration for refusing to preclear a proposed change.

The participation model tries to ensure that voters of color do not always depend on whites—as voters or elected officials—for their political power. To the extent that Congress is interested in pursuing the participation model, it ought to be concerned with the existence of structural features that would advance the political autonomy of voters of color. These structural features would include political structures that maximize the strength of voters of color; the presence of minority candidates at all levels of state government; and the existence of robust political competition in areas with a substantial population of minority voters. Such a framework might take Congress outside not only the jurisdictions currently covered by section 5 but also the issues that have occupied it, thrusting it toward issues of future significance such as ex-felon disenfranchisement, the relevance of voting identification, uniformity in federal ballots, guidelines for redistricting, and alternative voting structures.

CONCLUSION

We have showed that the renewal debate, when viewed from the actual preclearance practices of the DOJ, is slightly more complicated than it might first appear. The DOJ interposed significantly fewer objections than it did in first full decade of section 5 enforcement. Although this dramatic decline certainly indicates a reduced role for the DOJ, it does not permit a conclusion that there is nothing left for the DOJ to do. Moreover, to the extent that Congress is serious about promulgating a broader norm of political participation, Congress should not concentrate on the voting rights issues of the mid-twentieth century but on the voting rights issues of the twenty-first.

NOTES

1. See the testimony of Arthur Flemming, chairman of the U.S. Commission on Civil Rights, in the House hearings of 1975: “Section 5 of the Voting Rights Act . . . has become the centerpiece of the act” (587). See also Beer v. United States stating that section 5 is “the heart” of the VRA’s “enforcement mechanism” (425 U.S. 130, 147). See also Drew Days (1992).
2. The DOJ did not seem to write objection letters per submission. Submissions contained multiple proposed changes. Sometimes the objection letters responded to the whole submission and sometimes objection letters were written to address each objectionable proposed change.
3. One may be tempted to view the decline in objections as a sign that there were fewer objectionable submissions—and thus an indication of the fact that section 5 is much less necessary today. Although that may indeed be the case—certainly a great deal of progress has been made and that fact should not be downplayed—and, as we shall
show later, we hesitate to reach that conclusion in light of the nature of the objections that DOJ officials interposed.
4. This is particularly true in the 1970s and 1980s.
5. The DOJ often provided multiple reasons for objection to a proposed change. As a methodological matter, we catalogued all the reasons stated by the DOJ in interposing an objection. We included as a reason any negative statements that the DOJ made or any negative inferences that it drew from the presence of what it viewed as an objectionable factor.
6. Admittedly, these categories are not mutually exclusive and ironclad. There is some relationship between the two categories but it is not anywhere near perfect co-variance. What matters are not fine differences but aggregate distinctions, particularly where the differences are dramatic.
7. Drew S. Days III, Assistant Attorney General, Civil Rights Division, letter to D. A. Early, August 31, 1977 (on file with authors as SC 47).
8. David L. Norman, Assistant Attorney General, Civil Rights Division, letter to Daniel E. McLeod, March 6, 1972 (on file with authors as SC 10).
9. Consider in this vein Georgia v. Ashcroft (539 U.S. 461) inferring that support of elected officials of color might be relevant to a retrogression analysis.
10. See Abigail Thernstrom and Edward Blum, “Do the Right Thing,” Wall Street Journal, July 15, 2005, p. A10. Some in Congress made similar arguments during the 1975 debates. See Senator Hruska’s remarks (U.S. Senate 1975) complaining that the act should not be extended “at a time when the need for such special circumstances and conditions as prevailed 10 years ago, are no longer existent” (123).
11. This does not mean that Congress should not adopt a less costly regulatory measure. The point is that section 5 is doing some work, even if one were to characterize that work as minimal. Moreover, that work has value even if the cost-benefit analysis might justify a less costly regulatory framework.
14. To be clear, our argument is not that the Bossier Parish cases are insignificant. The point is to highlight why Miller might be of greater significance.
15. We do not mean to imply that the DOJ was incorrectly interpreting section 5. The point simply is that there are at least two ways of understanding the statute and the Court, particularly after Beer, understood the statute differently than the DOJ did.
16. See, for example, Senate hearings of 1975: the testimony of John Lewis, executive director of voter education project (109); the opening statement of Senator Bayh (3); and the testimony of Senator Scott: “First, the recent dramatic victories were made possible by the continued operation of the act. For example, it is doubtful whether the highly publicized increase in black members of the Alabama Legislature would have occurred if the multimember redistricting, initially attempted, had succeeded” (8). These impressive gains led some critics of the act to ask for its end. According to Mississippi’s attorney general, for example:

So it is not a question of whether or not blacks are going to vote for blacks. It is a question, in my opinion, and if I am wrong you can correct me, of whether or not
we are trying to create the way for them to participate in the process. If that is the thing before us, then I say that has been accomplished in Mississippi. It is an accomplished fact. (681)

17. See also the testimony of Arthur Fleming, the chairman of the U.S. Commission on Civil Rights: “We feel that the Voting Rights Act is a symbol of national commitment to the full political participation of all citizens” (U.S. Senate 1975, 73).
18. William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, letter to C. Dennis Aughty, September 23, 1988 (on file with authors as SC 95).
19. John R. Dunne, Assistant Attorney General, Civil Rights Division, letter to Harvird Jones, Jr., October 15, 1990 (on file with authors as SC 95).
20. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, letter to Philip A. Middleton, May 6, 1974 (on file with authors as SC 20).
22. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, letter to Mr. Hardwick Stuart, Jr., November 13, 1973 (on file with authors as SC 17).
23. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, letter to Daniel R. McLeod, September 20, 1974 (on file with authors as SC 26).
24. We also coded as failure to seek input from communities of color as a failure to be responsive to communities of color.

CASES CITED


REFERENCES

The Future of the Voting Rights Act


Chapter 4

Trends in Minority Representation, 1974 to 2000

David L. Epstein and Sharyn O’Halloran

Following the 2000 Census, Georgia redrew its fifty-six state senate districts to comply with the one-person-one-vote rule. At the time, the assembly and senate both had Democratic majorities. The governor, Roy Barnes, was a Democrat as well, and led the charge to construct a districting plan that could stem the expected Republican tide in the upcoming 2002 elections.

The key to this plan was to “unpack” many of the heavily Democratic districts and distribute loyal Democratic voters to surrounding districts. In particular, black voters were reallocated away from districts with either especially high or low levels of black voting age population (BVAP) to create more districts in the 25 to 40 percent BVAP range, so-called influence districts. This meant that some districts with black populations above 55 percent or 60 percent were brought down close to the 50 percent mark.

This strategy is illustrated graphically in figure 4.1. To construct this graph, the BVAPs in each district for both the existing baseline plan and the proposed plan were sorted from highest to lowest, and the difference between corresponding entries was calculated. The figure clearly shows the reallocation of black voters away from the extremes of the distribution and toward the center.

The state submitted its plan directly to the D.C. District Court for preclearance, and the Justice Department (DOJ) indicated its intention to interpose objections to Senate districts 2, 12, and 26, whose BVAPs were slated to fall from 60.6 percent, 55.4 percent, and 62.5 percent to 50.3 percent, 50.7 percent, and 50.8 percent, respectively. The state submitted evidence showing that the point of equal opportunity—the level of BVAP at which a minority-preferred candidate has a 50 percent probability of winning—was 44.3 percent, and argued that the redrawn districts should still offer black candidates a healthy chance of gaining office. The DOJ disagreed, arguing that the state had not met its burden of proving the proposed plan non-retrogressive.

The district court agreed with the DOJ and refused to preclear the plan. The Supreme Court eventually overruled in the case Georgia v. Ashcroft (539 U.S. 461), ruling that the district court had not taken sufficiently into account the state’s avowed objective of increasing substantive representation, even at a possible cost
The reaction to Ashcroft was swift and heated. Karlan (2004) denounced the decision as a first step towards “gutting” section 5 preclearance. Others claimed that it “greatly weakened the enforcement provisions of Section 5” (Benson 2004). An ACLU official’s reaction was that “The danger . . . is that it may allow states to turn black and other minority voters into second-class voters, who can influence the election of white candidates but cannot elect candidates of their own race” (House Committee on the Judiciary 2005, 6).

Others viewed the decision more favorably. Henry Louis Gates, for example, wrote in the New York Times that descriptive representation “came at the cost of substantive representation—the likelihood that lawmakers, taken as a whole, would represent the group’s substantive interests. Blacks were winning battles but losing the war as conservative Republicans beat white moderate Democrats” (September 23, 2004, A23).

At the heart of the latter set of arguments lies the notion of a tradeoff between substantive and descriptive representation: getting more of one necessarily entails accepting less of the other. This topic has been the subject of previous research: Morgan Kousser (1993) discusses the possibility of such a tradeoff in the context
of influence districts, as does Richard Pildes (1995) in his review of social science research on the changing political landscape in the South. More quantitative studies of the tradeoff include Charles Cameron, David Epstein, and Sharyn O’Halloran (1996) and David Lublin (1997), both of which studies detected the possibility of an emerging tradeoff in their analyses of election and roll call data through the early 1990s.

One of our goals is to expand and update this work, studying patterns of minority electability and congressional voting on minority-supported legislation for the years 1974 to 2000, and the districting plans that maximize substantive and descriptive representation. We also, for the first time, include Hispanic as well as black voters in these calculations, both to see if the patterns emerging for Hispanic representation differ significantly from black representation and to examine the degree of cross-minority support between blacks and Hispanics in elections and in the legislature.

Our results show that up until roughly the mid-1980s few nonminority legislators in the South championed black causes in Congress. As a result, districting schemes that maximized black descriptive representation were identical to those that maximized substantive representation. Over the past two decades, though, these objectives diverged, so that recent increases in the number of blacks elected to Congress have come at the cost of substantive representation.

For Latinos, the story is rather different. It has always been relatively difficult to elect Hispanic representatives, quite possibly due to the gap between total voting age population and citizen voting age population in concentrated Latino districts. On the other hand, white Democratic representatives have been generally supportive of Latino positions on roll call votes, much more so than Republicans. Thus there has always been a tradeoff between Latino descriptive and substantive representation, with the dimensions of this tradeoff changing little over time. The situation is much the same for blacks outside the South: supportive votes from nonminority Democrats have led to tradeoffs between the two types of representation throughout the period.

Finally, we find interesting relationships between issues of black and Latino representation. There remains an almost perfect electoral separation: districts with more black than Hispanic voters rarely elect a Hispanic representative and vice-versa. Further, adding Hispanic voters to a heavily black district increases the probability that a black representative is elected, but adding blacks to a Hispanic district does little to help Hispanic candidates win office.

DESCRIPTIVE REPRESENTATION

We begin with analysis of black and Hispanic electoral opportunity. Our data set consists of all elections to the House of Representatives between 1974 and 2000. For each election held during that period, we recorded the party and race (white, black, Hispanic) of the winning candidate. We also calculated the black voting age population (BVAP) and Hispanic voting age population (HVAP) of the district,
Blacks

Our first step is to review regional effects in the election of black representatives to Congress. Figure 4.2 displays the average percent of black voting age population for each of the fifty states on the horizontal axis and the percent of all elected representatives who are black during our time period on the vertical axis. Linear fit trend lines have been added to show the relationship between BVAP and the percentage of minorities elected for states with at least one black representative during the sample period.

The patterns shown clearly indicate that more blacks are elected to Congress in states with higher concentrations of black voters, but it is also clear that the southern states generally lie further to the right on the graph in comparison with other states. That is, it takes a higher percentage BVAP in southern states to elect the same proportion of black representatives as compared to all other states. We consequently separate these regions in our further analysis of black electoral opportunity.

For the analysis of black electoral opportunity, we divided representatives into three types: Republicans, white Democrats, and black Democrats. We then per-
formed an ordered probit analysis on this representative type using BVAP as an independent variable, for each congress and region. The results of this analysis, grouped into four periods, are shown in graphical form for southern districts in figure 4.3 and for all other districts in figure 4.4.

In each graph, the central curve represents the probability of electing a white Democrat, the curve reaching its maximum at low levels of BVAP indicates the probability of electing a Republican, and the line reaching its maximum at high levels of BVAP is the probability of electing a black Democrat. These graphs also include a horizontal line at 0.5; the level of BVAP where this line intersects the black Democrat curve indicates the point of equal opportunity (PEO). This is the level of BVAP needed to give a black Democrat a 50-50 chance of winning election and serves as a convenient summary of black electoral opportunities.

As shown in the figure, from the mid-1970s to the mid-1980s, white Democrats were still the dominant group in southern politics. In fact, the point of equal opportunity is estimated at over 100 percent in the 1981 to 1986 period, given that a number of southern districts with majority black populations still elected white
Democrats, such as Hale and then Lindy Boggs from Louisiana. Even in an all-white district (0 percent BVAP), Republicans had no better than an even chance of winning.

From here on, though, the picture changes dramatically. The point of equal opportunity falls steadily, to 65 percent in the third figure (1987 to 1992) and 42 percent in the fourth (1993 to 2000). At the same time, white Democrats’ chances of winning an election in a district with no blacks crashes to about 20 percent. The rise of Republican and black electoral prospects, that is, necessarily came at the expense of white Democrats. In the first two scenarios, white Democrats have a greater than 50-50 chance of winning for almost all levels of BVAP. By 2000, they only have a slightly greater than 50 percent chance of winning in the 20-40 percent BVAP range.

This increase in black electoral opportunity in the South can be traced to the greater willingness of white voters to cast their ballots for black candidates. Whereas white cross-over was estimated at under 10 percent during the 1980s, it has risen since then to somewhere between 30 and 40 percent on average.4

For districts outside the South, not much change is apparent. Equal opportunity starts in the first period at a level (43 percent) nearly equal to where it ends up...
in the South (42 percent), and then drifts down slightly from there. In terms of electing blacks to Congress, then, after lagging behind up through the early 1990s, the South has now caught up to the rest of the country.

Latinos

In analyzing the electoral patterns for Latino representatives, we again start with an examination of regional effects. As we did with black representatives, figure 4.5 charts the percent of elected Hispanic representatives as a function of overall state Hispanic voting age population.

The first thing to note is that relatively few states have elected any Latino representatives over the period studied. In particular, only eight states have had at least one Latino representative over the past thirty years. Given this small number of states, and the fact that, as shown in figure 4.5, there is no obvious regional pattern to the electoral relationship, this portion of the analysis has no regional breakdown.

Turning to the electoral patterns themselves, figure 4.6 shows the electoral curves in the same four periods as in figures 4.3 and 4.4 above. As indicated, Hispanic electoral opportunity nationwide is similar to black electoral opportunity outside the South: the trend here is to have no trend. The point of equal opportunity for

**FIGURE 4.5** / Hispanic Representatives Elected by State, 1974 to 2000

![Graph showing Hispanic representatives elected by state from 1974 to 2000.](image)

*Source: Authors’ compilations.*
Hispanics, however, ranges between 58 and 76 percent HVAP over the four time frame with an average of 66 percent. Electing Latinos was easier than electing blacks thirty years ago, but is more difficult today.

These patterns may reflect a number of underlying causes: greater white resistance to voting for Latino candidates, less cohesive voting among Latino voters, or greater disparities between voting age population and actual Latino voters, due perhaps to differences in citizenship rates. Whatever the cause, it is clear that at the moment more Hispanic voters are needed, as a percentage of total district population, to elect Hispanic representatives than black voters are needed to elect black representatives.

**Intergroup Substitution**

We next examine the relationship between combinations of black and Hispanic voters and the probability of electing a representative from one of these groups to office. As a first look at the data, figure 4.7 shows the BVAP and HVAP combina-
tions of all elections in our data set, along with the type of representative elected. A 45-degree line has been included; above the line the district has more Hispanic than black voters, and vice versa for districts below the line.

One notices first that there is relatively little mixing of the black and Hispanic election regions. Only seven elections saw a black representative elected from a district with more Hispanic than black voters. Conversely, only in five elections did a Hispanic representative win office in a district with more black than Hispanic voters. And in only one of all these cases was the other minority group actually a majority within the district.

We investigated these issues further by running a simple probit regression on the election of a black Democrat to office, using both BVAP and HVAP as independent variables, then repeated this procedure with the election of a Hispanic Democrat as the dependent variable. We found, surprisingly, that adding Hispanic voters to a heavily black district does help a black representative get elected. This pattern does not hold in reverse, however. That is, black voters do not give Hispanic candidates an extra boost at election time. We term this surprising because it is generally accepted that Hispanic voters are less liberal than black voters. If this is true, then blacks should vote for Hispanic candidates at higher rates simply because they are less likely to be tempted to vote for any Republican candidate who is on the ballot as well.

As for the significance of adding Hispanic voters to a black district, figure 4.8 shows the combinations of BVAP and HVAP that give a black candidate a 50 percent
chance of winning in each of the four periods. Two features are worth noting. First, the magnitude of the trade-off is not great; depending on the period, one needs between 20 percent and 40 percent more Hispanic voters to compensate for the 5 percent reduction in the number of black voters, for a ratio of somewhere between 4 to 1 and 8 to 1. Second, the exact terms of this trade-off have changed over time, but overall the lines move down and to the left from one period to the next. This is another measure of the trends toward decreasing electoral polarization, making it easier for black candidates to attain office.

**SUBSTANTIVE REPRESENTATION**

For our measure of substantive representation we started with all Congressional Quarterly key votes taken during this period. For each roll call we tabulated the aye and nay votes, coding all abstentions, absences, and pairs as missing data. We then determined which position was taken by the majority of the minority representatives who cast a valid vote and coded that as a vote in the pro-minority direction. Finally, we calculated the support score for each member and each Congress as the percentage of times that member voted with the majority of the minority representatives.8
Black

Support scores as a function of the district black voting age population are shown for southern representatives for each of the four time periods in figure 4.9. The relation between BVAP and support has been estimated using a “fractional polynomial” fit, a standard method for summarizing a possibly nonlinear relationship between two variables. In each graph, the uppermost line represents black Democrats, the next down is white Democrats, and the bottom is Republicans.

As evident in the figure, the support scores are relatively constant within each representative type; the major source of variation is found across types. White Democrats at higher levels of BVAP do seem to become more liberal in the second and third groups, but reverse this trend a bit in the fourth. However, in all cases 95 percent confidence bands show that the null hypothesis of a constant function within each group cannot be rejected, so these apparent trends may be due merely to chance.

FIGURE 4.9 / Black Support Scores for Different Types of Representatives, Southern States

Source: Authors’ compilations.

Note: —— Black Democrat, —— White Democrat, —— Republican.
The Republicans and black Democrats have fairly constant support scores across all periods; the biggest change comes from white Democrats, whose average support scores are 45.3 percent, 52.6 percent, 59.8 percent, and 64.3 percent in the four periods, respectively. In the early part of the period studied, then, it would be more or less correct to say that white legislators of either party did a poor job of representing black interests in the South. By the end of the period, though, white Democrat support scores were significantly closer to those of black Democrats than to Republicans.

The voting patterns for representatives from districts outside the South shown in figure 4.10, again, demonstrate no such trend. White Democrats uniformly support the black Democrat position on roll calls, and Republicans do not.

Latino

In contrast to southern blacks, the evolution of Hispanic support scores in figure 4.11 is again much less dramatic. White Democrats have by and large sup-
ported Latino issue positions, with averages of 59.2 percent, 72.1 percent, 73.1 percent and 79.6 percent in the four periods. Note too that Latino Democrats themselves are a bit less cohesive than blacks are: their average Hispanic support score is 84.0 percent, against average black support scores of 91.2 percent for black Democrats.

Complementarities

These observations raise questions of complementarities; that is, the degree to which Latino and black support scores coincide. To begin with, figure 4.12 shows a “sunflower” plot of members’ Hispanic and black support scores. It is clear that the two correlate highly: specifically, at 92.6 percent.

Looking at cross-minority support, black Democrats vote for Hispanic-favored legislation at the same rate as Hispanic Democrats. On the other hand, Hispanic Democrats trail the average black Democrat in supporting the black-preferred position on roll calls, though this gap has been closing over time. It is also interesting to examine the relative positions of black and Hispanic Democrats in the
The spectrum of all Democratic representatives. Figure 4.13 uses first-dimension Poole and Rosenthal DW-Nominate scores to place each representative on a general liberal-conservative scale, with lower scores indicating that the member has a more liberal voting record.

Although both groups start at the liberal fringe of the Democratic party, first the Hispanic Democrats, and more recently black Democrats as well, have drifted more toward the middle of the party’s mainstream. This may be partially due to the moderation of these members, but it is mostly due to the fact that Congress is polarizing in general, with all Democrats becoming relatively more liberal in their votes.

MAXIMIZATION

We now turn to the question of how one would draw districts to maximize either descriptive or substantive minority representation. If these are the same, then we can conclude that no trade-off exists between these two objectives; otherwise there is a trade-off.

To begin with, we define the “hazard rate” as the increase in the number of Republicans elected as one creates more and more majority-minority districts. This serves as a proxy for the costs in terms of substantive representation of
increasing minorities’ descriptive representation. Trade-offs between the two types of representation, then, are associated with high hazard rates.

**Black Voters and Representation**

The trends in section 2 established that, over the period studied, the hazard rate for electing Republicans in the South rose significantly, especially at low levels of BVAP. At the same time, black candidates found it easier to gain office, with the point of equal opportunity falling significantly below 50 percent BVAP by the year 2000. And the relative penalty for electing a Republican as opposed to a white Democrat rose as well: at first there was not much to choose between different types of white representatives, but by the end of the period white Democrats took roll call positions significantly more friendly to blacks’ point of view than Republicans did.

We calculated optimal concentrations of black voters to maximize both descriptive and substantive representation for a state with an overall BVAP of 25 percent, and present the results in figure 4.14. Each point in the graph represents a region and congress. The horizontal axis gives the BVAP that maximizes descriptive repre-
sentation (the expected number of black candidates elected to office), and the vertical axis, the BVAP that maximizes substantive representation (the average black support score). Also shown is a 45-degree line. If there is no descriptive-substantive trade-off, then points would fall on this line, indicating that the same concentration of minority voters maximizes both objective functions. Points that fall below this line indicate that one would concentrate black voters more heavily to maximize the number of black representatives elected to office, as opposed to maximizing legislative support in Congress.

Beginning with states outside the South, the recipe to maximize substantive representation has always been to spread black voters out evenly across all districts; hence, all these points lie on the 25 percent mark on the vertical axis. Maximizing descriptive representation always entails greater concentrations of black voters, with the exact number ranging between 40 percent and 60 percent. The story is much the same if we were to look only at eastern states, except that descriptive representation is maximized at higher levels of BVAP (from about 50 percent to 70 percent, depending on the Congress), due to the fact that a number of liberal white Democrats still represented heavily black districts in the East throughout the period.

The most interesting result comes with the southern districts. Until the 104th Congress (1995–1996), the maximization points fall almost exactly on the 45-degree line, indicating that the same districting strategies maximized both substantive and descriptive representation. The degree of concentration did change over time, from

Source: Authors’ compilations.
near 100 percent in the mid-1970s to about 58 percent in the mid-1990s, but the two numbers tracked each other almost exactly.

Now, however, substantive representation is maximized by constructing districts with only about 33 percent BVAP, whereas descriptive representation is still maximized at about 57 percent. Thus a sharp difference between the two objectives has emerged in the past decade, due mainly to increased Republican success in southern congressional races.

This discussion implies that a Pareto frontier has emerged, to use the language of economics. Whereas before gains in substantive and descriptive representation went hand in hand, that is, an increase in one should now come at the cost of some decrease in the other. We examine this possibility by simply graphing the actual levels of descriptive and substantive representation for both the South and the nation as a whole during our sample period. The results are given in figure 4.15.

As indicated, a frontier does seem to be emerging at both the regional and national levels. Until the 102nd Congress, blacks made solid gains in both types of representation almost every election. But since that time, gains in descriptive representation have come at the expense of substantive representation. It is important to note, by the way, that the first Congress for which this is apparent is the 103rd, which was the Congress immediately after the 1990s redistricting, but before Newt Gingrich’s Republican Revolution in the 1994 midterm elections. These figures, then, give much direct evidence in favor of the proposition that we are now living in a world of trade-offs.

**Latino Voters and Representation**

Again, the patterns for Latino maximization differ from those for blacks. Descriptive representation throughout the period is maximized at 80 percent HVAP, whereas
The substantive representation is maximized by an equal distribution of voters across districts. Thus the trade-off between these two objectives has been larger than for black representation.

Interestingly, the summary of actual descriptive and substantive Hispanic representation in figure 4.16 yields a stair-step pattern. First the average Hispanic support scores increase, as in the 95th through 97th Congresses, the 99th through 102nd, and 103rd to 105th. Then the levels of Hispanic descriptive representation increase, causing a decline in levels of substantive representation, as between the 97th and 99th and 102nd to 103rd. Then the increasing overall support begins again.

Another way to describe these patterns is as a ratchet effect: each type of representation increases at each interval, leading to higher levels of both over time. We see a moving frontier; there are trade-offs in representation but the terms of these trade-offs have moved in a positive direction.

CONCLUSION

The goal of this chapter was to review trends in the representation of minority interests from 1974 to 2000. We examined changes in the electability of black and
Hispanic representatives and their support on roll call votes in Congress. We also investigated the question, crucial for current debates over the impact of the Voting Rights Act, of whether a trade-off exists between these two goals. We found that, with the single exception of blacks in the South before the 1990s, this trade-off does exist for both black and Latino representation.

Regarding electability, we found that it used to be more difficult for blacks to win office in the South than in other regions. Now, however, the electoral patterns are nearly indistinguishable. As for Hispanics, it is always been relatively difficult for them to gain office, with no trends whatsoever apparent over the period studied.

On substantive representation, again, only blacks in the South early in the period showed a significant gap in voting patterns between white Democrats and minorities. Republicans, on the other hand, are uniformly unsupportive of minority-preferred policies.

This fact, coupled with the rising hazard rate of electing Republicans means that majority black districts are no longer optimal to maximize black substantive representation in the South. As for blacks outside the South and Hispanics in all regions, majority-minority districts have always been the key to electoral success but are never effective in securing the greatest number of votes for minority policy positions.

NOTES

1. The plan passed with the concurrence of forty-four out of the forty-five black state legislators.
3. It might be argued that these patterns are in fact due to the creation of majority-minority districts in the South, skewing the results toward the election of fewer black representatives overall. However, a simple regression analysis shows that, even with this factor taken into account, the regional coefficient on the South is still negative and significant, indicating that, indeed, it is harder to elect black representatives in the South than elsewhere.
4. The research supporting these findings is summarized in Richard Pildes (2002).
5. These include Tucker and Millender-McDonald from the CA 37th, Charles Rangel from the NY 15th, and Maxine Waters from the CA 35th.
6. These were Badillo and Garcia, both from the NY 21st.
7. This was Millender-McDonald in the election to the 106th Congress. At this point she was an incumbent, having first been elected from a district with nearly equal black and Hispanic populations that had changed demographically during the 1990s.
8. We also calculated support scores taking into account the degree of unanimity among the minority representatives; this variant had only a minimal impact on our final results.
9. The lines in the graphs were generated using Stata’s fpfit command.
10. The algorithm for these calculations is given in Charles Cameron, David Epstein, and Sharyn O’Halloran (1996).

CASE CITED


REFERENCES

Chapter 5

Congressional Power to Renew Preclearance Provisions

Richard L. Hasen

In 1965, Congress enacted the Voting Rights Act (42 U.S.C. sec. 1973–1973p). Section 5 of the act requires that “covered jurisdictions” obtain preclearance from the federal government before making any changes in voting practices or procedures. Section 5’s aim was to prevent state and local governments with a history of discrimination against racial minorities from changing their voting rules without first proving that such changes would have neither a discriminatory purpose nor effect.

Never before (or since) has a state or local jurisdiction needed permission from the federal government to put its own laws into effect. Covered jurisdictions protested that the preclearance rules exceeded congressional power and violated principles of federalism. In the 1966 case, South Carolina v. Katzenbach (383 U.S. 301), the Supreme Court by an 8-1 vote disagreed. The Court held that the preclearance provision was a permissible exercise of Congress’s power to enforce the Fifteenth Amendment’s prohibition on racial discrimination in voting. Congress renewed the preclearance provisions for another twenty-five years in 1982 and the Court again upheld Congress’s power to do so (Lopez v. Monterey County 525 U.S. 266). The current version of section 5 expires in 2007, and Congress may decide to renew it again, perhaps even extending its geographical scope.

This chapter considers whether Congress has the power to renew the Voting Rights Act’s preclearance provisions again. Despite South Carolina v. Katzenbach, the answer to that question has become muddled in confusion over the contours of a new set of rules—part of the Supreme Court’s New Federalism revolution (see generally Tushnet 2003)—regarding the proper scope of congressional enforcement powers granted in section 5 of the Fourteenth Amendment, which the Court has read as coextensive with its enforcement powers under the Fifteenth Amendment (Board of Trustees v. Garrett 531 U.S. 356, 373 n.8).

Beginning in 1997 with City of Boerne v. Flores (521 U.S. 507), the Court has limited Congress to passing “remedial” statutes. It has rejected congressional attempts to expand the scope of constitutional rights through legislation beyond that which is “congruent and proportional” to remedy intentional unconstitutional discrimination by the states. In Board of Trustees v. Garrett, the Court indicated that it will
search for an adequate evidentiary record to support a congressional determina-
tion that states are engaging in sufficient intentionally unconstitutional conduct so
as to justify congressional regulation (368).

Following these two cases, the road to preclearance renewal could be a rocky
one. In 1965 and even in 1982, when Congress reenacted section 5’s preclearance
through 2007, Congress could point to significant acts of intentional racial dis-
crimination by covered states to support preclearance provisions. Today, Congress
would be hard-pressed to find widespread evidence of such discrimination. I refer
to this issue as the Bull Connor is Dead problem.¹

Preclearance has now been in place for almost forty years, and it has served as
an effective deterrent. Most of the original racist elected officials are out of power,
and those who remain in power (along with any new elected officials who either
intend to discriminate on the basis of race or who otherwise would care less about
a discriminatory effect in a change in voting practices or procedures on a pro-
tected minority group) have for the most part been deterred by preclearance.
Thus, there is not much of a record of recent state-driven discrimination that
Congress could point to support renewal. The question of how much racial dis-
crimination in voting practices there would be today if we suddenly eliminated
preclearance is almost too speculative to answer. How may Congress then prove
that preclearance remains necessary under the Boerne-Garrett standard?

Some commentators have looked to Department of Justice’s (DOJ) preclearance
statistics to find enough evidence of a potential for constitutional violations to
support preclearance renewal. A closer look at the DOJ’s preclearance statistics,
however, offers little support for those who wish to build an evidentiary record to
support renewal. Other commentators have looked to private acts of discrimina-
tion to support renewal. The argument, though creative, probably cannot bear the
weight that commentators have put on it given Garrett’s focus on proof of state-
driven discrimination.

Nonetheless, all may not be lost for supporters of renewed preclearance. In the
two most recent Supreme Court cases on congressional power, Nevada v. Hibbs
(538 U.S. 721), and Tennessee v. Lane (124 S.Ct. 1978), the Court appears to have
backed away from the strict evidentiary standard imposed in Garrett. These cases
increase the chances that the Court would hold that Congress has the power to
reenact section 5’s preclearance provisions, particularly given Justice Scalia’s sep-
parate opinion in Lane in which he indicated his new position that Congress has
broad latitude to pass legislation aimed at combating racial discrimination. In
addition, the Supreme Court’s recent opinion in Georgia v. Ashcroft (539 U.S. 461),
which construed the statutory standard for granting preclearance, takes more
pressure off constitutional challenges to a renewed preclearance provision.

But the significance of these cases should not be overstated. The Court has not
formally jettisoned Garrett’s evidentiary requirement. Similarly, Justice Scalia has
insisted that Congress may impose laws that are aimed at eradicating racial dis-
crimination “only upon those particular States in which there has been an identi-
fied history of relevant constitutional violations” (Tennessee v. Lane, 2012). The
Court’s majorities in these cases are shifting and uncertain, and the effect of the
replacement of Chief Justice Rehnquist and Justice O’Connor with Chief Justice Roberts and Justice Alito adds a new level of uncertainty to the analysis. For these reasons, Congress would be well advised to craft the best evidentiary record possible to support a renewed preclearance provision. In addition, Congress should consider other potential bases of power under which it could reenact the provision, particularly if it changes or creates new VRA provisions.

CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

When Congress passed the Voting Rights Act in 1965, some southern states immediately challenged the legislation as exceeding congressional power.

Early Voting Rights Cases

In the first of the early cases, South Carolina v. Katzenbach, South Carolina challenged core provisions of the Voting Rights Act, including the preclearance provision. The Court rejected South Carolina’s argument that the challenged provisions “exceed[ed] the powers of Congress and encroach[ed] on an area reserved to the States by the Constitution” (323). It held that Congress had acted appropriately under its powers granted in section 2 of the Fifteenth Amendment.2

In so holding, the Court gave considerable deference to congressional determinations about the means necessary to “enforce” the Fifteenth Amendment. The Court noted that

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. (South Carolina v. Katzenbach, 328, footnote omitted)

Calling the requirement that a covered jurisdiction obtain federal approval before changing its own laws “uncommon,” the Court declared that “exceptional conditions can justify legislative measures not otherwise appropriate. Congress knew that some of the [covered states] had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.” (South Carolina v. Katzenbach, 334–35). Justice Black dissented: “It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments” (360).
The Future of the Voting Rights Act

South Carolina v. Katzenbach showed a Court highly deferential to congressional determinations about how to expand political equality rights, and such deference for the most part continued in three other cases in which the Court faced arguments over the scope of congressional power to enact various provisions of the Voting Rights Act (City of Rome v. United States, 446 U.S. 156, 187; Oregon v. Mitchell, 400 U.S. 112, 150; Katzenbach v. Morgan, 384 U.S. 641, 657–58).

In Katzenbach v. Morgan, the Court placed one limitation on the expansive view of congressional enforcement power under section 5 of the Fourteenth Amendment. In what has come to be known as the “ratchet theory,” Justice Brennan wrote for the Court that section 5 “does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court” (Katzenbach v. Morgan, 651 n.10.) Congress could therefore interpret for itself the requirements of the equal protection clause, so long as it does not take away equal protection guarantees recognized by the Court.

City of Rome v. United States is most notable for then-Justice Rehnquist’s dissent. Under the act’s section 5, preclearance may not be granted unless the DOJ finds that a voting change had neither a discriminatory purpose nor a discriminatory effect. The City of Rome argued that Congress could not prohibit voting changes with only a discriminatory effect under its powers granted in section 2 of the Fifteenth Amendment because the Fifteenth Amendment, properly interpreted, barred only purposeful discrimination.

Assuming arguendo the Fifteenth Amendment barred only purposeful discrimination, the Court’s majority held that Congress had the power under the Fifteenth Amendment to prevent jurisdictions from putting into effect laws with a discriminatory effect. “Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact” (City of Rome v. United States, 177).

Rehnquist dissented, arguing that Congress could not properly command the DOJ to bar state and local changes with only a discriminatory effect under its enforcement powers of the Fourteenth or Fifteenth Amendment. He acknowledged that Congress could do more than simply prohibit unconstitutional conduct; it could “act remedially to enforce the judicially established substantive prohibitions of the Amendments.” Thus, Rehnquist argued that Congress could properly impose a nationwide literacy test as a remedial measure, “effectively preventing purposeful discrimination in the application of the literacy tests as well as an appropriate means of remedying prior constitutional violations by state and local governments in the administration of education to minorities.” What Congress could not do, Justice Rehnquist wrote in his dissent, was to “determine for itself that . . . conduct violates the Constitution” (City of Rome v. United States, 210, 211).

Because he believed that the “effects” test was not remedial to prevent purposeful discrimination, he would have held that this element of the Act’s preclearance provision exceeded congressional powers.
New Federalism Revolution and New Evidentiary Burden

Justice Rehnquist’s City of Rome v. United States dissent sided with states and localities opposing a broad view of federal government power to regulate state and local voting rules. Justice Powell’s separate dissent focused even more directly on concerns that the federal government was intruding on state and local power. But these arguments failed to persuade a majority of justices in 1980.

In the last decade, however, we have witnessed a federalism revolution in the Supreme Court. Among other things, the Court has limited congressional power under the Commerce Clause (previously thought to be virtually limitless) and, through its Eleventh Amendment jurisprudence, it has increased the scope of the immunity of states from suits for damages or other retrospective relief for violation of federal law. The details of this fascinating and seismic shift in power from the federal government to the states are well beyond the scope of the analysis here and are detailed in Mark Tushnet (2003). Instead, I focus on the one aspect of the federalism cases that bears directly on the preclearance question.

The most relevant New Federalism case in this regard is the 1997 City of Boerne v. Flores case, which involved the constitutionality of a congressional statute, the Religious Freedom Restoration Act of 1993 (RFRA). RFRA was a congressional reaction to the Supreme Court’s controversial 1990 decision in Employment Division Department of Human Resources v. Smith, a case holding that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. Thus, the Smith Court held that it did not violate the constitutional guarantee of the “free exercise” of religion for the State of Oregon to deny unemployment benefits to American Indians who lost their jobs for using the illegal drug peyote for sacramental purposes.

Congress enacted RFRA to restore the pre-Smith law by preventing government entities from substantially burdening a person’s exercise of religion, even through a rule of general applicability, unless the government could demonstrate that the burden was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that governmental interest. In Boerne, the Catholic archbishop of San Antonio sought a building permit to enlarge a church in Boerne, Texas. Local zoning authorities denied the permit, relying upon an ordinance governing historic preservation in a district that, they argued, included the church. The archbishop brought suit, challenging the denial under RFRA. The Supreme Court held that RFRA, as applied to state and local governments, exceeded congressional power under section 5 of the Fourteenth Amendment.

The Court’s analysis began by citing the Voting Rights Act precedents described as standing for the “broad” power of section 5. But the Court then held that the section 5 power was limited only to enforcing the provisions of the amendment. In explaining what the Court believed it meant to “enforce” the amendment, the Court drew a line between legislation that is “remedial,” which is within Congress’s power, and legislation that makes a “substantive change,” which exceeds congressional power. “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine
what constitutes a constitutional violation.” The Court further explained that “there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect” (City of Boerne v. Flores, 519, 520). In so holding, the Court rejected the view of congressional power Justice Brennan advanced for the Court in Morgan.

The Court applied this new test for section 5 power to RFRA and held that RFRA came up short. Along the way, the Court explicitly compared RFRA to the Voting Rights Act. The Court first looked at the evidence before Congress supporting the need for both laws. “In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry” (City of Boerne v. Flores, 530).

Moreover, the Court held that though the Voting Rights laws approved in prior cases could be seen as remedial,

RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. . . . [Its sweeping] coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. (City of Boerne v. Flores, 532)

The Boerne Court further noted with approval that the laws at issue in the Voting Rights Act cases contained termination dates and geographic restrictions of the law, and the law addressed itself to remedy egregious unconstitutional practices in the states. “Limitations of this kind tend to ensure Congress’ means are proportionate to ends legitimate under § 5” (Boerne, 533).

Three post-Boerne Supreme Court cases confirm the substantial narrowing of congressional power under section 5 of the Fourteenth Amendment and the need for Congress to provide adequate evidence of unconstitutional conduct by the states. In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank (527 U.S. 627, 647), the Court held that Congress could not use its section 5 power to subject states to lawsuits for damages for violating a congressional statute governing patent infringement. The Court held that the statute failed to meet Boerne’s congruence and proportionality test because “Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations” (647).

In Kimel v. Florida Board of Regents (528 U.S. 62, 67), the Court held that Congress could not use its section 5 power to subject states to lawsuits for damages under the Age Discrimination in Employment Act (ADEA). Like Florida Prepaid, the Court in Kimel held that states could not be subject to federal age discrimination suits because of a lack of congruence and proportionality between the substantive requirements of the ADEA and the unconstitutional conduct that could conceivably be targeted by the Act.

In Board of Trustees v. Garrett, the Court confronted the same issue as applied to Title I of the Americans with Disabilities Act (ADA), which, among other things,
prevents discrimination in employment against the disabled. As in Kimel, the Court held that Congress failed to identify a pattern of irrational state discrimination in employment to justify the law’s application to the states. Board of Trustees v. Garrett, however, is most notable for the close examination the Court gave to whether Congress marshaled enough evidence of intentional state discrimination against the disabled in employment to justify allowing a remedy of monetary damages against the states.

The Court began by stating that the inquiry should not extend beyond the states themselves to units of local government such as cities and counties. “It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment” (Board of Trustees v. Garrett, 370). The Court then rejected as insufficient “half a dozen examples from the record [of employment discrimination against the disabled] that did involve States.” The Court stated that it was unclear whether the examples showed unconstitutional discrimination against the disabled. “But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based” (370).

Finally, the Court rejected “unexamined, anecdotal accounts” of discrimination by the states submitted to a congressional task force considering discrimination against the disabled. The accounts were not submitted directly to Congress, and the legislative findings supporting passage of the ADA contained nothing indicating a pattern of employment discrimination by the states. The Court concluded that “even if it were possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in City of Boerne” (Board of Trustees v. Garrett, 372).

The Court concluded by comparing the evidentiary record before it in Garrett with the record in South Carolina v. Katzenbach:

The ADA’s constitutional shortcomings are apparent when the Act is compared to Congress’s efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations. In South Carolina v. Katzenbach, we considered whether the Voting Rights Act was “appropriate” legislation to enforce the Fifteenth Amendment’s protection against racial discrimination in voting. Concluding that it was a valid exercise of Congress’s enforcement power under §2 of the Fifteenth Amendment, we noted that “[b]efore enacting the measure, Congress explored with great care the problem of racial discrimination in voting.”

In that act, Congress documented a marked pattern of unconstitutional action by the states. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote. Congress also determined that litigation had proved ineffective and that there persisted an otherwise inexplicable 50-percentage-point gap in the registration of white and African-American voters.
in some states. Congress’s response was to promulgate in the Voting Rights Act a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the nation where abundant evidence of states’ systematic denial of those rights was identified. (Board of Trustees v. Garrett, 373[citations and footnote omitted]).

Four justices dissented from the Garrett holding. The dissent detailed what it characterized as “powerful evidence” of discriminatory treatment against the disabled in employment that justified the law’s application to the states (Board of Trustees v. Garrett, 378). Furthermore, the dissent derided the majority for treating Congress as an “administrative agency” whose record it was reviewing (384). As Robert Post and Reva Siegel (2003, 14) remark, Garrett’s “implicit assumption that Congress can exercise its section 5 power only on the basis of the same kind of concrete and specific evidence of illegal conduct that a court is required to assemble in reaching a judgment about the liability of parties.”

The Garrett evidentiary standard is indeed a tough one to meet, and I now turn to consider whether Congress could meet that standard if it renews section 5 of the Voting Rights Act. After that consideration, I return to the Court’s jurisprudence, examining the extent to which Garrett’s evidentiary standard survives intact under the Court’s two most recent congressional power cases, Hibbs and Lane, and how these cases (along with an important recent case construing the current preclearance provision of the act) affect the question of congressional power to renew section 5.

FINDING EVIDENCE OF A CONTINUING NEED FOR PRECLEARANCE

The Bull Connor Is Dead problem is simply that because section 5 of the Voting Rights Act has been in effect in many places for nearly four decades, states do not engage in much activity that demonstrates purposeful racial discrimination. The very fact that section 5 has served as a good deterrent to such behavior complicates the task of renewal. How then can Congress point to sufficient intentionally discriminatory acts by the states to justify the strong remedy of having every voting change in a covered jurisdiction subject to federal preclearance?

If Congress cannot point to actual incidents of discrimination, it might examine instead the hypothetical question whether covered jurisdictions would engage in intentionally discriminatory voting practices and procedures if section 5 were not renewed. In so doing, Congress may be tempted to hearken to the history of voting rights abuses chronicled in detail in earlier congressional hearings on the enactment of the act in 1965 and its subsequent renewals. Those hearings revealed a strong history and pattern of state abuse. As chronicled by Bybee, following Reconstruction and continuing up to enactment of section 5, southern states used a variety of methods intended to limit the voting power of African Americans:
Among the most important forms of structural discrimination were registration barriers (such as the poll tax, grandfather clauses, and literacy tests); white primaries (to reduce blacks to the role of ratifying white-approved candidates); gerrymandering (to concentrate blacks into few districts); annexation (to alter the composition of the electorate); at-large voting (to submerge minority populations); and the redesign of governing bodies (to reduce, for example, the total number of elected offices). (1998, 15)

But these violations occurred at least decades ago. Bull Connor, the notorious commissioner of public safety in Birmingham, Alabama, who once turned attack dogs on civil rights marchers, died in 1973 (Boruki 2000). Most state legislators active in the pre-1965 days are no longer in office, and those who remain have taken much more conciliatory public positions on questions of race. The late Strom Thurmond comes to mind as an example of a southern politician whose public position changed significantly over the years.

How can Congress prove that there would be a significant problem with covered states if section 5 is not renewed? Can Congress show, in the words of Garrett, that the sunset of preclearance would lead again to “States’ systematic denial of” the voting rights of blacks or others, or to states that “routinely apply voting tests in order to exclude African-American citizens from registering to vote,” or something equivalently egregious to justify the preclearance remedy? The evidentiary burden will be especially difficult to meet if Congress passes a permanent (or nationwide) preclearance requirement, as opposed to a temporally (and geographically) limited one.

As the battle over section 5 renewal begins, proponents and opponents of section 5 renewal are attempting to create such a record, looking to specific instances of intentional discrimination in voting in covered jurisdictions. Laughlin McDonald (2005), for example, points to what he describes as intentional acts of discrimination in Georgia, South Carolina, and South Dakota (see also Katz 2005, 22–26, documenting intentional discrimination found in published section 2 cases in covered jurisdictions; National Commission on the Voting Rights Act 2006, documenting intentional discrimination and racially polarized voting since 1982). Opponents of section 5 renewal have also focused state by state, aiming to show both that intentional discrimination in voting no longer exists in any significant way in covered jurisdictions, and that in any case the problems faced in covered jurisdictions are no different from those faced in jurisdictions not subject to section 5 preclearance (American Enterprise Institute 2006; see also Katz 2005, 26–29).

It is unclear how much evidence would be enough to satisfy a majority of judges on the new Roberts Court. A few anecdotes of intentional discrimination may not suffice; demonstrating patterns of discrimination may be necessary. The more evidence that can be assembled of intentional state discrimination in covered jurisdictions, the more likely it is that the Court would uphold a renewed section 5. It seems important for Congress to show as well that the targeting provision of a renewed section 5 covers those jurisdictions where intentional discrimination in voting is most severe, and excludes areas where the same problems are less severe.
The Future of the Voting Rights Act

If Congress cannot dredge up enough recent examples of intentional discrimination in voting by the states that would be covered by section 5 to justify the preclearance procedures, it might turn to proxies to prove that such discrimination would emerge in the absence of preclearance renewal. I consider the two proxy approaches suggested by other commentators, and explain why I do not believe either approach is likely to have much success under the Garrett standard.

The Problem with Proxies

Victor Rodriguez suggests that DOJ statistics on preclearance provide evidence that section 5 renewal would be congruent and proportional to proven state violations (2003, 804; see also National Commission on the Voting Rights Act 2006, relying heavily on objections and withdrawals of preclearance requests as evidence of intentional discrimination). He points both to the high number of preclearance requests and to the absolute number of objections to preclearance interposed by the DOJ as a proxy for proof of intentional discrimination. On the high number of preclearance requests, Rodriguez argues that “there continue to be multiple opportunities for mischief on the part of election officials and legislatures.” On the absolute number of objections, he notes that since 1982, “the DOJ has continued to enter a significant number of objections” (807).

These statistics appear to be poor proxies for intentionally discriminatory state action in voting, for a number of reasons. First, the absolute number of preclearance requests demonstrates nothing more than that states and local jurisdictions covered by Section Five have been endeavoring to make a large number of changes in voting practices and procedures and submitting those changes to DOJ for approval. Figure 5.1, compiled from statistics I obtained from DOJ through a Freedom of Information Act request (Department of Justice 2003), indeed confirms that the number of preclearance requests has generally been rising, though it has been decreasing in the last decade. But the number tells us nothing about how much mischief the states would or would not do in the absence of section 5. A potential for mischief is not the same as mischief itself.

Rodriguez also overstates the significance of the number of DOJ objections. Rodriguez presents data on the number of objections over time, similar to the figure 5.2 data.

Whether or not these represent a large number in the abstract, Rodriguez errs in failing to control for the increase in the number of submissions. All else being equal, the number of objections should rise with the number of submissions, assuming a constant rate of objectionable conduct.

Figure 5.3 looks at objections as a percentage of preclearance submissions over time. The graph tells a very interesting story. Objection rates exceeded 4 percent of total submissions in the first five years of the Voting Rights Act. They fell precipitously to 1.31 percent over the next five years and have been falling steadily ever since, down to 0.05 percent from 0.23 percent in the last three five-year spans,
and are asymptotically approaching zero. Indeed, as we shall see, the DOJ filed only two objections nationwide for all of 2004 and one for 2005.

These figures, showing a trivial number of objections, do not prove an absence of discriminatory intent on the part of state officials. Perhaps section 5 is working well as a deterrent, and there is little reason to submit discriminatory voting changes that the DOJ will reject. These figures also do not include compromises between the DOJ and states whereby states made changes to avoid DOJ imposing an objection. There may thus be more objectionable conduct out there not captured by these statistics.

But there is good reason to believe that these figures overstate the extent of the problems of discrimination. A number of DOJ objections over the years have been based on the DOJ’s aggressive theories about how section 5 should be enforced. For example, the DOJ took the position that it would not grant preclearance to a state’s redistricting plan unless the plan contained the maximum number of majority-minority districts that it was possible for a jurisdiction to create. It also took the position that it would not grant preclearance under section 5 of a plan it believed violated section 2 of the Voting Rights Act.

The Supreme Court, however, rejected these positions (see Reno v. Bossier Parish School Board, 520 U.S. 471; 528 U.S. 320; Miller v. Johnson, 515 U.S. 900). We should therefore remove from the calculations those DOJ objections based on

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**FIGURE 5.1 / Preclearance Submissions over Time**

![Graph showing preclearance submissions over time](source: Authors’ compilations from U.S. Department of Justice (2003) (unpublished).)

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interpretation of section 5 going beyond eliminating retrogressive intent or effects. Although precise figures are not available, Rodriguez notes that four objections in 2002 concerned redistricting cases in which the jurisdiction lowered the percentage of minority voters in districts (Rodriguez 2003, 812 n.242). Since those objections, the Supreme Court has made it clear that such plans should be precleared, so long as the state can prove that there is sufficient cross-over voting by white voters and other factors so that the position of minorities has not been made worse off under a loose, totality of the circumstances approach. Thus, the DOJ figures overly inflate the extent to which states have attempted to make retrogressive changes, at least as retrogression is now understood by the Court.

In sum, I see very little in the DOJ evidence that Congress could use to support a case for a renewed section 5.

Both Pamela Karlan (1998) and Paul Winke (2003) point to evidence of private racist voting choices as a means of proving the case for the constitutionality of a renewed section 5. Historically, white voters have not backed minority candidates, though the rate of such racially polarized voting has been declining over time, particularly beginning in the 1990s (see Pildes 2002, 1523–529).

Karlan, writing after Boerne but before the other New Federalism cases, considered the extent to which evidence of racially polarized voting could support
section 5. Although acknowledging that white voters’ choices “were constitutionally protected even if they were based on outright racism,” Karlan contends that “the state was operating a forum that enabled white voters to engage in racial discrimination” (1998, 737–38).

Building on Karlan, Paul Winke tries to tie the private voting decisions of individuals to state-directed redistricting:

Where government actors can rely on a racially divided electorate in structuring the electoral process, discrimination can take subtle and facially neutral forms. Redistricting, for example, can work to minimize the political participation of minorities when those drawing boundary lines take cognizance of the willingness of their constituents to support minority candidates. (2003,104)

He concludes that given the combination of private and government action, the courts could decide that “the opportunity for minority participation was sufficiently restricted to create an inference that intentional racial discrimination was at work.”

No doubt these are creative arguments intended to substitute the available evidence of racially polarized voting for the missing direct evidence of intentional
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state discrimination that Congress highlighted as late as 1982 (see Karlan 1998, 734–36; McDonald 1983). However, it is hard to see how this evidence is enough to satisfy the requirements of Boerne and Garrett. These cases focus on unconstitutional action by the government. Whether or not redistricting “can work to minimize the political participation of minorities,” the courts will need some proof of intentionally discriminatory conduct by the states. Winke posits a plausible relationship, but fails to point to any proof that states subject to preclearance engage in intentionally discriminatory conduct.

Even accepting Winke’s argument, preclearance may exceed “reasonably prophylactic legislation” (Kimel v. Florida Board of Regents, 88) unless a new coverage formula requires preclearance only in jurisdictions with continued racially polarized voting and perhaps a history of using that polarization in the districting process so as to minimize the success of minority candidates. In addition, the evidence at most supports preclearance of only redistricting changes.

A Caveat

Justice Black, dissenting in the 1966 South Carolina v. Katzenbach case, described the extent of the intrusion into state sovereignty that section 5 worked as:

the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. (359–60)

Justice Black’s words, which did not convince the Court in 1966—a Court that was confronted with massive and uncontradicted evidence of intentional state discrimination in voting practices—may get a more receptive hearing after 2007. Predicting the Court’s reaction to this evidence, however, has been made more difficult by the most recent developments in the Court’s jurisprudence in this area, which I discuss shortly.

But even putting Hibbs and Lane aside, it is not clear that the Court would have the stomach to overturn a renewed preclearance provision. The early voting rights cases are considered by many to be a high-water mark for the Court in fostering racial equality in this country. As we have seen, in the Boerne line of cases the Court, which has pointed repeatedly to Katzenbach and the early cases as an appropriate use of congressional power, may be reluctant to undermine those precedents in evaluating the new section 5, even though the evidentiary issue will be somewhat different under a renewed section 5. It also might be politically unpopular to overturn a renewed section 5 (Rodriguez 2003, 811).

We have already seen a casual application of the Boerne standard in the 1999 case Lopez v. Monterey County. In Lopez, a group of Latino voters from a county in California covered under the 1982 Voting Rights Act’s preclearance requirement
challenged the state’s failure to preclear changes in its laws governing judicial elections in that county.

The Court rejected California’s argument that it would exceed congressional enforcement power under the Fifteenth Amendment to require the state to preclear its voting changes in the absence of evidence that the state had been one of the “historical wrongdoers in the voting rights sphere.” Although the Court cited Boerne, it stated that its prior voting rights precedents of South Carolina v. Katzenbach and City of Rome v. United States, both of which had upheld preclearance provisions, governed the case. Noting that the act “by its nature, intrudes on state sovereignty,” the Court upheld the intrusion because it “burden[ed] state law only to the extent that [the] law affects voting in jurisdictions properly designated for coverage” (Lopez v. Monterey County, 284). Justice Thomas dissented, intimating that Congress did not have the authority to require preclearance by California.

We should not make too much of Lopez v. Monterey County, however. Although it was decided after Boerne, it pre-dated Garrett and its focus on the evidentiary questions. In addition, Lopez concerned the constitutionality of the 1982 renewal of the preclearance provisions. The case thus does not control how the Court would address a challenge to the constitutionality of a renewed section 5 in 2007.

**THE NEWER NEW FEDERALISM: HOPE OR A RENEWED SECTION 5?**

In Nevada Department of Human Resources v. Hibbs (538 U.S. 721) and Tennessee v. Lane (124 S.Ct. 1978), the Court backpedaled somewhat from the strict evidentiary burden it set forth in Garrett. Some of the particular twists and turns the Court has added to the Boerne-Garrett inquiry in these cases are good news for supporters of a renewed preclearance provision.

**The Relevance of Hibbs and Lane**

Hibbs involved a challenge to the Family and Medical Leave Act of 1993 (FMLA). Nevada discharged a state employee after he failed to return to work because he was caring for his ailing spouse. The employee sued the state for damages, arguing that its conduct violated the FMLA, which, among other things, gives an employee a right to take a leave of up to twelve weeks to care for a spouse with a serious health condition.

The state argued that Congress exceeded its authority by allowing citizens to sue states for damages under the FMLA because there was not enough evidence of state discrimination on the basis of gender to justify imposing the mandatory leave policy on the states. The Court disagreed, holding that the evidence of gender-based discrimination by the states was sufficient. The opinion is curious, for reasons Vikram Amar (2003) details and I do not repeat here; there was no more evidence of state discrimination in Hibbs than in Garrett.
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One of the explanations the Court gave in Hibbs for distinguishing Garrett is potentially important in assessing the preclearance question. The Court noted that a higher level of scrutiny applies in assessing the constitutionality of legislation that discriminates on the basis of gender (at issue in Hibbs) compared to the rational basis level of scrutiny that applies in assessing the constitutionality of legislation that discriminates on the basis of age (at issue in Garrett) or disability (at issue in Kimel). The Court held that given this distinction, “it was easier for Congress to show a pattern of state constitutional violations” in Hibbs (736).

Amar explained that this analysis

cheats a bit as to the key issue. The central queries under the “congruence and proportionality” test are these: How often are States violating the Fourteenth Amendment, and how tailored is the Congressional fix to these violations? To say that gender classifications are subject to a more stringent standard of review than are disability classifications doesn’t really tell us how often States are violating the constitutional rights of women versus the constitutional rights of the disabled. (353)

Amar is right that the level of scrutiny should be irrelevant to the congruence and proportionality analysis. Nonetheless, the fact that the Court has said otherwise suggests that it may consider it relatively easier for Congress to show a pattern of racial discrimination supporting a renewed preclearance provision: race discrimination is subject to strict scrutiny, stricter scrutiny than gender claims.

Lane’s treatment of the evidence is in some ways more important than Hibbs’s for the preclearance question. The case concerned Title II of the ADA, and in particular the question whether a state could be subject to a suit for damages for failing to make its courthouses reasonably accessible to the disabled. One of the Tennessee v. Lane plaintiffs was a paraplegic who alleged that he could not use a wheelchair to access a courthouse for a criminal hearing. The other was a court reporter with disabilities who alleged that because of her disability, she could not gain access to a number of county courthouses and, as a result, lost her ability “to participate in the judicial process.” The Court held that Congress had the power to make states liable for damages for failing to provide access to the courts under Title II of the ADA.

Some of what is significant in Lane about the Boerne inquiry has little bearing on the preclearance question. For our purposes, I focus primarily on the evidentiary question. The Court began its evidentiary analysis of the extent to which states engage in unconstitutional discrimination against the disabled in providing access to the courts with a general discussion of the pre-ADA “backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights” for the disabled. (Tennessee v. Lane, 1989). The Court pointed to discrimination against the disabled in voting, marrying, and serving as jurors, and cited court cases identifying “unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions” (1989).
The Court then turned to the evidence Congress considered before passing the ADA. It pointed in particular to a 1983 report before Congress showing that 76 percent of public services and programs housed in state-owned buildings were inaccessible and unusable by persons with disabilities; 1988 testimony to a House of Representatives subcommittee from two persons with disabilities “who described the physical inaccessibility of local courthouses”; and “numerous examples” in a 1990 task force report “of the exclusion of persons with disabilities from state judicial services and programs” (Tennessee v. Lane, 1991).

The Court noted that in assessing the evidence, it was appropriate to examine not only violations by the state, but also constitutional violations on the part of nonstate governmental actors, such as city and county officials. This determination seemed directly contrary to Board of Trustees v. Garrett. (369).5

The majority’s opinion thus appeared to significantly lower the evidentiary burden for Congress, a fact the majority did not expressly acknowledge. The result is not so surprising considering the justices making up the Tennessee v. Lane majority: the four most liberal members of the Court, who had dissented in Garrett, along with perennial swing voter, Justice O’Connor. That same set of justices, along with Chief Justice Rehnquist, joined in the other permissive Boerne opinion, Nevada Department of Human Resources v. Hibbs.

Chief Justice Rehnquist, who wrote the Hibbs majority opinion but dissented in Lane, rejected the Lane majority’s conclusion that the Congress had identified a pattern of violations by states against the disabled to justify Title II’s damage remedy, at least as applied to courthouse access. First, the chief justice characterized the “backdrop” of discrimination against the disabled invoked by the majority as “outdated, generalized evidence.” Second, he noted that the “bulk of the Court’s evidence concerns discrimination by nonstate governments, rather than the States themselves,” evidence he dismissed as “irrelevant.” Finally, the chief justice characterized the congressional task force evidence cited by the majority as the same “unexamined anecdotal” evidence of discrimination against the disabled rejected in Garrett. “Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of ‘unequal treatment’ were irrational, and thus unconstitutional” (Tennessee v. Lane, 1999, 2000).

Rehnquist concluded that “there is nothing in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials” (Tennessee v. Lane, 2000 [Rehnquist, C.J., dissenting]).

The Tennessee v. Lane evidentiary analysis may ease the burden for supporters of renewed preclearance in three significant ways. First, the analysis would obscure the Bull Connor is Dead problem by allowing the use of old (what the chief justice referred to as “outdated”) evidence to support the new law. Lane was a 2004 decision, yet most of the evidence before Congress to which the Court cited was gathered in the 1980s and published in the 1990s. If there was enough evidence before Congress to support the 1982 preclearance decision, a point confirmed under the Boerne standard by Lopez, then perhaps that same evidence can
be relied upon to support renewed preclearance in 2007, at least for a preclearance provision that is similarly limited in temporal scope to the twenty-five-year term of the 1982 preclearance renewal.

Second, Congress may rely upon general evidence of racially discriminatory conduct in voting by state, county, and city officials in covered jurisdictions to support renewed preclearance. It need not point only to the actions of state officials, and apparently it need not provide too much particularity to show that each jurisdiction which would be covered by a renewed preclearance provision had an identically egregious recent history of racial discrimination in voting.

One caveat on this second point: to satisfy Justice Scalia, who wrote separately in Tennessee v. Lane, it will be necessary to point to actions of officials in each state that would be subject to preclearance. In Lane, Justice Scalia announced that for reasons of stare decisis, he would now hold that Congress has broad latitude to pass legislation aimed at combating racial discrimination. But he has insisted that Congress may impose laws aimed at eradicating racial discrimination “only upon those particular States in which there has been an identified history of relevant constitutional violations.” Thus, to meet Justice Scalia’s standard, more specific state-by-state evidence of intentional racial discrimination in voting may be required.

Third, the Court may look to court decisions demonstrating state (and local) racial discrimination in voting, as well as reports submitted to Congress, documenting at least a handful of intentional state violations of the voting rights of members of protected minority groups. Supporters of a renewed preclearance have already begun preparing those reports now, and they have begun filling the record with as much evidence they can muster of intentional state racial discrimination in voting to support a renewed preclearance provision.

Another aspect of Tennessee v. Lane also increases the prospects for the Court to uphold a renewed preclearance provision. Lane explained that in cases such as those under the ADA involving only rational basis scrutiny, Congress may nonetheless impose a “strong” remedy when the statute protects “fundamental rights.” The Lane Court noted that Title II of the ADA

like Title I, seeks to enforce [a] prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review. These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. . . . While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent. “Difficult and intractable problems often require powerful remedies,” but it is also true that “[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” (1988–89 [citations omitted])

A renewed preclearance provision involves race discrimination, so strict scrutiny already applies. But it also involves the right to vote, itself a fundamental
right. The tone of the Court’s opinion in Tennessee v. Lane on the fundamental rights question suggests that the Court is willing to defer more to Congress to remedy the more that Congress seeks to protect fundamental rights. Such a conclusion can only bode well for a renewed preclearance provision challenged as an improper exercise of congressional power.

Although the changes in Hibbs and Lane certainly increase the chances that a renewed preclearance provision would satisfy Boerne, the case is not a slam dunk. Congress will still be required to come forward with some evidence of intentional discriminatory conduct in voting. The Court did not give Congress a pass on producing evidence; it merely lowered, at least for now, the extent of the evidentiary burden.

More important, with Chief Justice Rehnquist’s and Justice O’Connor’s departures from the Court, the stricter evidentiary standard of Garrett could be revived by a new Court majority. A Congress that wants renewed preclearance sustained has every incentive to be as comprehensive as possible in chronicling problems of purposeful racial discrimination in voting.

Changes in Preclearance Standard and Beer Test

Recent developments in the statutory law governing preclearance also increase the chances that a renewed preclearance provision would be held constitutional. By making it easier for covered jurisdictions to obtain preclearance, these cases decrease the burden that preclearance imposes on the states and therefore make the preclearance remedy appear more congruent and proportional to the scope of state violations. Current law provides that to obtain preclearance, a state must demonstrate that a change in a voting practice or procedure does not have a “discriminatory purpose or effect.” The leading case on the meaning of this standard is Beer v. United States (425 U.S. 130, 141), in which the Supreme Court explained that discriminatory purpose or effect in the preclearance context means a purpose or effect to “retrogress,” that is, to make the position of minorities worse off than they were under the old law in the covered jurisdiction.

Since Beer, a number of significant cases have construed this so-called nonretrogression principle. As mentioned, the Supreme Court has in recent years repeatedly resisted efforts—mainly of the DOJ—to read the nonretrogression principle broadly, such as to require that covered jurisdictions not engage in vote dilution that could violate another provision of the Voting Rights Act.

In the most important nonretrogression case since Beer, the 2003 opinion in Georgia v. Ashcroft further eased the burden on covered jurisdictions. Under Beer, the nonretrogression principle was rather mechanical, at least in the redistricting context. One counted the number of majority-minority jurisdictions under the old and new plans, and so long as the number did not go down under the new plan, the plan was to be approved as “ameliorative” and therefore non-retrogressive.
In Georgia v. Ashcroft, however, the Court explained that even if the number of majority-minority jurisdictions goes down, a plan submitted for preclearance can still be declared ameliorative. The Court reached this conclusion by announcing the following principles to guide the retrogression inquiry:

First . . . in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. . . .

Second, any assessment of the retrogression of a minority group’s effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group’s opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. . . .

In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive.

The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a state may choose to create a certain number of “safe” districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.

Section 5 does not dictate that a state must pick one of these methods of redistricting over another. Either option “will present the minority group with its own array of electoral risks and benefits,” and presents “hard choices about what would truly ‘maximize’ minority electoral success.” (Georgia v. Ashcroft, 479–80)

As Karlan explains, “put simply, the Court [in Georgia v. Ashcroft] held that a plan could be precleared even if it reduced minority voters’ ability to elect their preferred representatives, as long as it preserved their ‘opportunity to participate in the political process,’ an opportunity that was ‘not limited to winning elections’” (2004, 30; see also Pildes 2004).

By allowing covered jurisdictions increased flexibility in defending changes in voting practices or procedures as nonretrogressive, the Court has limited the intrusion that preclearance makes on state governance. To be sure, the state still must obtain federal approval before putting into effect its own laws, and for that reason the threat of Boerne still hangs over the head of a renewed preclearance provision. But preclearance should be much easier to obtain than it was in 1965, 1982 or even 2002, making it a less draconian remedy than it was in the past from the point of view of federalism.

Early Department of Justice experience after Georgia v. Ashcroft and the Bossier II case suggests the department is treading lightly when it comes to preclearance. Ashcroft was decided in June 2003. DOJ filed only seven objections to preclearance requests from then until the end of 2005. I think it is too early to tell
how much influence the cases will have on preclearance determinations. It is interesting to note, however, that there were a total of only two objections filed in calendar year 2004, out of hundreds of filed requests for preclearance, and only one objection filed in 2005.

CAN CONGRESS ENACT PRECLEARANCE UNDER ITS OTHER ENFORCEMENT POWERS?

Although the issue is far from settled, the Supreme Court could hold that Congress lacks the power under the Fifteenth Amendment to reenact section 5’s preclearance provisions. But could Congress act under some other power granted to it in the Constitution? One candidate is the Guarantee Clause, contained in article IV, section 4, which provides that “the United States shall guarantee to every State in this Union, a Republican Form of Government.” Another possibility is the Fourteenth Amendment’s Equal Protection Clause, as the Supreme Court interpreted the clause in Bush v. Gore (531 U.S. 98), the case ending the Florida recount dispute following the 2000 election. Bush v. Gore may be most useful in upholding potential additions to the act aimed at fair voter registration and ballot procedures.

Elsewhere I have detailed the history and potential uses of the Guarantee Clause (Hasen 2003). Beginning in 1849 with Luther v. Borden (48 U.S. 1), the Supreme Court has refused to adjudicate claims that a particular state law or practice violates the Guarantee Clause. Luther arose out of a civil war in Rhode Island in the 1840s that pitted those who wanted to expand the franchise against supporters of the existing government who wished to continue use of Rhode Island’s narrow suffrage requirements. The factions formed rival governments. The president ultimately sided with the existing government and the rebellion was quashed.

Years after the insurrection ended, the case of Luther v. Borden made it to the Supreme Court. Luther was a trespass case in which police from the existing government broke into plaintiff’s home looking for evidence that he was participating in the rival electoral process. The plaintiff claimed trespass on grounds that the police officers had no authority to enter his home because the government for which they worked was not a “Republican” government under the Guarantee Clause.

The Court refused to consider whether the existing Rhode Island government was Republican under the Guarantee Clause, declaring in the 1849 case that “under this chapter of the Constitution it rests with Congress to decide what government is the established one in a State” (Luther v. Borden, 42). The Court’s practice to avoid the Guarantee Clause has continued to recent times. In 1980, the Court refused to consider whether certain provisions of the Voting Rights Act violated the Guarantee Clause, holding that the “issue is not justiciable.” (City of Rome v. United States, 182 n. 17; but see Hasen 2003).

If it is for “Congress to decide” what constitutes Republican government and to guarantee it, perhaps Congress could decide that Republican government requires preclearance. In other words, Congress could decide that to guarantee Republican government in those states that historically have engaged in intentional racial
discrimination in voting, federal government preclearance remains warranted. Under this theory, Congress could impose preclearance to guarantee Republican government even absent contemporary proof of intentionally discriminatory conduct in voting.

Perhaps this end run around the New Federalism cases would be too much for the Supreme Court, causing it to start adjudicating claims under the Guarantee Clause, and in particular to determine what, precisely, Republican government means. Interpreting the Guarantee Clause to give Congress what amounts to carte blanche to make structural changes in the political process without Supreme Court oversight would work a fundamental change in Congress-Court relations, negating some of the New Federalism revolution.

For this reason, Court acquiescence in this approach is unlikely though still possible: the Court might not want to open itself up to Guarantee Clause claims, which will draw the Court even further in the political thicket. Nonetheless, there seems little downside for Congress also basing its passage of a renewed section 5 on the Guarantee Clause.

Bush v. Gore offers another possible basis for congressional power. The case the Supreme Court decided ending the Florida recount in 2000 has proven controversial, and legal scholars continue to debate the precedential value, if any, of the Court’s holding that selective manual recounts violated the Fourteenth Amendment’s Equal Protection Clause by “valu[ing] one person’s vote over that of another” (Bush v. Gore, 104–05; see Hasen 2004 on the scholarly debate).

To the extent the case is properly read as requiring a certain kind of equality in the nuts and bolts machinery and rules used to run elections, then new provisions of the Voting Rights Act aimed at fair voter registration and ballot procedures may be upheld, even if applied nationwide and to state and local elections (see Persily, chapter 11 this volume, suggesting possible amendments along these lines). I put aside the question whether the Voting Rights Act, and not the Help America Vote Act, is the proper place for such amendments. Thinking only about congressional power, the argument for reliance on Bush v. Gore is plausible. Moreover, there seems little harm for Congress to assert the case’s equal protection holding as an additional basis for its power to add election-related provisions of the Voting Rights Act.

One final caveat: even if the Court upholds a renewed section 5 against constitutional challenge, specific applications of the rule could still raise constitutional concerns. For example, in assessing retrogression under section 5, it might not be constitutional for courts to compensate for lower minority voter turnout, at least to the extent it has been shown that minority voter turnout has equaled or exceeded overall turnout rates (Evangelis 2002; Pildes, chapter 1 this volume). In a somewhat parallel context, although the Supreme Court has upheld section 2 of the Voting Rights Act as an appropriate exercise of congressional power, courts are now considering whether construing section 2 to apply to felon disenfranchisement laws would render it unconstitutional in that application on the basis of violating the Boerne “congruence and proportionality” standard (Muntaqim v. Coombe 366 F.3d 102, 130; Farrakhan v. Washington 359 F.3d 1116, 1121).
CONCLUSION

Congress and those individuals and organizations seeking to influence Congress will soon devote a substantial amount of time to debating the wisdom of renewing section 5 of the Voting Rights Act. Supporters, within and outside Congress, of a renewed section 5 should go into these debates with their eyes open, recognizing that the Court, rather than Congress, will have the final say on whether a renewed section 5 ultimately will have the force of law.

At the very least, these supporters need to consider making the strongest evidentiary record of intentional discriminatory conduct in voting by states to justify preclearance provisions. The evidence should target as many states as possible that would be covered by a new section 5. If direct evidence is not available, proponents of the new law should consider whatever proxies for intentional discriminatory conduct by states might be available.

Under the existing and muddled Supreme Court precedents, it is far from clear whether Congress will be able to make the case to satisfy the Supreme Court that the “uncommon” preclearance rationale is “congruent and proportional” to prove intentional racial discrimination in voting by covered jurisdictions today. For this reason, supporters of the renewed law would do themselves a service to explore alternative bases for congressional power. In the battle between Congress and the Supreme Court over the New Federalism, the preclearance provisions remain in danger of becoming the next casualty.

An earlier version of this chapter appears in Volume 66 of the Ohio State Law Journal.

NOTES

1. Laughlin McDonald (2005, 1) misunderstands my “Bull Connor is dead” point. He writes:

   I have attended a number of conferences recently on the Voting Rights Act and the special provisions that are scheduled to expire in 2007. Invariably someone will make the comment, “we don’t need Section 5 anymore because Bull Connor is dead.” I have always found such statements to be simpleminded in the extreme. Bull Connor is dead, but so is Thomas Jefferson. So is George Washington. So is my grandfather. So is William Tecumseh Sherman. So is William Shakespeare, and the list goes on and on. Simply because all of these people are dead, it does not mean that they are erased from memory and history, that their legacies no longer exist, that they do not influence the way we think and act. The past continues to inform the present.
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I am not claiming that because Connor is dead, section 5 is no longer necessary or that the legacy of his racist action no longer affects the South. I am claiming that because the original racist officials in covered jurisdictions are either no longer in power or no longer explicit about their racist views, it is harder for Congress to come up with the evidence to satisfy the Supreme Court that the strong remedy of preclearance remains necessary. This is not a claim against the renewal of section 5, nor do I intend to make such a claim in this chapter.

2. Section 1 of the Fifteenth Amendment prevents the United States or any state from denying or abridging the right of citizens of the United States to vote “on account of race, color, or previous condition of servitude.” Section 2 declares that “Congress shall have the power to enforce this chapter by appropriate legislation.”

3. Michael Pitts notes the following interesting statistics on objections following the Bossier decisions: “Between January 24, 2000, (the day the second Bossier was decided) and January 24, 2004, the Attorney General denied preclearance on 34 occasions (not counting continued denials of preclearance). . . . Eleven of those preclearance denials involved retrogressive purpose” (2005, 280 n.102).

4. For example, the Court in Lane explained that when faced with a broad statute applicable in a variety of contexts—as opposed to the preclearance statute, applicable to the single context of a covered jurisdiction making a change in a voting practice or procedure—the courts in conducting the Boerne inquiry must focus on the application of the statute to a specific context (Tennessee v. Lane, 1988–89, 1993). Thus, rather than asking whether Title II of the ADA as a whole could be applied to state governments as a congruent and proportional remedy to intentional state discrimination against the disabled, the majority considered its application only to courthouses.

5. William Araiza also reads a footnote in Tennessee v. Lane as suggesting that the actions of private actors could be relevant, which as I have explained, could help renewal of section 5 of the VRA (2004, 52).

6. In Tennessee v. Lane, the Court looked at ADA violations by local courthouses because those courts are treated as arms of the state for Eleventh Amendment purposes (1991 n.16). In a challenge to a renewed preclearance provision, the question would not be Eleventh Amendment immunity but Congress’s substantive authority to renew preclearance under the Fourteenth or Fifteenth Amendments. When the discussion relates to Congress’s enforcement powers generally, it makes no sense to ignore a record of constitutional violations by localities. Thanks to Sam Bagenstos for raising this point.

7. This count is based upon my review of the DOJ website, at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.

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Chapter 6

Does Section 5 of the Voting Rights Act Still Work?

Samuel Issacharoff

The approaching renewal date for section 5 of the Voting Rights Act (VRA) raises questions about both the purpose of the act at this point and the administrative mechanisms the act employs. The legislation was premised on a deep sense of national urgency over the exclusion of black Americans from meaningful political participation in significant parts of the country—those areas that fell within the newly created concept of section 5 covered jurisdictions. Section 5 placed political life in those jurisdictions under a form of administrative receivership and treated political activity within those areas as subject to a rebuttable presumption that the continued exclusion of blacks from meaningful political opportunity was the dominant feature of all political decisionmaking in those jurisdictions.

The regulatory side of section 5 was based on novel administrative models that responded to the extraordinary sense of urgency over the continued exclusion of black Americans from the exercise of the franchise. First, the act was not a law of general application, but targeted at specified sections of the country based on the levels of political participation in the 1964 presidential election. Second, the act was directed at specific practices, most notoriously literacy tests, that could be "suspended"—in effect, prohibited—and removed as barriers to black electoral participation. Third, the law could build an administrative model around proposed changes to formal requirements for participation, such as voter registration eligibility requirements or poll sites or, after a time, changes in election systems.

As is oft repeated, the act was successful beyond the scope of any other civil rights statute. So successful indeed, that if the same eligibility requirements had been applied to the 1968 election instead of the 1964 election, there would have been virtually no covered jurisdictions. Moreover, section 5 of the VRA continued to provide benefits for newly enfranchised black citizens, even after formal barriers were removed. The effect of preclearance was to provide a one-way ratchet for minority political gains. Particularly after the Court’s 1969 decision in Allen v. State Board of Elections (393 U.S. 544), section 5 provided oversight not only on the processes of registering and casting a ballot, but on issues such as annexations and the use of at-large election districts. In Allen, for example, the question presented was whether section 5 would be limited to the ability to cast a vote, or
would reach the effectiveness of the vote. In extending the reach of section 5 to include the electoral prospects of minority-preferred candidates, the Court gave invaluable protection to fledgling minority political successes in the early stages of the civil rights era. As Pamela Karlan expressed it, “section 5 contains a natural benchmark that preserves the political gains minority voters have achieved through political or legal action” (2004, 21). That benchmark is “the status quo that is proposed to be changed” (Reno v. Bossier Parish School Board, 528 U.S. 320, 334). The benchmark was preserved by freezing in place local political arrangements and imposing exacting administrative review upon covered jurisdictions. In practice, section 5 coverage denied to local jurisdictions a customary range of political decisions—including districting, terms of office, and electoral systems—that were ordinarily subject to what Justice Souter would term the pulling and hauling of everyday politics (Johnson v. De Grandy, 512 U.S. 997, 1020).

As the 2007 date for renewal emerges on the political landscape, it is worth reviewing the exceptional role of section 5 of the VRA. In light of the tremendous political gains for minorities covered by section 5, particularly southern blacks, it may be perverse even to question the need to extend section 5 after its current sunset in 2007. But, as courts reviewing section 5 have noted since its original implementation, the conditions for its success (and constitutionality) involve an intensely practical assessment of the justifications for displacing the normal functions of politics.

Perhaps the most salient change in the forty-year history of section 5 may be found in the subject matter of controversy under the act. Whereas the early days of the act were directed to access to the ballot, increasingly the most visible and contested arena for section 5 has been the proper distribution of political power. For example, applying the “nonretrogression” standard of Beer v. United States, preclearance has emerged as a central factor in the decennial redistricting wars (425 U.S. 130, 141). It would indeed be an extraordinary stroke of fortune if the regulatory model developed for the exclusion of blacks from voting in the South in 1965 were to apply in full fashion to the very different set of concerns forty years later. Extraordinary, indeed. And it is my sense that the act is showing its age precisely because of the extraordinary success it had in overcoming the first-order barriers presented in the past.

This chapter is focused on the question whether the evolution of politics since the last extension of section 5 in 1982 has altered the conditions for its continued utility as a first-order mechanism to oversee minority participation in the political process. The discussion primarily concerns the preconditions for the section 5 administrative approach to work and the substantial changes that have occurred since 1965. Secondarily, it revisits the type of regulation at stake under the VRA in light of changed circumstances.

SECTION 5’S PRECONDITIONS

Examined in retrospect, there are four preconditions for section 5 to work effectively and to retain the clear sense of purpose that permitted it to overcome the normal presumptions of state autonomy and respect for federalism. Two of these preconditions
are fairly well understood in analyses of section 5. The first is the urgency and extent of the harm to which Congress addressed itself in placing much of the country under a regime of what amounts to administrative receivership. As expressed in South Carolina v. Katzenbach, “the constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects” (383 U.S. 301, 308). That historical experience demonstrated to the Court’s satisfaction that the underlying assault on black voting rights constituted a clear violation of the Fourteenth and Fifteenth Amendments (333–34). Even where the evidentiary basis for the claim of widespread discrimination was more tenuous, as with the nationwide extension of section 4 in 1970, the Court nonetheless returned to its empirical assessment that “Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments” (Oregon v. Mitchell, 400 U.S. 112, 133).

The second condition is also widely appreciated and turns on the nature of the extraordinary preclearance mechanism. Section 5 of the Voting Rights Act and its implementing regulations require the grant or denial of preclearance to occur within sixty days of submission—leaving aside the capacity to obtain extensions of that time. The act’s original triggering mechanism related to section 4 and the initial suspension of literacy tests. As the act was applied to increasingly complex governance questions, including redistricting, ease of administration and the scope of potential administrative review came to dominate the Court’s concern in section 5 cases. These cases can be divided among three major themes. First, in cases such as Morris v. Gressette (432 U.S. 491), the Court limited the preclearance process to its administrative core and held that as a matter of administrative law the decision to preclear was not subject to challenge or judicial review (507). Second, in Beer v. United States and its progeny, the Court limited the scope of the preclearance inquiry to the issue whether or not there was retrogression as a result of the proposed alteration in state voting practices (425 U.S. 130, 141; see also City of Lockhart v. United States, 460 U.S. 125, 134). Third, in cases such as Presley v. Etowah County Commission (502 U.S. 491), the Court limited the sweep of section 5 to cover voting practices and to remove questions about the efficacy of governance from the ambit of preclearance. Together these three considerations narrowed section 5 to questions that could be addressed through relatively mechanical assessments of voting practices. For example, the Beer retrogression test made it easy to decide that a districting arrangement in a town with a 20 percent black population that yielded one 45 percent black district (out of five) should not be precleared if the prior arrangement had afforded one district that was 65 percent black. The limitation on presumptive black electoral opportunity required little more than the sort of sixth-grade arithmetic that has its own allure in the voting rights jurisprudence (see Lucas v. 44th Gen. Assembly, 377 U.S. 713, 750).

The last two considerations turn out to be relatively unexplored in the literature. Both of these depended on the one-party feature of political life in the covered jurisdictions. The third precondition is that blacks in the historic Jim Crow South had no avenue of political redress. In the one-party South, the VRA served as a blunt tool directed to the failure of political competition. Not only were blacks largely disenfranchised, but even if able to vote, they could never aspire to be the influential
swing voters in a one-party political environment. So long as the Democratic Party remained unchallenged, and so long as that party was organized around the principles of resistance to any encroachments on Jim Crow, the political system would remain immune to the pressing claims of black citizens. The effect of the emergence of black voters was to force political parties to attempt to expand their political bases by appealing to the newly enfranchised black electorate.

Finally, there is the fourth precondition, which, to the best of my knowledge, had gone unnoticed in judicial and scholarly accounts of the VRA. As long as the South remained entirely Democratic, the tremendous powers given to the federal government to intercede in local political affairs in the covered jurisdictions could not be used for partisan gain. Section 5 served to ratchet black political power up at the expense of the encrusted white establishment of the Democratic Party. Until the reemergence of the Republican Party in the South, intervention from Washington could alter the racial dimensions of political power, but not the partisan divide. In paradoxical fashion, the more southern politics continued to be organized around the retrograde isolation and suppression of black political interests, the more enlightened and noble would be the intervention from Washington.

The question for today is whether the successes of the VRA have compromised its mission. No longer are blacks political outsiders in the covered jurisdictions. To take but a single example, the major Supreme Court cases of the past decade addressing minority representation, beginning with Shaw v. Reno (509 U.S. 630), have all arisen from claims of southern politics being too solicitous of minority political claims. As the responsiveness of southern legislatures to claims for minority representation reveal, the Supreme Court’s intervention in the Shaw cases notwithstanding and the Court’s nuanced treatment of Georgia v. Ashcroft (539 U.S. 461) confirming, the southern political process is highly attuned to black political claims. The presumption that Washington represents the only forum for safeguarding black political advancement is tenuous at best. Moreover, the development of real partisan competition in the South, and the clear identity of black interests with the electoral prospects of the Democratic Party, lend a partisan tinge to the intervention from Washington. It is not a surprise that the two section 5 inspired cases in the Supreme Court this the last round of redistricting, arising in Mississippi and Georgia, were heavily laden with charges of partisan misuse of the preclearance provisions of the act (for Mississippi, see Branch v. Smith, 538 U.S. 254; for Georgia, see Georgia v. Ashcroft, 539 U.S. 461). Those charges were already widely heard in the 1990s round of redistricting. In the post-2000 round, not only are those charges being raised again, but it is increasingly difficult to discern the positive role that the extraordinary powers of section 5 now plays.

RULES, STANDARDS, AND ADMINISTRATIVE PRECLEARANCE

Beginning with the Court’s first assessment of section 5 in South Carolina v. Katzenbach, one clear source of constitutional concern was the intrusiveness of
the VRA on local implementation of election laws that had long been seen as a matter of state prerogative. In the intervening decades, the Court has returned time and again to questions of federalism and has demanded far greater justification for federal incursions on matters traditionally reserved for the states. In light of the major federalism decisions of late, City of Boerne v. Flores (521 U.S. 507) and Nevada Department of Human Resources v. Hibbs (538 U.S. 721), it is certainly possible to revisit the Court’s acceptance of the constitutionality of section 5 dating back to the seminal cases of the 1960s and 1970s. Most notably, in City of Boerne the Court struck down the Religious Freedom Restoration Act (RFRA) on the grounds that the legislative record was insufficient to establish the need for federal intervention. As set out in City of Boerne, federalism constraints doomed the lack of “congruence and proportionality” of the act’s sweeping remedial scheme in light of the quality of evidence before the Congress. Although in reaching its decision the Court repeatedly distinguished RFRA from the VRA on the basis of the greater factual justification for the latter, the passage of time might bode poorly for a clear legislative finding of the continued need for section 5. Subsequently, in Hibbs, the Court appeared to back off the sterner implications of City of Boerne, indicating that it might very well carve out a protected area for discrimination concerns along the classic frontiers of suspect classes and leaving the exact constitutional standard to be applied unresolved.

Beyond the role of the congruence between specific fact-finding and the scope of section 5, however, its constitutionality may also be thought to rest on the parsimony of the administrative model it employs. It is difficult to read cases such as Beer and Presley without noting the Court’s penchant for defining the scope of permissible section 5 review to that which would be “straightforward,” to adopt the terminology of Beer. Although these cases arise as matters of statutory interpretation, ample authority supports the proposition that the Court’s statutory construction should favor rather than condemn the constitutionality of a statute. Likewise, there is authority for constraining the scope of more open-ended standards—as opposed to less discretionary rules—when placed in the hands of non-judicial actors. Indeed, this issue was presented indirectly in cases, such as Miller v. Johnson (515 U.S. 900), where the Court addressed the “limited substantive goal” of section 5 (926). In deciding that compliance with section 5 could not be a sufficiently compelling state interest to survive equal protection strict scrutiny, the Court refused to allow the administrative processes of section 5 preclearance to reach the multifactored assessments of constitutionality.

Although not addressed in constitutional terms, the issue of administrability surfaced directly in Georgia v. Ashcroft. It is difficult to imagine a setting as far from the initial concerns of section 5 as that of Georgia politics giving rise to the Ashcroft litigation. The issue was whether preclearance should be granted to Georgia’s post-2000 redistricting of its legislative districts. Rather than use section 5 to protect against any diminution of concentrated black political power, the new version of the Georgia Democratic Party, with full participation of the now significant black political establishment, sought to capitalize on its control of redistricting to expand the political impact of the black vote. Indeed, the underlying plan
had been brokered by legendary civil rights veteran John Lewis, now a senior Democratic congressman from Georgia, in an effort to maximize the political clout of the state Democratic legislative delegation and to allow for blacks among the ranks of legislative committee chairs. As described by the Supreme Court,

the new plan therefore “unpacked” the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts, drawing 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30%-50%, and 4 other districts with a black voting age population of between 25%-30%. When the Senate adopted the new plan, 10 of the 11 black Senators voted for it. The Georgia House of Representatives passed the plan with 33 of the 34 black Representatives voting for it. No Republican in either body voted for the plan, making the votes of the black legislators necessary for passage. (Georgia v. Ashcroft, 539 U.S., 470–71)

The key to the Senate plan was, in the Court’s words, to “unpack” the black concentrated districts, spread the black vote around more Democratic districts, and actually increase the number of districts that were majority black in voting age population (Georgia v. Ashcroft, 470–71). At the same time that the new Senate plan sought to leverage black political strength, it also diminished the locked-in protections of the overwhelmingly black concentrated districts. The question, therefore, was whether this dispersal of concentrated black voting power was retrogressive under the well-established Beer standard. Further, so long as the question was whether there was an arithmetic diminution in the number of clearly black-controlled districts or in the level of black concentration in those districts, the answer seemed foreordained.

The striking feature about Ashcroft was the willingness of the entire Court to abandon the formal Beer standard for retrogression in favor of a more nuanced assessment of the on-the-ground political realities of a jurisdiction. Under Beer, preclearance was limited to a mandate “that the minority’s opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State’s actions” (Bush v. Vera, 517 U.S. 952, 983, emphasis omitted). Even a plausible claim of discriminatory effect was not deemed to be an appropriate basis for the interposition of a DOJ objection under section 5, so long as the rather mechanical standard of nonretrogression was satisfied—permitting a change that simply perpetuated the existing, arguably discriminatory, situation because “although there may have been no improvement in their voting strength, there has been no retrogression either” (City of Lockhart v. United States, 135).

Justice O’Connor introduced a new test for section 5 that turned on the totality of the political factors that might affect minority political—as opposed to narrowly electoral—prospects. Thus, even diminished numbers of minority elected officials could survive preclearance because “maintaining or increasing legislative positions of power for minority voters’ representatives of choice . . . can show the lack of retrogressive effect under § 5” (Georgia v. Ashcroft, 539 U.S. 461, 484). The clear implication is that the preclearance process should be faithful to the nuanced preferences
of minority voters who might sensibly favor having fewer, but more powerful, legislative representatives to more, but less powerful candidates who would face legislative marginalization. The empirical foundation for this inquiry might include facts as disparate as the seriousness and financing of minority preferred candidates approaching the election and the relative power that they might hold in legislative caucuses after the election. The plurality devoted careful attention to the complexities of Georgia politics, holding that, by contrast to the mechanical retrogression test from Beer, “the ability of a minority group to elect a candidate of choice remains an integral feature in any § 5 analysis” (484).

No reading of the plurality opinion in Ashcroft can fail to recognize that the Court substituted a highly nuanced totality of the circumstances approach for the relatively rigid Beer retrogression test. Significantly, Justice O’Connor claimed authority for this rendering of section 5 not from any of the preclearance case law, but from her concurrence in the defining case under section 2 of the Voting Rights Act, Thornburg v. Gingles (478 U.S. 30, 87–89). The difference between the two sections of the VRA is significant. As set out, section 5 is an administrative mechanism designed to lock in place the status quo, unless the legislature demonstrates that no proposed changes have a retrogressive effect. By contrast, section 2, as amended in 1982, provides for a plenary adjudication of whether a particular electoral practice, such as the use of multimember election districts, is actually discriminatory and should be struck down. Rather than assume the benchmark of the prior electoral practice, as under section 5, the test for unlawful minority exclusion under section 2 asks whether, under the totality of the circumstances, a challenged election practice results in minorities having an equal opportunity to participate in the political process. Justice O’Connor’s view of section 2, as set forth in her dissent in Gingles, resisted the primary focus on polarized voting practices in a particular jurisdiction and instead argued for a much broader inquiry into the entirety of the political factors that promote or resist minority electoral ambitions. Ashcroft provided the means for resurfacing that approach, although now in the administrative posture of section 5 rather than the direct litigation under section 2.

For the dissent in Georgia v. Ashcroft, the abdication of Beer was grudging and went only so far as to repudiate the per se implications of Beer for any reduction in the number of majority-minority districts in a covered jurisdiction (539 U.S., 494–95). But the introduction of broad-range review prompted what is, in my view, the strongest aspect of the Souter dissent. For Justice Souter, the lack of administrability of the Court’s refashioned section 5 is a major unwinding of the statutory scheme. In the first instance, Justice Souter claims—no doubt correctly—that it is unlikely that Congress ever envisioned Justice O’Connor’s test for retrogression. Although true, this is hardly an argument-stopping claim. Voting rights law is liberally strewn with Court innovations that are either subsequently tacitly adopted by Congress—the Beer standard itself—or, as with the test for vote dilution in Gingles and in Johnson v. De Grandy, crafted wholly by the Court to bring order and lend coherence to a messy legislative compromise.

More significant yet may be the parade of horrors associated with the fact that historically section 5 has drawn its force from the ease of administration of a
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relatively mechanical test for diminution of black electoral concentration. So long as the prototypical harm was defined as keeping black votes concentrated below the level necessary to elect a minority candidate to office, and so long as this harm was defined independently of the extent of polarized voting or turnout or other complicated factors, administrative review by the Department of Justice (DOJ) could be accomplished within the regulatory timeframe and allow elections to proceed if precleared.

GEORGIA BY WAY OF NEW JERSEY

The focus on the administrability of section 5 helps illustrate the underlying difficulty in fashioning a statutory design that can account for the nuances of a competitive political process. In moving section 5 from a bright-line rule under Beer to an assessment of the competing political considerations in securing effective black representation, the Court introduced to section 5 for the first time the fine-grained calculus of trade-offs of political influence versus descriptive representation. The earlier view of the VRA is well summed up by Judge Harry Edwards in concurrence in the Ashcroft trial court: “Our dissenting colleague argues that § 5 is satisfied whenever a covered jurisdiction adopts a plan that preserves an ‘equal or fair opportunity’ for minorities to elect candidates of their choice. This is not an accurate statement of the law” (Georgia v. Ashcroft, 195 F.Supp.2d 25, 97).

Judge Edwards well captures the central tension in the current application of section 5. So long as the preclearance requirement is limited to mechanical inquiries, and so long as the ability to provide an “equal or fair opportunity” for minority electoral success is not a factor in the preclearance equation, the Beer standard could work well as a matter of administrative law. As soon as effectiveness of representation and totality of circumstances are added to the mix, however, the simple regulatory regime begins to break down. The clearest example of this comes by way of comparing the record presented in the Georgia litigation to Page v. Bartels (144 F.Supp.2d 346), a Republican challenge to the 2001 redistricting of New Jersey.

At issue in Bartels was a redistricting plan that sought to maximize minority political leverage by reducing the number of safe seats for minorities and the claim was that this diluted minority voting strength. Bartels, however, was litigated under section 2 of the Voting Rights Act and thus required an assessment of the totality of factors affecting minority voting prospects in New Jersey, not simply a determination of whether the plan was retrogressive in diminishing minority voting concentrations. The district court, operating under section 2, found that the plan “as structured will encourage franchise participation of New Jersey voters, including African-American and Hispanic voters, and will do so without diluting or impairing minority participation” (Page v. Bartels, 369). Rather than apply a mechanical assessment of the percentage of minority voters in districts before and after redistricting, the New Jersey court assessed the electoral prospects of minority preferred candidates under an intensely local examination
of political conditions. The contrast between Judge Edwards’s rendition of the objectives of section 5 of the Voting Rights Act and the Bartels court’s assessment of VRA standards is directly tied to the operative differences between section 2 and section 5. Whereas section 2 claims are held to a threshold of proof of actual diminution of an effective opportunity to elect, section 5 locks in—at least until Ashcroft—a simple quantitative definition of minority concentrations in specified districts. Although the legal regimes under which Ashcroft and Bartels operated may have been different, the factual issues of the cases were similar. Thus, a comparison of the fact record highlights the troubling effects of section 5 rigidity in a more fluid and more competitive political environment.

The challenged aspects of the Bartels plan involved the reconfigured boundaries of four districts in northern New Jersey: Districts 27, 28, 29, and 34. Under the previous (1991) districting system, the percentage of white (WVAP), black (BVAP), Hispanic (HVAP), and total minority voting age populations (MVAP) were as presented in table 6.1.

The most salient feature of the Bartels plan was the proposed decrease in the black voting age population in the three districts in which they were in a majority, such that they would find themselves in the minority in all four districts. The reconfigured boundaries shifted the voting age populations as presented in table 6.2.

The Bartels plaintiffs claimed that the decrease in the black voting age population would, in the presence of racially polarized voting, chill minority participation, and frustrate the purposes of the VRA. These claims were buttressed by ample voting rights case law suggesting that districts with minority concentrations between 40 percent and 55 percent almost embodied minority vote dilution. The district court, however, credited testimony on the strength of interracial political

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coalitions and found that more competitive, less packed districts, “would increase minority election opportunities over the next ten years” (Page v. Bartels, 366).

The factual scenario at issue in Ashcroft is not unlike that of Bartels. The Georgia Senate’s redistricting plan in Ashcroft likewise “unpacked” several districts where minority voters constituted the majority of eligible voters, reducing their strength in all but one district to just over 50 percent. At the same time, however, the proposed redistricting plan increased the strength of minority voters in other “influence” districts, where they would have a reasonable chance of electing candidates of their choice. At bottom, the question in both the Georgia and New Jersey cases was 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. The New Jersey court refused to read section 2 of the VRA as rendering inviolable the concentration of black voters into districts with guaranteed black descriptive representation achieved at the expense of the emergence of politically viable cross-racial coalitions. A quick look at the numbers in Georgia reveals the similarity of the question posed there under section 5 to that presented under section 2 in New Jersey. Table 6.3 lists both the percentage of the black voting age population (BVAP) in the relevant state senate districts under the existing districting plan, which served as the benchmark against which the proposed redistricting plan was developed, and the percentages in the new challenged districts under the proposed plan (Georgia v. Ashcroft, 56).

In comparing the redistricting plans challenged in Ashcroft and Bartels, one sees the similarity in the proposed percentage decreases in minority population from the original districts to the reconfigured districts in both plans. Both significantly reduce black concentrations in previously safe majority-minority districts. Both create districts that under preexisting voting rights law would be almost exemplars of dilutionary arrangements. Notably, however, the Bartels plan maintains the greatest deviation in the percentage of black voting population from an existing to a proposed district: new District 27 under the Bartels plan experiences a 25.3 percentage net decrease of black voters from the former 1991 districting plan. Conversely, under the redistricting plan in Ashcroft, the Senate district that anticipates the greatest decrease in black voting age population is District 22, with

<table>
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<th>Georgia Senate District</th>
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<th>BVAP under Proposed Plan</th>
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<td>26</td>
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Source: Georgia v. Ashcroft, 195 F. Supp. 2d 56.
a 12 percentage point net reduction from its predecessor district. The fact that the
redistricting plan in Ashcroft did not propose decreases at the same rate as those
upheld in Bartels only reinforces the impact of the more mechanical section 5
restrictions compared to section 2.

Moreover, the trial presentations in Ashcroft virtually mirror those in Bartels.
Expert witnesses for the United States in Ashcroft testified to the existence of
racially polarized voting in the challenged Senate districts, making it “close to
impossible for an African American candidate to be elected” in at least one of the
proposed districts (Georgia v. Ashcroft, 61). The United States also offered expert
testimony based on the now standard regression analyses used in voting rights
cases to further describe racially polarized voting patterns and the minimal
amount of “white crossover” (70). Despite Georgia’s criticism of the regression
analysis because it only considered the level of white crossover voting, and the
testimony of Georgia’s expert witness, based on alternative statistical analysis, to
support the contention that the proposed redistricting plan did not have a retro-
gressive effect, the court nonetheless concluded that it did:

In sum, then, just as cross-racial coalition-building . . . can allow smaller numbers to
extend great influence, so too can its antitheses, racial-bloc voting, allow a drop in
numbers to become a retrenchment of power. Thus, the more we find evidence of
racial polarization in the disputed Senate districts, the more we are persuaded that
Georgia has failed to meet its burden of proving that the reductions in African
American populations in those districts and in other majority-minority districts has
not lessened the ability of its African American voters to effectively exercise their
collective right to vote. (78)

Just as in Bartels, supporters of the Georgia redistricting plan marshaled lay tes-
timony from legislators to demonstrate black support for the redrawn districts
and for the contention that the plan did not have a retrogressive effect. Incumbent
African American senators confirmed that they “believed the plan gave them and
others a ‘fair’ or ‘reasonable’ chance of victory in the redrawn districts” (Georgia
v. Ashcroft, 89). But, unlike the court in Bartels, the Ashcroft court rejected such
arguments, declaring that the “retrogression analysis does not ask if a proposed
district is ‘fair’ or whether a possibility exists that a minority preferred candidate
would be elected” (91).

The different outcomes in Georgia (in the district court) and New Jersey ulti-
mately turned on three factors. First, under section 5, Georgia bore the burden of
proof and had to overcome the presumption that its redistricting objectives were
antithetical to black interests. Second, the courts differed on the conception of
polarized voting. For the Ashcroft district court, polarized voting emerges as a yes-
no lever. Its presence under section 5 buttressed the presumption that any diminu-
tion in minority concentrations would be retrogressive and a violation of the act. In
Bartels, by contrast, the court appears more faithful to the Gingles language con-
cerning the existence of legally significant polarized voting. This term appeared for
the first time in Justice Brennan’s plurality opinion in Gingles and has not yielded
much case law elucidation (Thornburg v. Gingles, 55–58). Under this approach, the question is not whether black and white voters show distinct preferences at some level of statistical significance, a question that is likely to be answered in the affirmative in just about any jurisdiction in the United States, but whether such differences in voting patterns compromise black ability to stand a reasonable chance in the political process overall. For the Bartels court, this approach meant providing minority voters in the redrawn districts with “a reasonable opportunity to elect candidates of their choice” (362). For the Ashcroft court, by contrast, any type of equal chance or political fairness approach was inconsistent with the stringent demands of section 5. The court would deny preclearance even if the effect of such denial was a predictable overall diminution of black political prospects, and even if the plan in question was not imposed on black voters but emerged as the product of intense negotiations in which black representatives were active and critical participants. Third, the courts differed in their assessments of the objectives of the Voting Rights Act sections they confronted. The Ashcroft court, consistent with the overwhelming bulk of section 5 case law, viewed the act as a bulwark against change. The presumption had to be that of black exclusion, and the test therefore was whether black political enclaves had been adequately protected. By contrast, the Bartels court embraced a totality of the circumstances approach to assess whether the plan short-circuited black political aspirations or fairly offered a meaningful prospect for influence in an increasingly integrated political environment.2 As a result of these three factors, despite the factual similarities between the two cases, the outcomes were diametrically opposed.

POLITICS WITHOUT SECTION 5

Leaving aside for the moment the difference between the legal burdens imposed by sections 2 and 5 of the Voting Rights Act, it is impossible to examine the facts presented in New Jersey and Georgia and not be struck by the similarities. I believe that it is difficult to endorse the outcome in Bartels as a matter of protecting black political opportunity, yet side with the district court majority in Ashcroft in condemning the political deals realized in Georgia. Further, I want to suggest that the Supreme Court, by bringing the outcome of the section 5 analysis into conformity with the section 2 result in Bartels, may have seriously compromised any possible administrative application of the preclearance requirement.

The next step, therefore, is to pursue the implications of these two observations. What does it mean that the act as previously applied appears to hamper the very type of coalitional politics that traditional defenders of minority voting rights so adamantly fought to protect in New Jersey? Further, what is the effect of compelling the bureaucratic and intrusive section 5 preclearance mechanism to take account of increasingly fine-grained distinctions in the political realities of covered jurisdictions? In sum, have the altered political environment and the compromised administrability of section 5 done more than call into question its constitutional moorings? Have they also forecast its disutility as a matter of policy?
These questions point us decidedly away from constitutional law and direct us instead to fundamental questions about the relationship between law and politics. Section 5 of the VRA is a strong variant of what is often termed the Carolene Products view of antidiscrimination law (United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4). Although section 5 is obviously a product of congressional rather than court generation, it shares with Carolene Products' equal protection law a presumption that a discrete and insular minority group cannot turn to the normal operation of politics to protect its interests. As Justice Souter would have it, the assumption that the normal gives and takes, the obligation and opportunity to “pull, haul, and trade to find common political ground,” should not apply to a particular group itself requires some level of exacting scrutiny (Johnson v. De Grandy, 1020).

I conclude with three points. First, there appears to be little reason to believe that the law should continue to treat blacks in Georgia distinctively from blacks in New Jersey. The effect of the Supreme Court's decision in Ashcroft is to try to equalize the treatment within the confines of section 5. I suspect that administrative implementation of the Ashcroft standards will not be possible and that this administrative impossibility will put renewed pressure on the policy justifications (and the constitutional rationale) for section 5. But Ashcroft does more than just make implementation difficult. The decision creates a dilemma for advocates of the continuation of section 5. To the extent that the decision is seen as an improper construction of section 5, then the exact basis for the continued administrative subordination of politics in Georgia has to be made clear. Put bluntly, why should black voters of Georgia not be permitted the same degree of political opportunity to form coalitions as black voters of New Jersey? Conversely, to the extent that the decision is accepted as properly advancing a correct interpretation of section 5, what justifies the extraordinary administrative mechanism that operates to reproduce, within a compressed and rigid time frame, the protections and scope of section 2 in Georgia but not New Jersey?

Second, the New Jersey litigation points to a deeper concern about what it means to have properly functioning politics. One way of understanding the tension between the district court decisions in Bartels and Ashcroft is to focus on the nature of the assurance owed to black voters by the respective provisions of the VRA. The New Jersey court accepted the claim that blacks were owed only a fair chance to form coalitions and have a reasonable opportunity to prevail electorally. By contrast, the Georgia court asked for guarantees of minority electoral success, which in turn translated into the maintenance of packed minority districts. The effect of Ashcroft is to put pressure on a traditional weakness in the structure of section 5. As originally conceived in terms of a suspension of literacy tests followed by administrative obstacles to the reestablishment of such tests, section 5 was fairly confined to questions of eligibility to cast a vote. Preclearance acted only to ensure individual abilities to vote in the face of the overwhelming obstacles inherited from Jim Crow.

Beginning with Allen v. Board of Elections, however, preclearance expanded to the effectiveness of the franchise. This was arguably of greater importance in
advancing black electoral opportunity than even the dismantling of literacy tests. But Allen introduced an administrative presumption that the electoral mechanisms routinely used in other parts of the country were inherently suspect if adopted by southern jurisdictions faced with newly enfranchised blacks. I do not intend to echo the arguments of Abigail Thernstrom against this important extension in Allen (Thernstrom 1994, 1995). My claim is only that once section 5 was used to reach electoral mechanisms based upon the likely distributional effect on black electoral success, there was always a risk that a constricted view of permissible political outcomes would infect the preclearance process. I am not the first to express concern that a narrow focus on securing the electability of minority candidates could constrict the range of political accords available to minority voters and thereby, under conditions of mature political engagement, actually thwart minority political gains. This is a claim that others, such as Carol Swain, have raised in the past (1997). Much in this debate turns on a difficult empirical assessment of when minorities become full players in the political process. But it is possible to express the problem in terms of the tension between two of the operative notions in the Carolene Products footnote. On the one hand, the Court’s famous formulation invokes the principle of special solicitude (granted judicial and not congressional, but I wish to leave that to the side) arising out of discrete and insular status. But, at the same time, this is coupled with the idea that the special solicitude is not simply the product of discreteness, but of the inability to seek redress through the normal operations of the political system. One way of reading Ashcroft is to see the Court suggesting 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.

Further, what is perhaps most remarkable about Ashcroft is the Court’s willingness to consider that black electoral prospects in Georgia could not be divorced from the partisan battles for legislative hegemony. Only a few years earlier, in Easley v. Cromartie (532 U.S. 234), the Court held to the fleeting hope that it could ground constitutional doctrine on hermetic seals between considerations of race and partisanship in North Carolina (257–58). In Easley, the last of the Shaw line of cases, the Court found that racial considerations did not predominate in drawing a minority-concentrated district on the grounds that partisanship had also been at play. Ashcroft implicitly rejects this approach in favor of assessing racial impact as inextricably tied to overall political opportunity, a consideration in which partisan representation is an inescapable component. In so doing, Ashcroft looks to the competitive fires of realigned southern politics to find powerful allies for black interests outside external legal intervention. In contemplating that partisan competition may erode the traditional forms of section 5 review, the Court invites further inquiry into whether the administrative model of preclearance captures the protections necessary in jurisdictions with active partisan competition (see Issacharoff and Pildes 1998). Or, at the very least, Ashcroft calls into question the continued utility of section 5 for those types of front-burner political decisions (as with redistricting) where political vigilance is likely to be intense.
Third, so long as the South was solidly Democratic, there was little partisan gain available from controlling the levers of preclearance. The original scope of the act was directed primarily to voter eligibility. Although in the aggregate bringing black voters into the political process was likely to alter electoral outcomes, my sense is that relatively few preclearance decisions were likely to be directly outcome determinative. This is a debatable point that may turn on how outcome determinativeness is defined. I suppose that cases involving municipal annexations, or a change in voting from districted to at-large elections, could be categorized as outcome determinative in some indirect sense. But I want to suggest that using preclearance for districting configurations following the decennial census dramatically increases the ability to use preclearance to affect the projected outcomes in terms of partisan representation. I would further suggest, without empirical support as such, that whatever partisan gain might be had from preclearing or failing to preclear the relocation of voting booths or the change in hours of voting, it is unlikely to be obvious or significant enough to prompt the intervention of political actors. This again raises the question whether the continued application of section 5 might be divided into the administrative side of voting access, where partisan vigilance is likely to be more lax, and matters of extreme partisan concern, such as redistricting, where partisan vigilance is not only likely to be high, but likely to tempt the purported guardians on high in Washington.

A DIFFERENT ADMINISTRATIVE MODEL?

The symbolic command of the VRA makes it unlikely that the regulatory structure of section 5 will change significantly. But what if we were starting afresh, without the inherited forms of section 5? It is unlikely that the regulatory response would be so heavy-handed, so much in the disfavored command-and-control model of this historically grounded and extraordinary statute. For example, the other chapters in this volume document that the burdensome requirements of submission and the elaborate infrastructure at the Department of Justice have led to a vanishingly small number of actual objections. The bail-out provisions remain onerous and essentially unusable in any state where the entire state is covered. This is not by accident. The very purpose of the act was to thwart change and to be burdensome in designated areas of the country, to place them under onerous administrative oversight.

But what if the huge oversight apparatus over the “lower bound” of access is subjected to some form of cost-benefit analysis? Would the trivial number of objections justify the cost of compliance? What if the prime voting rights concerns are not changes as such, but matters such as election day administration and felon disenfranchisement, and malfunctioning voting machinery and a host of issues outside the purview of section 5? What if the places of concern are as likely to be Ohio as Alabama? What if the “upper bound” concerns about proper distribution of political power implicate DOJ in a series of problematic, partisan-infused processes?
any or all of these begin to hold sway, then perhaps the inherited administrative model does not well fit the modern era.

To give but one alternative, imagine an administrative model based on the Securities and Exchange Commission (SEC) rather than the Food and Drug Administration (FDA). Whereas the FDA model requires prior approval and onerous testing before a new drug is brought to market, the SEC primarily serves to compel disclosure that can subsequently be used by private parties to challenge misrepresentations or fraud. An SEC model would reduce DOJ’s role to the maintenance of a Web site where jurisdictions would submit any changes made to voting-related activity the model was implemented. The disclosure would include the reason for the change—as for example the change of a polling site because a flood had washed out the old polling place. Challenges would be on an after-the-fact basis, but on one of two grounds. Plaintiffs could claim that the changes violated the substantive provisions of section 2 or they could challenge the disclosure as being false. False disclosures would bring administrative penalties, attorneys’ fees, and a ratcheted set of responses aimed at imposing greater and greater administrative receivership for misperforming jurisdictions. As set out in Heather Gerken’s chapter in this volume, this form of “responsive regulation” far better fits the diminished sense of urgency of the original issues from 1965.

The purpose of this discussion is not to give a full accounting of possible alternative regulatory models. Rather, the point is to show how the further we come from the conditions giving rise to the section 5 preclearance model the more attenuated it seems from the voting rights issues now on the table. Were the act to be designed from scratch today, it is difficult to imagine something as cumbersome and intrusive as the current administrative model being the administrative mechanism of first choice.

CONCLUSION

I began with an examination of the changed political environment that has eroded the preconditions for the success of section 5 of the Voting Rights Act. The emerging conclusion is 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 Voting Rights Act was passed in 1965. I further suggest that the combination of an administratively complex standard emerging from Ashcroft together with the strengthened world of partisan competition has called into question the continued utility of administrative preclearance—or at least of preclearance in the world of first-order political decisions such as redistricting.

What remains unanswered is what would happen in the absence of section 5. Would blacks still have the same bargaining power or might partisan protection erode in the absence of the special attention that preclearance continues to offer? Professor Karlan, in supporting the continued importance of section 5, argues that the political gains registered by black voters in the South over the past forty years “have all occurred in the shadow of section 5, which has given minority voters and
their representatives an invaluable bargaining chip” (2004, 36). If the burden for change is certainty of outcome, then the status quo always prevails. My suspicion is that the combination of section 2 of the VRA, the protections of the Fourteenth Amendment, and the fact of being in the process and at the table would afford much protection. Whether this combination is enough, absent section 5, is certainly debatable. What seems less unclear, however, is the mischief that section 5 can play in stalling coalition politics and inviting politically inspired interventions from outside the covered jurisdictions.

NOTES

1. The Court described an expert’s conclusion that the “point of equal opportunity is 44.3% BVAP, which means that ‘there’s a 50-50 chance of electing a candidate of choice’ in a district with an open seat and with 44.3% BVAP” (Page v. Bartels, 66).

2. For example, the court stated that evidence showing that “African-Americans and Hispanics often vote in support of each other’s candidates” in the challenged districts was significant in assessing the political opportunities of both groups (Page v. Bartels, 362).

3. For a more optimistic account of the ability of the Department of Justice to integrate Ashcroft into an enforceable administrative framework, see Meghann Donahue (2004).

4. For the most current account of the impact of packed minority districts on increasing Republican gains in the South and diminishing the legislative influence of minority legislators, see David Lublin (2004).

CASES CITED

The Future of the Voting Rights Act


REFERENCES

The enactment of and subsequent amendments to the Voting Rights Act of 1965 (VRA) were critical moments in the evolution of contemporary American election law. The VRA’s dramatic impacts upon the transformation of southern politics, the enfranchisement of the African-American community and the rising power of Latinos in the West are well-documented. (Davidson and Grofman 1994; Kousser 1999). In 2007, the Congress must consider whether section 5, a critical component of the VRA, should be renewed. Many varied considerations—political, legal, and symbolic—will ultimately determine the prospects of section 5 renewal and of any amendments to it that might be considered as well. But on the merits, the critical public policy questions are as follows: what were section 5’s goals; did it achieve those goals; if yes, how did it achieve those goals; and assuming those goals are still valid, will section 5 in its current or some amended form still be needed in the future?

The focus of this paper is on the third question. While the VRA’s goals generally, and section 5 specifically, have evolved controversially over time through legislative amendments and court interpretations (Thernstrom, 1979, 1987; Swain, 1993), it has always in the broadest sense been about enhancing participation and representation opportunities for racial and ethnic groups that have experienced past political discrimination. Where there have been attempts to measure the progress on both goals, there has been less scholarly consideration of how the law was enforced and why it was effective, with some exceptions, such as Frank Parker (1993).

Laws must be interpreted and then applied to particular facts and circumstances by the relevant government agencies and then reviewed by the courts. In the case of the Voting Rights Act, there were multiple interests involved in its implementation, maneuvering within a significant amount of ambiguity in the legislative language and congressional intent. Voting rights attorneys, and in some periods, the Department of Justice (DOJ), developed more expansive interpretations of the law that pushed jurisdictions to do more for protected groups than they might have done otherwise or that they thought they had to do under their reading of the law.
In some cases, affected jurisdictions, at least initially, interpreted their VRA obligations too narrowly and invited section 5 objections from the DOJ. The federal courts were left with the task of resolving these differences and, along the way, shifted the focus, applicability, and evolution of section 5.

In this chapter we look at the issues and problems of VRA enforcement, focusing on several themes. First of these is that risk aversion drives much of the nearly universal compliance with the VRA. The political and fiscal costs of noncompliance are high, more often than not significantly higher than the costs of compliance, and, in that context, affected jurisdictions prefer certainty and simple rules. The high level of compliance and the pattern of Justice Department objections reveal that after a period of learning that usually followed shifts in court doctrine, most jurisdictions had no trouble figuring out what they had to do to get preclearance for their voting changes. The VRA falls between the extremes on a specificity continuum that stretches from the certainty and simplicity of the “one person, one vote” rule to the more ambiguously defined political gerrymandering standard. The desire for certainty has driven some proponents to advocate for formal rules and empirical rules of thumb that sometimes lack the flexibility to achieve the best outcome in particular situations. In the face of new political and demographic circumstances, simple formulae became harder to apply, and the court has retreated to a more flexible standard (for example, Georgia v Ashcroft, 559 US 461). The high level of compliance from communities with electoral histories that were suspect enough to warrant covered jurisdiction status as well as the growing strategic divisions between legal and political elites raises serious questions about the role that a renewed section 5 should play in the future.

ENFORCEMENT, UNCERTAINTY, AND RISK- AVERSE COMPLIANCE

For those individuals in local communities and the states who must figure out how to comply with Voting Rights Act requirements, a critical consideration is the clarity of the rule or standard they are working under. Until they are briefed, many legislators and staff know little or nothing about the provisions of the act and how it might constrain their line-drawing and other electoral decisions. Inevitably, lawyers who advise covered jurisdictions over the likely legality of a proposed redistricting or procedural change have become central to the political process, because localities and states have learned that mistakes in interpreting the Voting Rights Act can cost a lot in litigation and other expenses (for example, paying consultants to redraw lines). Many small local jurisdictions rely on their city or county attorney’s office to read the relevant case law and interpret its meaning to their elected officials and staff. State legislatures and large cities with diverse populations can more often afford to retain outside counsel from the ranks of specialists in voting rights law. Jurisdictions that have had section 5 problems in the past or have good reason to feel vulnerable in the present will also hire demographic experts as an insurance plan of sorts, reasoning that it is cheaper to
retain and rely on experts during the redistricting process than to be sued for mistakes down the line. Hiring experts also sends a message to the potential opponents that the defense of any new redistricting plan will be taken seriously. These legal briefings and expert analyses provide a framework of permissible action. In addition, the NCSL and other organizations have done a good job of providing educational briefings and materials on the VRA and relevant federal redistricting law in advance of the new census.

In redistricting, line-drawers, who are not usually lawyers, want to know what they must do to comply with the federal law. The less nuanced and ambiguous the legal advice is, the happier the line-drawers are likely to be, quite apart from whether they agree or disagree with the intent of the law. Risk aversion is the motor of VRA compliance. Few if any jurisdictions intentionally set out to test the limits of case law. Especially in cases when the local city or district attorney advises the redistricting authority, risk aversion is the name of the game as the goal of local legal professionals typically is to minimize lawsuits. In some cases, carrying legal insurance can lessen a community’s risk aversion. In general, however, it is too expensive and disruptive of normal electoral and legislative business to risk the prospect of having the DOJ or a federal court overturn a redistricting plan that needs to be in place for the next election, or to postpone proposals for changing the method of election or annexing new areas that have been widely vetted in the community. Filing deadlines and campaign logistics put pressures on legislators and commissions to finish their work in a timely fashion. Moreover, incumbents at all levels prefer the lines they draw themselves to ones imposed on them by third parties such as the courts. The incentives overwhelmingly are to do what is necessary to avoid being sued and overturned.

One measure of the high degree of VRA compliance is the fraction of section 5 objections out of the total number of submissions. If many jurisdictions are getting objection letters, or are finding themselves in repeated violations over the year, it would suggest that compliance is difficult, either because jurisdictions are confused about the law or because they are willing to challenge the law. On the other hand, if the odds of getting objection letters from the Department of Justice are low, then we can infer that jurisdictions seem to understand the law and are able to comply with it.

Evidence for this can be found in the three graphs we have compiled from the Justice Department’s STAPs (submission, tracking, and processing) reports. The first, figure 7.1, displays the volume of section 5 submissions over time from 1965 to 2005. The submissions are clustered into four types: redistricting, annexation, ballot access and method of election. The second, figure 7.2, displays the objections by year and type, and the third, figure 7.3, the percentage of objections by category, specifically the number of objections divided by the number of submissions of a given type.

The patterns in the data reveal the following. Overall, the number of submissions increased dramatically after the VRA renewals and changes in 1975 and 1982 as more covered jurisdictions were added and as the definition of potential violations expanded. Redistricting submissions, our particular focus here, seem to follow an
especially predictable pattern. Because redistricting regularly occurs after the new census numbers are released at the beginning of every decade, submissions peak in the first three years of that decade. In the latest redistricting round, for instance, there were only forty-nine submissions for redistricting preclearance in 2000, the year of the census, but 985 in 2001, and 1138 in 2002. Of all the redistricting submissions from the covered jurisdictions, the Justice Department objected to only four in 2001 and sixteen in 2002. So the odds of failing preclearance were respectively less than 1 percent and 1.4 percent. At the height of the Gingles era—Thorburg v. Gingles (478 U.S. 30)—in the late 1980s and early 1990s, when arguably the level of DOJ scrutiny was greater, the redistricting objection rate was only slightly higher (7 percent in both 1991 and 1992). Leaving aside for the moment the significance and explanation for the small rate change between decades, the objection rates are very much consistent with our contention that most jurisdictions attempt to comply and make changes in district lines without running afoul of the Justice Department.

The patterns for nonredistricting-related submissions are not as regularly cyclical, but the general conclusions about rejection rates hold. The most common submissions are new annexations, polling place and precinct changes, and issues around special elections. This pattern has changed little since 1982. The failure rate of submissions has been very low (in recent years 1 percent or less) and has dropped a little since the early 1980s.

Turning to the question of why the low rates of rejection in the 1970s and 1980s become even lower in the late 1990s, there may to some extent have been a kind
of “learning” taking place. The highest rejection rates were in the earliest years (around the 1970s). These stabilized and dropped by the early 1980s and dropped again in the late 1990s. This could be learning in the sense that the pattern is consistent with the hypothesis that the covered jurisdictions might have been more willing to challenge the law or were more confused about its interpretation in the early years and less so in the later years. It is also possible that the part of the administration accounts for this to some degree, given that the largest drops came between the Carter and Clinton administrations, but the data do not suggest that party of the executive branch alone accounts for the decrease. Redistricting objection rates, for example, dropped in the second Clinton administration as well. Quite likely, the court decisions of the mid-1990s—Shaw v Reno (509 U.S. 630) and its progeny cases—restrained the Department of Justice from pursuing the aggressive affirmative action positions it had taken in previous years.

Another important question is whether there are many repeat offenders and whether most jurisdictions, after receiving one letter, never receive another. Looking at the number of objections received by the counties from 1968 to 2005, we see that a little over half of the counties (55 percent) that received objection letters got two or more over this time frame. Forty-nine received five or more, and four received ten or more: Harris County in Texas (thirteen), Dallas County in Alabama (ten), Grenada County in Mississippi (ten), and Charleston County in

Source: STAPS Report, Department of Justice.
South Carolina (ten). This suggests that though most are complying, certain areas of the country still run repeatedly afoul of the Voting Rights Act. The existence of frequent offenders underscores the value of having covered jurisdictions. Some areas of the country are still struggling with providing equal voting opportunities for protected minority groups, and need to be scrutinized more carefully than others. These problematic areas are concentrated in the South. The only areas outside that South that appear on the list of those with five or more objection letters are Apache County in Arizona and New York City.

CHARACTERIZING VOTING RIGHTS UNCERTAINTY

Noncompliance is sometimes caused by uncertainty as to what is expected of covered jurisdictions. The uncertainty level in VRA enforcement lies between the more rule-like certainty of the one person, one vote doctrine and the ultimately unenforceable and ill-defined political gerrymandering standard. In the case of one person, one vote, the Court arrived at a relatively simple, straightforward rule fairly quickly. Districts had to be drawn to be as nearly equal as possible using the new census numbers. Calculations of the ideal population and total deviation were easy to perform, and the data needed for them were mostly reliable. There have been legitimate concerns about the census undercount in every decade, but in turn the Census Bureau has worked hard to correct this problem: for example, by increas-
ing spending on Census 2000 outreach to populations that are often missed. Undercount is a serious problem since it disproportionately hits poor and disadvantaged communities, but the new census methods have greatly decreased the size of the problem (Persily 2001). The courts also had issues to resolve concerning the differences between the maximum population deviations for congressional versus state and local legislative seats in a series of cases in the late 1960s and early 1970s such as Kirkpatrick v. Preisler (394 U.S. 526), White v. Weiser (412 U.S. 783), Swann v. Adams (385 U.S. 440), Abate v. Mundt (403 U.S. 182), Mahan v. Howell (410 U.S. 315), and Gaffney v. Cummings, (412 U.S. 735). The litigation on this question diminished considerably by the early 1980s, in part because the courts had clarified the issue (for example, congressional districts had to be mathematically equal but there was some room for more flexibility in the standards for state and local districts), but also because many state and local jurisdictions adopted very small maximum allowable deviations into their redistricting guidelines, charters, and codes just to be safe.

Complying with the equal population rule in the end proved not to be very difficult. Except for a fleeting thought by one Court justice that it might be possible to catch the gerrymandering fly with a finer population equality net (Justice Stevens in Karcher v. Daggett, 462 U.S. 725), line-drawers could sleep comfortably at night knowing that if they kept their deviations below 1 percent and as close to zero as possible, they would not likely run afoul of the law and their work product would be implemented. There were few if any incentives to manipulate the population variations, such as making all the opponent’s districts the highest allowable population and under-populating the favored party or interest’s seats, for partisan or racial advantage. If anything, the greater the mischief intended in the plan, the more likely that population deviations would be held to the lowest possible levels.

At the other end of the extreme is the so-called partisan gerrymandering standard in Davis v. Bandemer (478 U.S. 109) and later considered in Vieth v. Jubelirer (124 S.CT.). Far from establishing a rule, the Court created a hard to understand and ultimately impractical standard. Indeed in the Vieth decision, the Court itself noted that the plurality’s test, the need to show that the gerrymander was part of a systematic and successful effort to exclude the minority from effective political power, had caused “puzzlement” and consternation among the lower courts. The Court rejected proportionality, a potentially simple way to measure a fair seat division, but it also could not accept the statistical complexities and incomprehensibility of notions of symmetry and bias in S-shaped curves. To make matters worse, there is no consensus about the more appropriate data to measure competitiveness or bias: would it be registration data, normal votes, or some other composite measure? Given that there are no benchmark indicators to use, and that there have been no successful challenges to date, the Bandemer decision proved to be no constraint on line-drawing. Indeed, partisanship and incumbency considerations were sometimes invoked as evidence that district lines were not drawn for primarily racial purposes (Easley v. Cromartie, 532 U.S. 234).
The two key provisions of the VRA, sections 2 and 5, fall between these two extremes. Both sections are more ambiguous, and hence surrounded in more uncertainty, than the “one person, one vote” rule but are less ambiguous than the political vote dilution standard. The types of uncertainties associated with sections 2 and 5 vary somewhat. Section 5, especially in the period immediately after Beer v. United States (425 U.S. 130) was decided and then later after Reno v. Bossier Parish School Board (520 U.S. 471) and Reno v. Bossier Parish School Board (528 U.S. 320), dealt exclusively with lower bound expectations, establishing the status quo as the lower bound and denying changes in covered areas that worsened the prospects of minority representation. Covered jurisdictions that were contemplating changes that would cause retrogression in the prospects of protected groups risked failing the preclearance hurdle, and then having to make changes that satisfied the DOJ. Compliance meant doing no worse than the status quo in proposed institutional changes or redistricting, but not necessarily requiring an entity to do better.

Section 2, on the other hand, had a higher lower bound expectation and upper bound expectations that changed over time. Additionally, of course, it applied to both covered and uncovered jurisdictions. Section 2’s lower bound expectations were higher than section 5’s in that section 2 required that electoral institutions not have a dilutive effect as opposed merely to avoiding retrogression. The dilutive standard is higher in that the status quo might itself be dilutive, denying a protected group the full opportunity to elect a representative of its own choosing. Such an arrangement or mechanism might pass a retrogression standard, given that keeping the status quo does not worsen the situation, but fail the dilutive test under the Gingles criteria. Following the 1982 amendments to the VRA, the Justice Department adopted regulations that allowed it to deny preclearance to avoid a section 2 violation. In essence, for the period in which that regulation was in operation, the distinction between section 2 and section 5 standards blurred. When the Court subsequently invalidated the Justice Department’s regulation in Reno v Bossier Parish I, the differences were restored.

The other notable aspect of section 2 is its fluctuating upper bound. The upper-bound question is this: if a jurisdiction could do better in relieving vote dilution, how much better was it legally obliged to do? The application of section 2 was clarified by the Court in Thornburg v. Gingles, and in the three criteria the Court identified, there was an implied limit to the obligation a jurisdiction faced in terms of remedying potential vote dilution: namely, that if there were no evidence of racial polarization or group cohesion, or no sufficiently large and compact concentration to create a majority-minority district, then there was no obligation to create an additional one. But as the voting rights groups and the Justice Department became more assertive and creative in the late 1980s and early 1990s, the constraint of reasonable compactness lessened, and the quest for max-black or Latino districts was seemingly limited only by one’s cartographic imagination. Hence, a city might act in a conscientious manner to create new minority districts under what it believed to be the Gingles rules, but still find that it was in violation...
of the law and obliged to adopt a less compact, max-minority plan. In this period, there was no easily knowable upper bound. Moving from the expectation of doing no worse than the status quo, then toremedying obvious vote dilution (do better) and finally, to finding the optimal maximization plan (do the best) raised the ante of uncertainty and pressure on local and state jurisdictions. The Court later lowered the upper-bound expectations and uncertainty in a series of cases that began with Shaw v. Reno (509 U.S. 630), essentially restoring the constraints of compactness of other traditional redistricting criteria (for a dissenting interpretation of these cases, see Kousser 1999).

Comparing the tests for section 2 vote dilution analyses to an equal population calculation, it is obvious that the former is far more complex. But even the more straightforward section 5 retrogression test is less simple in application. The most basic interpretation would use census data, as does the equal population test, and would ask the following question: has the proposed new redistricting plan reduced the minority population percentages in the existing majority-minority districts, and if so, by how much. But to measure the “real” electoral prospects of affected minority groups, as opposed to apparent ones, the Justice Department, and the jurisdictions themselves, often needed to look at Citizen Voting Age Population (CVAP), voter registration or Statement of Vote data. This was particularly important for cases in that involved Latinos and Asians, groups with large number of immigrant and age ineligible voters. CVAP and registration data, however, were only sporadically available. CVAP is released much later than the redistricting data and is often not available when needed. In the case of voter registration, data would be estimated with sometimes questionable ethnic surname dictionaries, opening up the resulting data to speculation about its accuracy. Because conclusions about whether districts are winnable by protected groups can vary depending upon whether population, CVAP, VAP or registration data are employed, the data choices associated with section 5 retrogression tests can pose real compliance uncertainties.

Data considerations aside for the moment, the critical consideration in a section 5 determination is whether there will be retrogression under a proposed plan. This can be a fairly complex situation to assess in the case of a redistricting. The most mechanical application of the retrogression rule focuses simply on the number of majority-minority districts before and after boundary changes. But it is virtually impossible to have a strictly mechanical application and do justice to section 5 goals, which is to prevent backsliding in the voting opportunities of the protected groups. As the earlier point about data suggests, what seems like an apparent opportunity as measured by basic PL94-171 census data might in some circumstances not be a real opportunity, because of such demographic factors as high rates of noncitizenship and age ineligibility. If a seat is 75 percent Latino and is reduced to 65 percent Latino, is that retrogression? Under certain conditions it might be: for example, if the Latino population has a high percentage of underage and noncitizen residents, then 65 percent population might translate into 35 percent of the registered voters, and if the non-Latino population is more affluent, white and polarized against Latino candidates, even 65 percent might not be
enough. Under other conditions, 55 percent might be more than enough: for example, if the Latinos are an older, more established population, and are intermingled with liberal whites or blacks. Ironically, the logic of retrogression can quickly resemble the logic of vote dilution if extenuating demographic and political considerations are taken into account. Only the simplest purely numerical population rule avoids this complexity, and it can become a tool of vote dilution itself if applied in a purely mechanical fashion.

After the decision in Georgia v. Ashcroft (539 U.S. 461), the necessity for more nuanced evaluation has increased. In some ways, this is a welcome development because it acknowledges the previous point that old rules about heavily concentrating minority populations might not apply for the election of minority representatives in all places, and that opportunities should be defined in a more contextually sensitive way. If protected groups can form alliances with whites of similar political attitudes, or other minority groups, they need not necessarily be concentrated at the high levels used in the past to have a fair opportunity to elect a representative of their choice. Of course, nuance is allied with ambiguity, increasing law-drawer uncertainty about what it takes to comply with the VRA. Predicting elections is an uncertain business, and making an airtight case that a seeming retrogression in majority-minority populations actually does not diminish the chances for minority representation is practically impossible.

Tests of polarized voting can be used to argue that in particular areas, the absence or low degree of polarized voting against a protected group justifies less concentration. Proving anything about polarized voting, however, never mind conclusively, has always been difficult. Leave aside a decade of academic squabbling about whether we can accurately infer polarized voting at the individual level from aggregate census data, and the long-standing and unchallenged view of survey methodologists that people often conceal or misrepresent their views about racial politics, at what level of polarization do we draw the line and say that there needs to be a majority-minority remedy? There has never been, nor will there ever be, a definitive answer to this question.

Most likely, future line drawers, following the reasoning of the Court in Georgia v. Ashcroft, will rely on the opinions of elected minority officials and consultants in the affected jurisdictions: if the minority caucus and other minority political leaders think that their candidates can win in the new seats, the courts are likely to defer to that judgment. This is mostly sensible, but also problematic. It is possible that the elected officials do not speak for the community as a whole, as happened in the 2001 California congressional redistricting. Disputes over changes in the San Fernando Valley and San Diego that lowered Latino percentages in seats Latinos had prospects of winning created a split between MALDEF and the Latino legislative caucus. Latino legislators appeared to be more concerned with their respective reelection prospects in noncompetitive seats and with the power of the Latino caucus in the legislature, than with gaining additional political opportunities for Latinos in California. To complicate things more, it is reasonable to expect that as more Latino Republicans get elected, differing views about Latino seats will be colored by partisan leanings.
Risk aversion with respect to implementing section 5 on the macro-level of a statewide plan implies making sure that the total number of majority-minority seats does not go down, ideally by any measure. On the micro-level of evaluating one district at a time, it means not lowering the minority numbers in previously majority-minority districts to levels below the status quo. For a period in the early 1990s, when the Justice Department incorporated section 2 vote dilution standards into section 5 reviews, there was uncertainty about how much improvement beyond the status quo was expected of covered jurisdictions? Upper bound uncertainty cast into doubt the ultimate acceptability of arrangements in covered areas that clearly did not cause retrogression, but that did nothing, or less than was possible, to ameliorate existing minority vote dilution. A covered jurisdiction might create a redistricting plan with one new minority seat when there are other plans that could increase it to two. Would it be acceptable?

The Court noted that this often put the Justice Department or nonprofit advocacy groups in the driver’s seat, forcing jurisdictions to adopt plans that sacrificed other considerations for the sake of more or better majority-minority seats (see, for example, the Court’s account of the DOJ’s role in Miller v. Johnson, 515 U.S. 900). If a better minority seat option existed, then risk aversion about a Justice Department objection or lawsuit drove the process toward accepting it. Since some of these options were quite noncompact and violated traditional redistricting norms, it is not surprising in retrospect that the court felt the need to cap this process with the Shaw line of cases. Minority rights advocates rightly predicted that this would take the pressure off jurisdictions to do the very best they could for minority seats, and this is no doubt true, but it also did not lead to widespread retrogression in uncovered jurisdictions.

Widespread retrogression in minority representation in uncovered areas did not occur after the Shaw line of cases for several reasons. First, electing minority officials creates a legislative momentum for continued minority representation. As more minorities get elected, they form minority caucuses in the legislature that can effectively bargain for districts. Second, there is a built-in status quo inertia in legislatively controlled redistricting that advantages the boundary changes that were made last time. Those who run in the new seats come to like them on average, and their preference for minimal change in the next redistricting, shared by the minority members, preserves the achievements of the previous decade. Third, the legal advice that most jurisdictions were getting was that the safest path was the middle: do not do too much and do not do too little. Preserve the status quo and do not attract attention. And, last, uncovered areas were less likely to engage in retrogressions and covered areas were still covered, which meant that one could not turn back the clock.

In covered jurisdictions, the new post-Shaw upper bound certainty affected both section 2 and section 5 expectations. Moreover, the Bossier decisions removed explicit vote dilutive considerations from section 5 review, although, as we argue, a similar type of vote dilutive reasoning is unavoidable in retrogression tests. Covered jurisdictions were relieved of the burden to do max minority plans, but still have the section 5 expectation that they can not do less than the status
quo. So reversion to a purely retrogressive rule may have led to the creation of fewer new minority seats, but also little backsliding. And what backsliding there was in some cases proved to be the community sanctioned sort upheld in Georgia v. Ashcroft that was based on more nuanced political considerations.

**FLEXIBILITY AND SPECIFICITY CONSIDERED**

The curious path from Beer v. United States to Georgia v. Ashcroft illustrates a tension between specificity and flexibility. The relatively simple formulation of retrogression that compares the number of majority-minority seats (either by VAP or some other measure) has many advantages. Most of all, it provides an easy way to determine a benchmark for those who must comply and for the DOJ to enforce. But the effect of the simple formal rules and informal rules of thumb can be undermined by exceptional or changed political and demographic circumstances. The rules only make sense if they serve the purpose of section 5 by preventing retrogression in the participation and representation opportunities of protected groups. Whatever the benefits of clarity, it serves no good if it works at cross-purposes with the overall VRA goals.

There has always been the danger that simple rules overlook complex realities. In the eighties, some courts and social scientists propounded the so-called 65 percent rule (Brace et al. 1988). This empirical rule of thumb stated that a majority black district had to have a 65 percent population in order to give black candidates a reasonable opportunity to win. The margin above 50 percent took into account various socioeconomic disadvantages. There were many problems with this rule of thumb: it assumed similar levels of white support across different areas of the country, it was not based on any systematic estimation, it did not apply to Latinos very well, and so on. But its appeal was that it provided a simple way to build in an error margin for a majority-minority district.

Over the years, social scientists, the DOJ, consultants, and the courts have become a little more sophisticated in the rules they adopt, but it is still an imprecise science at best. In Arizona, for instance, the citizen’s commission in 2001 looked at the cumulative record of Latino candidates for the state legislature and some local offices, and tried to establish benchmarks based on that. At best, forecasting election results based on district characteristics is a probabilistic exercise yielding a bounded estimate that a minority candidate could win the seat, other things being equal, given past elections. With respect to the Arizona state legislative redistricting, the Latino community and the Democrats wanted to lessen the concentration of Latinos in Phoenix to maximize the chances of picking up another Latino representative in another seat. The DOJ and others disagreed, and thought that traditional rules of thumb about super-majority Latino populations being needed to guarantee Latino success should be maintained. Clear rules of thumb would relieve the courts from dealing with dueling analyses such as these. But the simple rule could be wrong.

Two questions need to be answered by the debate over section 5 renewal. The first is whether renewal is needed. Given that most submissions are not objected
to, and that the incentives are to comply with the nonretrogression rule, proponents have a strong case for keeping section 5 in place. Removing it would remove very important lower bound expectations, and open the option for doing less in areas that have finally achieved racial progress. In the redistricting realm, combined with the Shaw line of cases on section 2, a failure to renew might open the door to redistricting that uses community of interest and compactness criteria to roll back gains from the past. There may be a case for easing or changing the criteria that allow communities to become uncovered, but voting rights advocates should and will fight to preserve section 5.

The other question concerns specific retrogression benchmarking versus more flexible standards. Here, we would argue for the flexible approach in Georgia v. Ashcroft. Some small uncertainty combined with risk aversion will on average make jurisdictions try harder to comply as long as the DOJ and courts are willing to enforce the intent of the VRA. The danger with rigid, unchanging formulations of retrogression and vote dilution is that they can become restraints on minority political opportunity rather than protections. With a multiplicity of nonwhite groups living close to one another and much variance in the behavior of white voters, old rules can overconcentrate single protected minorities in majority seats, and lessen the prospects of coalition building and expanded representation. Whether the old rules work for or against protected groups is an empirical matter, and the opinion of the community, including its duly elected officials should matter. Renewing section 5 to maintain lower boundaries in suspect areas makes a lot of sense. Resisting changes in its application could prove counterproductive to the law’s goal of enhanced minority representation.

CASES CITED

REFERENCES


The extension of the Voting Rights Act (VRA) to Latinos1 and other language minorities (Asian Americans, American Indians, and Alaskan Natives) in 1975 signals a major transformation in how the national political system responds to its nonwhite ethnic and racial populations. By extending the procedural guarantees and protections of the 1965 VRA to Latinos2 and other language minorities, Congress broadened the nation’s understanding of ethnic and racial electoral participation. Institutionally, extending these procedural guarantees and protections assured Latinos and the other covered language minorities that states and localities could not deny them access to the electoral process because of their ancestry or language use. Further, by 1982, the courts and Congress had established an affirmative responsibility for states and localities to draw electoral districts from which Latinos and other covered minorities could elect candidates of their choice when their populations were sufficiently numerous and concentrated. These candidates of choice were frequently, but not always, fellow Hispanics. With their voting rights guaranteed by the VRA, Latinos could turn to the Department of Justice (DOJ) and the federal courts to ensure that they would have meaningful access to the polls and be able to elect Hispanic candidates if they so desired. In sum, the 1975 and 1982 VRA extensions and the court decisions that explicated their meaning prohibited explicit practices that had historically disenfranchised Latinos and reduced the likelihood their votes would lead to the election of candidates of their choice.

Because the VRA has substantially reduced many of the racist obstacles that explicitly denied them access to the electoral system, Latinos today confront a political environment that includes fewer electoral impediments than did Latinos in 1975. Indeed, as evidenced in the 2004 presidential and congressional campaigns, both major parties now encourage Latinos to engage in conventional political activities such as voting, running for, and winning elective office. State and local parties are more inconsistent; some actively seek Latino participation, others use their institutional powers to discourage it. Nonetheless, Latinos continue to confront impediments that prevent them from attaining the influence that their dramatically increased population predicts should be theirs.
EXPECTATIONS FOR MINORITY EMPOWERMENT

Congress extended VRA coverage to Latinos and three other language minority populations when the act was renewed in 1975. The 1975 extension provided the same procedural guarantees that had been guaranteed to African Americans in the South in 1965: registration and voting without intimidation and prohibitions on local jurisdictions changing voting rules or procedures without Justice Department approval. Congress also added one provision for language minorities in section 203—bilingual election materials.

Unlike the contentious hearings before Congress before the original passage of the VRA, our reading is that a majority in Congress was predisposed to extend the VRA and to add coverage of the language minorities in 1975, and that those members who opposed the VRA in 1975 opposed it in general terms rather than opposing the extension of VRA protections to Latinos (de la Garza and DeSipio 1993). Testimony in support of extending coverage to Latinos came primarily from Latino leaders, elected and civic, almost all of whom were Mexican American. Their testimony focused on similarities between the black and Latino experiences with exclusion and intimidation. This testimony was not inaccurate as it was incomplete. It focused congressional attention on the experiences of Mexican Americans in areas of high conflict between Mexican Americans and whites.

Testimony did not analyze the modal experience of Mexican Americans and Puerto Ricans, which involved both relatively high levels of participation and frequent manipulation of their votes. This modal experience was similar to what white ethnics experienced at the hands of political machines. What differentiated the Mexican American and Puerto Rican experiences with political manipulation, however, was that the “machine politics” lasted from the late nineteenth century to the 1960s and was only rarely controlled by Mexican Americans or Puerto Ricans. For white ethnics, machine control rarely lasted more than one generation (roughly twenty or thirty years) and often involved coethnics in leadership positions. Many white ethnic machines certainly lasted longer than thirty years, but the machines that survived did so because new immigrants replaced the previous generation as the base of the machine’s support.

Congress considered an amendment to extend coverage to all linguistic minorities, but rejected this proposal. Instead, the 1975 amendments only added Latinos, Asian Americans, American Indians, and Alaskan Natives—populations that had experienced multigenerational exclusion from electoral politics based on linguistic differences from the majority population—to VRA coverage.

“STRIKE IT DOWN WHEREVER IT MAY THRIVE AND PROSPER”

Testifying in support of the 1965 VRA, Representative Jeffrey Cohelan (D-CA) concluded his prepared testimony with this rather dramatic call to end disenfranchisement not just in the South, but “wherever it may thrive and prosper” (U.S. House
Although we would not claim that most members of the House and Senate agreed with Representative Cohelan’s goal for the VRA, he was not alone in supporting it. Quite the contrary. In both 1965 and 1975, many members of Congress expressed positions similar to those of Representative Cohelan (though perhaps not as ringingly). Still others—mostly members from the South, expressed fears that the VRA would be the first step in a steady expansion of federal regulation of voting. This understanding of the VRA, as the first step in the progressive expansion of voting protections and popular participation, has been lost in the years since 1975, with the debate focusing more and more on the specific legal guarantees provided in the act, its amendments, and judicial interpretations. As will be evident, our discussion of Latinos and the VRA focuses on what yet needs to be done. We make these proposals in light of this expansive understanding of the VRA as a bill that can strike disenfranchisement where it thrives, at least to the degree that this disenfranchisement focuses on blacks, Latinos, and the other covered language minorities.

Advocates of an expansive reading of the VRA and Congress’s ability to nationalize voting rights did not take a single set of positions nor did they necessarily agree. Our goal in presenting these varied positions here, then, is to suggest that some in Congress saw the potential for further expansion of VRA protections (beyond, of course, section 203 and majority-minority districting provisions that Congress did enact). Representative Richard Schweiker (R-PA), for example, spoke of congressional action in 1965 in terms of a compact so that all citizens could vote. “This compact,” he argued, “must deal directly not only with the present ‘hard core’ problem of massive discrimination, but also must be adequate to avoid the development of new devices and stratagems of oppression in the future” (U.S. House 1965, 713). Schweiker also noted that the requirements for coverage were inadequate. He sought legislation in which “even a handful of voters with a meritorious claim of voter discrimination would have their rights protected. The rights of all qualified persons to vote without further delay is our objective, not merely the elimination of a certain percentage of discrimination” (715). John Conyers (D-MI) amplified President Johnson’s call for a federal guarantee for every American’s right to vote and demanded that Congress “extend coverage of this bill to so that it will have some meaning to the thousands upon thousands of Americans who are not within the purview of the original administration bill formula” (724). Senator George McGovern (D-SC) noted that “The conscience of America now demands that action be taken to secure this precious right [voting] for all Americans” (984). Representative Abraham Multer (D-NY) made more specific who he felt was neglected by the bill:

Hundreds of thousands of Puerto Rican citizens are quite literate in Spanish but not in English. This should not be regarded as a disability with respect to exercising of the duties and rights of citizenship. Practically every newsstand in New York City carries newspapers printed in Spanish which give news and commentary on the affairs of government at every level.... Since the Treaty of Paris is the law of the land, the right to conduct their public affairs in Spanish is a right of Puerto Ricans under United States law. (774–75)
Though somewhat more rare, similar positions were articulated in 1975 congressional debates over VRA extension.

Interestingly, opponents of the VRA expressed fears about a potentially expansive VRA that mirrored the hopes of their opponents. Senator John Sparkman (D-AL) feared the VRA could be read in such a way to end state control over voting regulation (U.S. Senate 1965, 627). Senator Sam Ervin (D-NC) criticized his fellow senators saying that his reading of the Fifteenth Amendment was more limited than theirs. “The only power to adopt appropriate legislation for the enforcement of the 15th Amendment is the power to prevent the State from doing what that Amendment prohibits it from doing and not the power to adopt a set of affirmative laws to take charge of State and local elections” (U.S. Senate 1965, 811). Ultimately, Ervin feared that the bill would “allow the registration of individuals who are not qualified to vote under any objective standard, regardless of race or color, in the guise of preventing discrimination solely because of race or color” (837). Senator Strom Thurmond (R-SC) spoke of the bill as overriding “provisions of the Constitution [Article 1, section 2 and the Seventeenth Amendment] and [to] substitute qualifications for voters established by the Federal Government” (832).

This is, at best, a selective presentation of statements for and against the VRA in 1965 and 1975, but we present it as part of our broader discussion of the VRA protections of Latinos to suggest that in its infancy many members of Congress saw the act as (or feared that the act would become) a starting point of a national debate on expanding citizen participation in politics. The many immediate successes of the bill tempered this debate over time. We, however, think that this debate needs to be reengaged. In the discussion that follows, we indicate that, while dramatic, increases in the number of Latino voters and gains in Latino representation have not kept up with the rapid growth of the Latino population. For Latinos to achieve participation comparable to other groups in U.S. society and representation more in balance with their numbers, this debate must begin anew.

THE VRA AND LATINO VOTING

The Latino population has expanded greatly since the 1970s. In 1973, Hispanics numbered 10,577,000 (U.S. Bureau of the Census 1974). By 2004, this number had grown to 41,322,070, an increase of 291 percent (2005a). The number of Latino officeholders in this same period increased by 279 percent (from 1,280 in six states—the only enumeration conducted prior to 1984—to 4,853; see table 8.1). This pattern also appears even more dramatically in an examination of the period since 1984, the first year for which there was a national examination of Latino officeholding. In 1984, there were 16,533,000 Latinos and 3,128 Latino officeholders (U.S. Bureau of the Census 1988; NALEO Educational Fund 1984). By 2004, these numbers had grown to 41,322,070 and 4,853, respectively. So, Latino population increased by 150 percent and the number of Latino officeholders grew by 55.1 percent. Juxtaposing these rates illustrates that the well-publicized growth in
Latino officeholding in the period of VRA coverage has not kept up with Latino population growth in the same period. There is no doubt that this is because local jurisdictions and non-Hispanic political elites have continued to find ways to mute Latino voices. In New York, for example, the Puerto Rican Legal Defense Fund (PRLDEF) unsuccessfully sued to have a state senate seat redistricted to favor Latinos. The district proposed by the legislature was made up of 53 percent Latinos, 8 percent African Americans, and 33.8 percent non-Hispanic whites. Many of these Latinos are noncitizens (a topic we return to later) and, consequently, ineligible to vote. The Latino citizens are less likely to vote than the white residents of the district because of demographic factors. As a result, the district is effectively controlled by the non-Hispanic whites because of their cohesive vote in the Democratic primary. PRLDEF proposed an alternative district composed of 61.2 percent Hispanics, 16.3 percent Blacks and 10.8 percent non-Hispanic whites that would have been much more likely to elect a Hispanic. Analysis indicated that Latino voters in the contested district would vote as a bloc, but their candidates of choice—the Hispanic candidates—could not win the primary election because nonminority voters also vote as a bloc to defeat the Latino candidates (de la Garza 2003). The court’s rejection of PRLDEF’s claim exemplifies the impact of Shaw v. Reno (509 U.S. 630) and subsequent rulings that have had the effect of reducing the incentive for jurisdictions to draw as many majority-minority districts as possible given the minority population size and concentration.

A more ominous example is evident in the recent history of Lawrence, Massachusetts. Lawrence is a community in which Latinos have the opportunity for electoral gains solely because of immigrant-driven population growth. The number of communities that, like Lawrence, will experience similar growth and have enough Hispanics to design Hispanic-majority districts will increase substantially.
in the coming years. Lawrence’s response to its new demographic reality is significant, therefore, because it illustrates how such jurisdictions may respond to their new Latino residents.

Lawrence officials acknowledge their city has a history of being hostile to Hispanics.\(^4\) They also admit they provided no assistance, such as bilingual materials, to Latino citizens. Latino leaders attributed such reactions to a widespread fear that Hispanics were taking over the city. To delay or prevent this, city officials—all of whom were non-Hispanic whites—in 1982 prohibited voter registration at Latino community celebrations until a Massachusetts superior court ordered the city to grant this right to Latinos. In 1984, Lawrence was officially informed that it had been designated a VRA-covered jurisdiction and was provided with materials explaining its obligations. Lawrence’s response is suggested by the fact that additional letters reminding local officials of these obligations were sent in subsequent years. Nonetheless, in 1993, 1995, and 1997, Latinos protested the city’s ongoing failure to implement VRA requirements, especially those related to bilingual and other types of electoral assistance.

Consequently, in November 1998, the Department of Justice took Lawrence to court, and by September 1999, a new agreement was reached which provided that the city must have seventy-eight bilingual election officials in each election. As of 2002, the city had failed to meet this requirement.

Another tactic used by city officials to disenfranchise Hispanics was the constant cleansing of voter registration rolls. Roll cleansing was implemented by an annual English-language census mailed without translation to all registered voters. Those who did not respond were taken off the active voter list. Spanish-dominant Latinos could not respond to the questionnaire, and many of those who knew some English were, according to Hispanic community leaders, uninformed regarding the importance of the document. This combination of Spanish dominance and lack of information helps explain why the Latino response rate was so low that 25 percent of Hispanic registered voters were placed on the inactive list in 2001.

Electoral campaigns also manifested the deep rift between Latinos and non-Hispanic whites. Anglo candidates have used racial appeals to mobilize their supporters and did not pursue Latino votes; indeed, non-Hispanic candidates never even visited Latino neighborhoods or organizations to meet and win supporters. Latino candidates, however, fruitlessly sought Anglo support. Indeed, Anglo opposition to Hispanic candidates was so rigid that in 2001, Democratic non-Hispanic white voters voted for the triumphant Republican candidate rather than for the Latina Democratic challenger. This shocked Hispanic leaders, as the following statement indicates: “What I was disappointed was that the Democratic white Anglo-Saxon community decided to support a Republican rather than vote through the Democratic party.” These practices help explain why by the late 1990s, even though the majority of city residents were Hispanic, there was only one Latino on the seven-member school board and one on the nine-member city council. Thus, in 1998, the Justice Department invoked the VRA to sue the City of Lawrence. “Hispanic citizens in Lawrence have faced significant and numerous barriers in casting an effective vote,” said Bill Lann Lee, acting assistant attorney
general for civil rights. “Our lawsuit is a comprehensive enforcement effort designed to eliminate those barriers” (Overton 2005, 168).

In 1999, Lawrence city officials settled part of the lawsuit and agreed to provide bilingual voting information, ballots, and poll workers. The city also committed to disseminate election information through local Spanish-language media and community groups.

By 2001, the voting rights lawsuit, combined with grassroots registration drives and the federal motor voter law’s easier voter registration requirements, helped increase Latino registration. Latinos had come to make up over 60 percent of Lawrence residents and 43.7 percent of the city’s registered voters. The 2001 mayoral race featured a former mayor’s brother, forty-four-year-old Republican city councilor Michael Sullivan, against Democrat Isabel Melendez, who was a sixty-three-year-old radio host. Sullivan reached out to Latinos, spent three times as much as Melendez, and won by 957 votes.

A few months later, Mayor Michael Sullivan’s administration settled the remaining claims of the voting rights lawsuit by agreeing that six of the school committee members would be elected from districts rather than citywide and the mayor would serve as chair. The city would also appoint a bilingual member to its board of registrars of voters and a full-time bilingual staff member to the city hall elections office (Overton 2005).

In our previous analysis of the VRA, we argued that many of the original barriers that provided the justification for Congress to extend VRA coverage to Latinos have diminished, if not disappeared (de la Garza and DeSipio 1993). The potential for violence that some Latinos, particularly Mexican Americans, faced prior to 1975 if they tried to exercise the franchise has disappeared and the arbitrary use of language and literacy requirements that appeared in jurisdictions with high concentrations of Latinos from California to New York have largely disappeared. Arbitrary changes of voting rules and voting locations have declined considerably. Yet, as the preliminary evidence we have presented should suggest, the VRA’s federalization of voting protections for Latinos and the guarantee of bilingual voting material in areas of Latino concentration have not overcome the historical legacy of underrepresentation in Latino communities; in fact, underrepresentation has increased since the 1970s. Equally important, local jurisdictions that have experienced significant increases in their Latino populations are attempting to disenfranchise Hispanic voters by implementing or retaining practices such as those that justified extending the VRA to Latinos in 1975. This may occur more frequently in communities that historically had few Latino residents—jurisdictions not covered by section 5. It may also occur, however, in covered jurisdictions experiencing similar demographic transformations. Given that Lawrence’s response may be replicated by other communities in similar circumstances, it is essential that the preventive protections available under section 5 should be retained for historically covered jurisdictions and that similar protections should be fashioned, either from an expansion of section 5 or a restructured section 2, to new jurisdictions, such as Lawrence, rather than to ignore the political changes that are likely to result from changing demographics. In effect, we are
calling for a dynamic analysis of the value of section 5 to the contemporary Latino population rather than a historically focused approach.

LATINO ELECTORAL PARTICIPATION SINCE 1975

The failure of Latino electoral participation to grow at a rate commensurate with overall Latino population growth reflects the VRA’s failure to eliminate state-imposed barriers that reduce Latino voting. In raw numbers, Latino electoral participation has grown dramatically in the years since Congress extended the VRA to Latinos in 1975. In 1976, slightly more than 2 million Latinos went to the polls. In 2004, Hispanic voters numbered approximately 7.6 million (U.S. Bureau of the Census 2005b).

Despite this dramatic increase in the number of Latino voters, the share of Latino adults voting declined. In 1976, 31.8 percent of Latino adults went to the polls. In 2004, just 28.0 percent voted. This decline in the share of Latinos turning out to vote exceeds the decline in the share of the population as a whole turning out in this period. So, while the number of Latinos going to the polls has increased dramatically, the number of Latino adults not going to the polls have increased even more rapidly (see table 8.2).

Among U.S. citizen Latino adults, the number of Latinos voting has increased somewhat more rapidly than the number not voting. Between 1976 and 2004, the number of voters increased by 262 percent while the number of citizen nonvoters has increased by 224 percent. Hispanic nonvoting citizens considerably outnum- ber Latino voters. In 2004, 8.5 million Latino adult citizens did not vote compared to 7.6 million Latino voters.

Most of the factors accounting for this decline in the share of Latinos going to the polls are not unique to the Latino community. Demographic differences between Latinos and non-Latinos including a higher share of younger, poorer, and less educated Latinos, and the absence of mobilization of Latino voters explain most of the differences between Latino and non-Latino voting at the individual level (Wolfinger and Rosenstone 1980; Calvo and Rosenstone 1989; DeSipio 1996a; Leighley 2001; Shaw, de la Garza, and Lee 2001). Although there is relatively limited comparative study of Latino and non-Latino electoral behavior, the available evidence suggests that much but not all of the gap between Latino and non-Hispanic white participation at the individual level can be accounted for by controlling for these characteristics.

At the group level, moreover, Latinos are much more likely to have characteristics that predict nonparticipation and, consequently, they are less likely to turn out on election day. Although many of these individual-level barriers are also found in African American communities, the one that may be most significant—non-U.S. citizenship—is not. Its impact could easily have been anticipated and addressed in 1975 had Congress investigated more deeply the causes of low rates of Latino electoral participation. Because it was ignored, it has become an even greater barrier in the intervening years.

As is evident from table 8.2, non-U.S. citizen Latino adults have been the most-rapidly growing share of the Latino nonvote. The number of Latino adult non-U.S.
citizens increased from 2.6 million in 1976 to 11.0 million in 2004, an increase of nearly 489 percent. As we will indicate, many of these non-U.S. citizen Latinos are either recent legal permanent residents or longer term legal permanent residents who are interested in becoming U.S. citizens. Any strategy to increase Latino participation, then, must not only account for barriers presented by higher concentrations of poorer, less educated, younger, and less mobilized individuals, but also must target obstacles that slow naturalization rates and the pace at which naturalized citizens become voters.

Clearly, naturalization and its impact on Latino voting is an issue that could be addressed with amendments to either sections 2 or 5 of the VRA. It falls within section 5 because state structures impeded naturalization among Latino immigrants who are both statutorily eligible and interested in joining the American polity (Pachon and DeSipio 1994; DeSipio 1996a; DeSipio, Pachon, and Moellmer 2001). Section 2 could also be used to remedy the consequences of low Latino naturalization rates because antinaturalization practices and increasing requirements for naturalization could be conceptualized as post-1975 initiatives that limit

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<td>2,620,000</td>
<td>1,876,000</td>
</tr>
<tr>
<td>1980</td>
<td>2,453,000</td>
<td>3,112,000</td>
<td>2,645,000</td>
</tr>
<tr>
<td>1984</td>
<td>3,092,000</td>
<td>3,622,000</td>
<td>3,027,000</td>
</tr>
<tr>
<td>1988</td>
<td>3,710,000</td>
<td>4,368,000</td>
<td>4,815,000</td>
</tr>
<tr>
<td>1992</td>
<td>4,238,000</td>
<td>4,540,000</td>
<td>5,910,000</td>
</tr>
<tr>
<td>1996</td>
<td>4,928,000</td>
<td>6,281,000</td>
<td>7,217,000</td>
</tr>
<tr>
<td>2000</td>
<td>5,934,000</td>
<td>7,224,000</td>
<td>8,440,000</td>
</tr>
<tr>
<td>2004</td>
<td>7,587,000</td>
<td>8,501,000</td>
<td>11,041,000</td>
</tr>
</tbody>
</table>

Sources: Authors' compilations of census data.
Notes: Current Population Survey (CPS) voting data likely overreport turnout and the U.S. citizen population. Despite this overreporting, they are the only source that allows comparison of Latino turnout and non-participation across elections.

The CPS is based on a survey of approximately 80,000 individuals conducted in the weeks after the election. Small sample sizes for specific subsets of the Latino adult population, such as non-U.S. citizens, ensure that the reported voting, non-voting, and non-U.S. citizenship rates are estimates. We would encourage looking at trends, as opposed to specific year to year changes.
Latino voting and are, consequently, retrogressive. Finally, naturalization could have a place in a revised section 4. Jurisdictions seeking to bail out of section 5 coverage could use support for immigrant naturalization as evidence of their commitment to minority electoral empowerment.

We must also note that, as we have argued previously, the construction of majority-minority districts has the potential to diminish the competition for Latino votes and consequently the mobilization that leads to increased levels of Latino electoral participation (de la Garza and DeSipio 1993). The representational benefits resulting from such districts and their dampening effect on turnout produces a political tension that Latino elected officials and communities must resolve. The seriousness of this problem was evidenced in a legal challenge to California’s post-2000 redistricting in which Latino incumbents (as well as the Democratic Party) and the Mexican American Legal Defense and Education Fund (MALDEF) found themselves on opposite sides of the issue. The state legislators and the Democratic Party won and fewer Latino legislative districts were created than could have been. Their victory may result in creating Latino districts that offer less incentive to increased Latino turnout than would more competitive districts that could come to be represented by a Latino over the course of the decade, with extensive district-wide mobilization.

REReducing State Barriers and Creating New Incentives

The failure of Latino representation or participation to grow at rates commensurate with Latino population growth highlights the dilemma we identify with the expansion of the Voting Rights Act to Latino communities. The VRA’s design did not account for the unique characteristics of Latino communities and, as a result, failed to target specific obstacles affecting Hispanic turnout. The relative success of the legislation in removing major historical barriers to Latino voting has overshadowed the ultimately more democratic objective of removing all major obstacles to Latino participation.

The following section addresses four issues that, though they have not been explicitly designed to disenfranchise Hispanics, impede Hispanic voting. Two of these are easily conceptualized as falling within an expanded section 5. As we will show, an argument may be made that the others are within the purview of a reconceptualized section 2. However they are approached, there can be no doubt that Hispanic electoral engagement cannot be maximized unless these barriers are eliminated.

Unintended Impediments

The most significant explanation for nonvoting among Latino adults is noncitizenship. In the 1990s, approximately 40 percent of Latino adults were not U.S. citizens (see table 8.3). The comparable figure for non-Latino whites is 2 percent and for non-Latino blacks, 6 percent.
These 11 million adult Latino noncitizens include both legal permanent residents and undocumented immigrants. Here we discuss a strategy for speeding the political incorporation of legal permanent residents eligible for naturalization. Later, we examine a strategy to extend the opportunity for electoral participation for legal permanent residents with less than the five years of residence required for most immigrants to naturalize as U.S. citizens. (Legal permanent residents married to U.S. citizens can naturalize after three years; members of the military also have expedited procedures for naturalization.) Were these two strategies to be implemented, the eligible Latino electorate would increase by as much as one-half. For reasons we discuss later, the Latino electorate would probably grow by a smaller rate.

There is no exact figure available on the number of legal permanent residents in the United States at any moment. Although the federal government maintains data on new immigrants, it does not know what happens to them subsequently. Some immigrants subsequently emigrate and others die. Still others naturalize. It is only for the final outcome that there are reliable estimates. So, though we know that approximately 3.1 million Latinos immigrated to permanent residence in the 1980s and 3.8 million in the 1990s, we cannot say how many remain in permanent resident status.

Of the 11 million noncitizen Latino adults at the time of the 2004 election, at least 1.1 million had immigrated to permanent residence since late 1999 and were ineligible to naturalize. Others were undocumented, though the exact number is debated (U.S. Immigration and Naturalization Service 2003, table Q; Bean, Van Hook, and Woodrow-Lafield 2001; Bean et al. 2001; Passel 2005). A 2004 estimate finds that 4.2 million Latino legal permanent residents were eligible for naturalization, as were 3.5 million non-Latino legal permanent residents (NALEO Educational Fund 2004). They are supplemented by the between 300,000 and 350,000 Latino legal permanent resident adults who achieve eligibility for naturalization each year.

Clearly, not all immigrants who achieve five years of legal residence have an interest in U.S. citizenship or political participation. The evidence, however, is that

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**TABLE 8.3 / Non–U.S. Citizens as Share of Adult Latino Population**

<table>
<thead>
<tr>
<th>Year</th>
<th>Latino Adults</th>
<th>Non–U.S. Citizens</th>
<th>Percentage Non–U.S. Citizens</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td>6,594,000</td>
<td>1,876,000</td>
<td>28.5</td>
</tr>
<tr>
<td>1980</td>
<td>8,210,000</td>
<td>2,645,000</td>
<td>32.2</td>
</tr>
<tr>
<td>1984</td>
<td>9,471,000</td>
<td>3,027,000</td>
<td>32.0</td>
</tr>
<tr>
<td>1988</td>
<td>12,893,000</td>
<td>4,815,000</td>
<td>37.3</td>
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<tr>
<td>1992</td>
<td>14,688,000</td>
<td>5,910,000</td>
<td>40.2</td>
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<tr>
<td>1996</td>
<td>18,426,000</td>
<td>7,217,000</td>
<td>39.2</td>
</tr>
<tr>
<td>2000</td>
<td>21,598,000</td>
<td>8,439,000</td>
<td>39.1</td>
</tr>
<tr>
<td>2004</td>
<td>27,129,000</td>
<td>11,041,000</td>
<td>40.7</td>
</tr>
</tbody>
</table>

Sources: Authors’ compilations of census data.
many more Latino legal permanent residents are interested in U.S. citizenship and have engaged in some behavioral act to pursue U.S. citizenship—such as taking classes to prepare for the exam or getting the application from the INS—than have successfully naturalized. A 1989 survey found that the vast majority (more than 85 percent) of Latino immigrants eligible for naturalization planned to reside in the United States permanently, a finding confirmed by other studies that look at Latino adults more broadly (de la Garza et al. 1992; Pachon and DeSipio 1994; Farkas, Duffett, and Johnson 2003; DeSipio 2006). Despite this high interest in permanent residence in the United States, the survey found that approximately 41 percent of Latino immigrants eligible for naturalization had not done anything concrete to pursue naturalization, though some express an interest in doing so in the future. Of the remainder, approximately half had naturalized and half had begun to pursue naturalization, but had not succeeded in their objective (Pachon and DeSipio 1994, chap. 7). We would identify this group of “citizenship interested” Latino immigrants, particularly those who have done something concrete to naturalize, as a primary target for expanding electoral participation among Latinos. This population of Latino immigrants interested in citizenship numbers at least 2.3 million in 2005.

How does this relate to the Voting Rights Act? We would argue that there are two connections. First, state-sanctioned impediments to naturalization were well institutionalized in 1975. Thus, steadily increasing requirements for naturalization and bureaucratic barriers to naturalization over the past thirty years exacerbate a historical problem that, had the 1975 extension of the VRA addressed Latino non-participation explicitly, would have been eliminated or reduced by 2005. Making naturalization more accessible would have increased the Latino electorate substantially and created conditions that would have helped overcome low levels of electoral participation among Latinos. Given that obstacles to naturalization were institutionalized by 1975, the 2007 renewal debate offers a unique opportunity to eliminate them.

The gap between interest in naturalization and successful naturalization can be explained largely by difficulties applicants have with the administrative requirements for naturalization particularly the naturalization application form (DeSipio 1996a; DeSipio, Pachon, and Moellmer 2001). Although these barriers have existed in some form since the first knowledge requirements for naturalization were implemented in 1906, they have increased in recent years as more specific requirements have been imposed. The application forms now total ten pages, with six additional pages of instructions. In addition to steadily added complexity, the INS began to increase the naturalization application fee in the early 1990s and has raised the fee several times since. It now costs $390 to apply for naturalization, including the required charge for “biometrics” (fingerprinting). To the extent that these administrative requirements and costs have increased in the period since the VRA was extended to Latinos, these increases violate the principle that governs section 5. This is especially urgent because the barriers to naturalization have become particularly stringent in the wake of September 11, 2001.

A more important consideration as the VRA is reexamined prior to 2007 is how the unfulfilled demand for naturalization among Latino immigrants can
be channeled into districting strategies. We would propose that commitments by state and local government agencies to financially support naturalization classes and naturalization assistance centers be recognized as components of districting strategies in areas with large numbers of noncitizen Latinos, particularly noncitizen Latinos with lengthy residences in the United States. Support for naturalization promotion could also be built into revisions to section 4 bailout procedures. To the extent that state assistance allows immigrants interested in U.S. citizenship to become U.S. citizens, a major barrier to engagement will be reduced. This will increase Latino participation and, in some cases, Latino officeholding. Although some might argue that the state should not play a role in promoting naturalization, we would argue that these efforts should be understood as removing obstacles to participation that prevent a significant segment of the Latino community from voting.

No strategy to improve Latino electoral participation can succeed without addressing the problem of non-U.S. citizenship. If the VRA addresses Latino participation directly, naturalization must be a part of this discussion. Our proposals here suggest how to raise the likelihood that citizenship-eligible immigrants who are interested in naturalization could achieve their goal.

NONCITIZEN VOTING AS PATH TO CITIZENSHIP

Even if procedures for naturalization were reformed to facilitate the incorporation of immigrants interested in pursuing U.S. citizenship, and the additional bureaucratic requirements and costs for naturalization that have been imposed were reversed, noncitizenship would continue dampening Latino voting. Although the numbers vary from year to year, between 300,000 and 350,000 Latinos immigrate and become permanent legal residents each year (and are joined by approximately 550,000 non-Latinos). Most of these new immigrants remain ineligible to naturalize and, consequently, to vote in national and most local elections for at least five years. To ensure that this population of legal permanent residents have access to the ballot box, we would repeat a proposal we made in 1993 that all new legal immigrants be given a one-time five-year, non-renewable voter registration eligibility at the time of immigration (de la Garza and DeSipio 1993, 1522). Those immigrants who exercise this privilege on a regular basis during the eligibility period would receive citizenship. We would argue that this exercise of good citizenship is as important as the knowledge-based measures that the current naturalization law requires.

We should acknowledge two things about this proposal. First, we would expect relatively few immigrants to take advantage of this voting privilege and opportunity for a behaviorally earned naturalization. Immigrants are generally younger and less educated and have lower incomes than the U.S. born, and thus experience the demographic barriers to participation at even higher rates. As important, they are new to the United States and have not been socialized to U.S. politics, nor are they part of networks that provide political information and encouragement.
to participate. Research in the period since we originally made this proposal has demonstrated that naturalized citizens are less likely to vote than comparably situated U.S.-born coethnics (DeSipio 1996b; Levitt and Olson 1996; Minnite, Holdaway, and Hayduk 1999; Shaw, de la Garza, and Lee 2001; Mollenkopf, Olson, and Ross 2001). We would expect that this gap would be even greater among new immigrants. We note, however, that an exception to this pattern may have appeared in California beginning in the mid-1990s (Pantoja, Ramírez, and Segura 2001).

Second, we do not agree on the scope of permanent resident voting that should be allowed. DeSipio would make the voting privilege the same as citizen-voters in the jurisdiction where the immigrant resides. Anything short of a full voting right would create too many administrative requirements for already overburdened local election officials and would diminish the already low odds that immigrants would take advantage of the opportunity (since the presidential race is usually the one that generates the most interest). De la Garza would limit the immigrant voting privilege to state and local races. He is concerned that nonnaturalized immigrants should not have the opportunity to select leaders who could have influence over U.S. policy toward their countries of origin.

Even with these concerns in mind, the broad objective of this proposal is to expand the potential electorate to include what will continue to be a large share of the Latino and Asian American electorates. Although some would address this population, and the legal permanent residents eligible for naturalization discussed previously, by extending the vote to noncitizens, we see a value in connecting this vote more directly to naturalization. For recent legal immigrants who want to participate in U.S. politics, we would like to offer the reward of a more direct path to U.S. citizenship that would potentially create more civically engaged U.S. citizens than does the current set of requirements.

SAME-DAY REGISTRATION AND VOTING

A third strategy is to reduce the barriers associated with voter registration, most notably requirements that require registration in advance of election day (Teixeira 1992; Alvarez and Ansolabehere 2002). A reform such as this would increase electoral participation among all electoral groups, but its impact would be particularly large among Latinos who experience a larger-than-average turnout-depressing effect of registration requirements.

Registration requirements have a very checkered history when it comes to immigrant-ethnic groups. They were first imposed on a large scale during the previous era of large-scale immigration (the late nineteenth and early twentieth century) in part to control the political influence of the new immigrant and second-generation participants in electoral politics who came to shape the urban politics of the era (Keyssar 2000). This, of course, was not the only reason. Concerns about fraud and multiple votes by the same voter also drove their imposition. Whatever the reason for their implementation, however, their cost was almost immediately
felt. The first wave of advanced voter registration requirements often required registration months in advance of the election and at times when many working people could not register. Turnout declined dramatically in jurisdictions that imposed advance registration requirements.

Over time, these initial onerous registration requirements have been replaced. Today, no state requires registration more than thirty days before an election. All states also have multiple means of registration, including the mail. Nevertheless, the costs of advance registration requirements remain and are paid disproportionately by newer, more mobile, less educated, and younger voters (Teixeira 1992; Mitchell and Wlezien 1995; Highton 1997; Brians and Grofman 1999). Registration requirements also shape campaign strategies in that certain types of issues are not raised until after the registration deadline has passed. Michael Alvarez and Stephen Ansolabehere (2002, 13) estimate that if California were to adopt election day registration, Latino turnout would increase by 11 percent and African American turnout would jump by 7.1 percent. They acknowledge that California, because of the composition of the adult nonvoting citizen population, might see more of a positive impact on turnout from election day registration than would other states. The Committee for the Study of the American Electorate (2005, 5) finds that the six states with election day registration saw an increase in 2004 turnout of 7.5 percent over 2000 levels. The other states saw increases of only 5.4 percent.

For election day registration to be implemented, concerns about the potential for increased fraud would have to be addressed. In states that have election day registration or no registration requirements (Minnesota, North Dakota, and Wisconsin and Wyoming, New Hampshire, and Idaho, respectively), there is little evidence of fraud, but it should also be noted that they have no history of deeply embedded electoral corruption.

These states do offer models, however, for how fraud can be limited in states with same-day voter registration (Alvarez and Ansolabehere 2002; Tobias and Callahan 2002). In both Wisconsin and Minnesota, electoral fraud is a felony and these statutes are enforced. Both states also require that voters registering at the polls have a current form of identification or signed affidavit certifying their identity that is countersigned by someone registered in the same precinct. After the election, the states require counties to validate all of the new registrants and to ensure that none is registered more than once. All counties rely on the same computer network, so this verification is relatively easy. Alvarez and Ansolabehere argue that, because of these requirements and the greater attention paid by local elected officials to the potential for electoral fraud, that fraud may actually be less likely with election day voter registration than with traditional electoral rules.

Is this within the scope of the VRA? Certainly, but not as the act is currently understood. Registration requirements predate the VRA and thus could come under section 5 in the originally covered jurisdictions to the extent that it can be demonstrated that they have been used as a device to reduce minority voting. Even though they have generally been relaxed over time, their effect is to dampen participation and particularly participation among more politically marginal segments of the adult citizen population. More than other racial and ethnic populations in
the United States, a disproportionate share of the Latino adult U.S. citizen popula-
tion has the characteristics that predict nonparticipation and would benefit from
election day registration. Recasting the VRA to address specific Latino obstacles
could justify such a change.

VOTING RIGHTS FOR RESIDENTS OF PUERTO RICO

Our proposal for eliminating the final obstacle is perhaps the most controversial,
but we think it can be argued that it is encompassed by a broad conceptualization
of the VRA as initially extended to Latinos in 1975. Also, at a more fundamental
level we see extending presidential voting (and electoral college representation) to
the people of Puerto Rico as a way to both recognize the national responsibility
to make the grant of U.S. citizenship to Puerto Ricans in the Jones Act real, and to
equalize the treatment of all Puerto Ricans, regardless of where they live.9 The
model for this new voting and representation right is found in the extension of
presidential voting rights to the residents of the District of Columbia in the
Twenty-third Amendment (1961):

Section 1. The District constituting the seat of government of the United States shall
appoint in such manner as the Congress may direct: A number of electors of President
and Vice President equal to the whole number of Senators and Representatives in
Congress to which the District would be entitled if it were a state, but in no event
more than the least populous state; they shall be in addition to those appointed by the
states, but they shall be considered, for the purposes of the election of President and
Vice President, to be electors appointed by a state; and they shall meet in the District
and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate
legislation.

Under current law, a Puerto Rican adult’s right to decide who will be president
is a function of residence. Those living in Puerto Rico cannot, for the most part,
vote in presidential elections. Some, those recently resident in a state or the
District of Columbia, may vote absentee if they meet state rules for absentee vot-
ing. Those living in one of the states or the District of Columbia, on the other hand,
have full voting rights as long as they meet the state’s registration requirements.

Some in Puerto Rico have sued to change this bifurcated treatment. In a legal
struggle that began in 1991 and continues today, Puerto Rican residents of Puerto
Rico have sued in federal court to obtain the presidential vote for residents of
Puerto Rico. In 2000, a federal district court in Puerto Rico ruled that voting was
a fundamental right of citizenship and, consequently, Puerto Ricans residing in
Puerto Rico were entitled to vote in presidential elections (de la Rosa et al. v. The
United States of America, 2000 U.S. Dist. Lexis 13553). This ruling was quickly
reversed by the circuit court, which held that the U.S. Constitution limits the elec-
tion of the president to the District of Columbia and states with representation in
the electoral college. As a result, the circuit court ruled, residents of Puerto Rico could earn the presidential vote only by constitutional amendment or if Puerto Rico were to become a state (de la Rosa et al. v. The United States of America 2000, 25499). The claim was raised again in Boston in 2005.

The relationship between United States and Puerto Rico is long and troubled, but not our focus here (Trias Monge 1997; Cabán 2000; Aleinikoff 2002). Instead, we see the question of presidential voting rights for residents of Puerto Rico in terms of the broader objective of expanding electoral participation in Latino communities and eliminating historical barriers to voting. There has long been a discrepancy noted in Puerto Rican political participation. Elections on the island see high voter turnouts. In the 2003 legislative elections, for example, 82.6 percent of registered voters and 74.4 percent of the adult population voted (Center for Voting and Democracy 2003). Puerto Ricans on the mainland, on the other hand, turn out at low rates, even when compared to other Latinos (Wolfinger and Rosenstone 1980, 91–93; Falcón 1999). Explanations for the low mainland rates include institutional (Goris and Pedraza 1994) and partisan (Falcón 2004) factors that would not change if residents of Puerto Rico were granted a presidential vote. Issues, however, also come into play that would potentially have spillover effects that would raise Puerto Rican voting more generally. Specifically, high turnout in Puerto Rico is driven by the centrality of a single issue—status. Were residents of Puerto Rico empowered to vote in presidential elections, national candidates and parties would have to enter this debate to win votes.

With the passage of the Twenty-third Amendment in 1961, presidential voting was decoupled from statehood. Congress recognized the fundamental inequity of denying the then 700,000 residents of the District of Columbia a voice in presidential selection. The amendment also decoupled the award of electoral college delegates from statehood, granting the District of Columbia a minimum (and effectively a maximum) of three delegates. This reform should be understood as part of the general expansion and federalization of voting rights in the early 1960s—reflected in the testimony of members of Congress discussed earlier—which included the Twenty-fourth Amendment to the Constitution prohibiting poll taxes and the Voting Rights Act and as part of a desire to empower African Americans who made up a large share of the new presidential voters in the District of Columbia.

We are convinced that section 5 could be understood to encompass Puerto Rican voting. A state structure excluded from the franchise a significant share of the Latino electorate. Even if that argument is discounted, we see no particular reason why an amendment like the Twenty-third should be not drafted for residents of Puerto Rico. That said, the limit imposed on presidential electors for the District of Columbia of having no more electors than the smallest state would be fundamentally inappropriate for a territory of 3.8 million people (more than six times the District’s current population). Instead, we would propose that Puerto Rico be given the number of electors equivalent to what it would receive if it were a state, between seven and eight under current apportionment rules. Note that we are not here seeking to impose a resolution on the question of Puerto Rican status, which
must be resolved by Puerto Rico. Instead, we are proposing that the connection between citizenship and the ability to select the president affirmed in the Twenty-third Amendment should also apply to U.S. citizen residents of Puerto Rico.

The consequence of this change on Latino empowerment would be threefold. The most obvious would be to provide electoral access to Puerto Ricans in keeping with the VRA’s intent. Second, it would create an added incentive for presidential candidates to address issues of relevance to Puerto Rico and Puerto Ricans in their campaigns. Third, the high rates of participation that have characterized electoral participation in Puerto Rico may well spread to Puerto Ricans on the mainland. Although some of the explanation for the current gap is institutional, a large part results from the centrality of the status issue to political organization in Puerto Rico. If status and other issues relevant to Puerto Rico become more “national” and candidates have an added incentive to mobilize Puerto Ricans, then Puerto Rican electoral participation in the states may more closely resemble Puerto Rican electoral participation in Puerto Rico.

CONCLUSIONS

The core of our argument illustrates the centrality the VRA has for future Latino electoral engagement. We think that each of the electoral strategies we identified reflects a logical extension of the central goals of the VRA—to reduce state barriers to participation that disproportionately shape the likelihood that Hispanics will be able to vote and elect the candidates of their choice.

Although our efforts to identify Latino-specific remedies to low rates or participation reflect the continuation of or a logical extension to the VRA, they also illuminate a debate that Congress has not previously engaged. As we demonstrated in our earlier work (de la Garza and DeSipio 1993), Congress invested little effort in 1970 or 1975 to understand why Latinos did not vote or how their experience of electoral barriers differed from those of African Americans. In the limited congressional testimony from Latino leaders before the 1975 extension, there was little effort to dissuade Congress of its gut instinct that the barriers to Latino participation were the same as those to black participation. As we have shown here, there certainly are commonalities between Latinos and other racial-ethnic populations’ patterns of participation—a shared experience with the class-based barriers of voting. There are also, however, distinct Latino experiences that need to be addressed if the VRA is to ensure maximum participation in all covered populations. Most notable of these is that Latinos have a huge number of adult noncitizens who are barred from most electoral participation.

Obstacles constructed in communities such as Lawrence, Massachusetts, where Hispanics did not historically live, resemble those used in Texas and across the Southwest to disenfranchise Latinos before 1975. Section 2 type remedies must be readily available to prevent their institutionalization. Election day voter registration will enhance participation among all groups, but will have a particular benefit in populations such as Latinos with more marginal and less mobilized adult
U.S. citizens. The proposals to speed the electoral incorporation of legal permanent residents—reduced bureaucratic barriers to naturalization, state support for naturalization assistance as a component of districting strategies in areas covered by the VRA, and a new behavioral route to naturalization—will address the single largest and fastest growing cause of nonvoting among Latino adults, and would also assist in enhancing electoral participation among Asian Americans. Finally, granting residents of Puerto Rico a presidential vote and representation in the electoral college would ensure that the 3.8 million U.S. citizen residents of Puerto Rico would no longer be disenfranchised based solely on the happenstance of residence. Combined, these proposals would ensure that Latino participation could begin to grow at rates comparable to Latino population growth and that the levels of Hispanic underrepresentation which have grown slightly over the VRA era would begin to diminish. To make that potential a reality, Latinos would also have to find ways to mobilize voters, develop coalitions with other voters, and develop a forward looking leadership. In sum, the Voting Rights Act will remain central to Latino electoral influence, which will create the foundation for Latinos to exercise the political role that their numbers predict and their status as citizens guarantee.

We would like to express our appreciation to the participants in the Russell Sage Foundation-sponsored “The Coming Fire: Conference on the 2007 Renewal of the Voting Rights Act” and particularly to Jennifer Hochschild, Morgan Kousser, and Rick Pildes for helpful comments on an earlier draft of this paper.

NOTES

1. We use the terms Latino and Hispanic interchangeably to refer to individuals who trace their origin or ancestry to the Spanish-speaking nations of Latin America and the Caribbean.

2. Although the 1975 VRA revision expanded the act to include Asian Americans, Native Americans, and Alaskan natives as protected groups in addition to Latinos, our analysis focuses exclusively on the continued significance of the VRA on Latino electoral behavior. Latinos will continue to be the largest of the groups incorporated by the 1975 amendments, and the combination of linguistic and other demographic characteristics, continued ethnic discrimination, and unique land claims strongly support the argument that whatever VRA-related claims Latinos can make are also relevant to Asian Americans, American Indians, and Alaskan natives. By focusing on Latinos, then, we are not only providing support for VRA claims made by other groups, but we are also providing a detailed insight into the VRA’s relevance for Latinos, which because of their size, demographic characteristics, and history, should best illustrate the extent to which the VRA can influence minority group electoral access and overall political well being.
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3. We have not reviewed the 1970 VRA renewal hearings to assess whether these positions were also articulated in congressional debates of that year.

4. The description of political practices in Lawrence is taken from Rodolfo de la Garza and Lee Valentine (2002) submitted to the Department of Justice in Department of Justice v. City of Lawrence. The final report, which is an edited version of the draft, was not completed because the case was settled out of court.

5. We focus here on presidential elections. Like other racial and ethnic populations, Latinos participate in state and local races at lower rates than in presidential races. There is some tentative evidence that in Los Angeles County and in several large cities nationwide, Latino participation may exceed turnout among non-Hispanic populations when a Latino candidate is at the top of the ballot or an issue of particular importance to the Latino community is on the ballot.

6. These data, and Census Bureau estimates of Latino voting in earlier years, are based on self-reporting of citizenship, registration, and voting in the weeks after the election. It is quite likely that they overstate registration and voting, though we cannot estimate the levels of over-reporting. We would also expect that some respondents misreport citizenship status.

7. Matt Barreto, Gary Segura, and Nathan Woods (2004) find different results in a study of southern California, but this could be a function of legacy of the mobilizing effects of the ballot propositions of the mid-1990s and the political nature of some of the naturalization that followed (see Pantoja, Ramírez, and Segura 2001; Pantoja and Segura 2003).

8. The knowledge-based requirements to demonstrate good citizenship are a twentieth-century invention. Beginning in 1906, Congress added specific skills to the length of residence, good moral character, and oath of political loyalty requirements that had characterized U.S. naturalization requirements from the nation’s first days (DeSipio and de la Garza 1998, chap. 3). In 1906, Congress required that naturalizing citizens be able to speak English. In 1950, Congress added reading and writing English to the speaking requirement and added a requirement that naturalizing citizens demonstrate knowledge and understanding of the fundamentals and principles of American government (civics). Although unstated in law or regulation, the twentieth century has seen an added skill become necessary for immigrants seeking naturalization—bureaucratic competence to negotiate a complicated application form and a bureaucracy that makes no effort to promote naturalization among immigrants (Duarte 1985; DeSipio, Pachon, and Moellmer 2001).

9. A reading of the 1965 Voting Rights Act hearings demonstrates that the voting rights of Puerto Ricans were very much on the minds of some members of Congress when the VRA was first considered. The Puerto Ricans mentioned in congressional statements in 1965, however, were Puerto Ricans resident in New York who faced disenfranchisement because of their lack of English skills (see, for example, statements of Senator Stennis [U.S. Senate 1965, 817], Representative Adam Clayton Powell [U.S. House 1965, 373], Representative Abraham Multer [U.S. House 1965, 774–75] among others).

10. During the month and a half that the district court’s ruling was on appeal, the possibility of a Puerto Rican vote peripherally entered the 2000 presidential campaign.
Puerto Rico quickly passed enabling legislation to hold a popular vote on the same day as the rest of the country and George Bush promised to campaign for its votes. Few expected the district court’s ruling to stand, however, and neither campaign dedicated resources to win Puerto Rico’s votes (DeSipio and de la Garza 2004).

CASES CITED


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Expanding Coverage of Section 5 in Indian Country

Laughlin McDonald

Recent voting rights litigation in Indian country, with its findings of widespread and systematic discrimination against Indians, underscores the need for continuing the special preclearance and language minority provision of the Voting Rights Act (VRA). It also makes a strong case for extending the preclearance requirement throughout the West, not simply to the relatively few counties covered under existing law.

HOW THE VOTING RIGHTS ACT WORKS IN INDIAN COUNTRY

Congress amended the Voting Rights Act in 1975 to extend its protections to “language minorities,” defined as American Indians, Asian Americans, Alaskan Natives, and persons of Spanish Heritage. Indians, as a “cognizable racial group,” were undoubtedly already covered by the permanent provisions of the original act of 1965, which prohibited discrimination on the basis of “race or color” (42 U.S.C. sec. 1973aa-1a(e)). Although Indians were held to be a political rather than a racial group in determining the constitutionality of granting members of federally recognized tribes preference in hiring by the Bureau of Indian Affairs, the courts have also held that Indians were also entitled to protection under the Fourteenth Amendment. In addition, a number of jurisdictions with substantial American Indian populations were covered by the special preclearance provisions of section 5 of the Voting Rights Act of 1965, including the state of Alaska and four counties in Arizona. The 1975 amendments made the coverage of Indians explicit.

The 1975 amendments also expanded the geographic coverage of section 5 by including in the definition of a “test or device” the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population was a single language minority group (U.S. Senate 1975, 9). As a result, the preclearance requirement was extended to fifteen counties and townships in California, Florida, Michigan, New Hampshire, New York, and South Dakota, and
the entire states of Alaska, Arizona, and Texas (C.F.R. pt. 51, app.). Seven counties were covered because of their Indian populations. The amendments in 1975 further required certain states and political subdivisions, pursuant to section 203, to provide voting materials and oral assistance in languages other than English (42 U.S.C. sec. 1973aa-1a). Although there are several tests for “coverage,” the requirement is imposed on jurisdictions with significant language minority populations with limited proficiency in English where the illiteracy rate of the language minority is higher than the national illiteracy rate. Covered jurisdictions are required to furnish voting materials in the applicable language and in English. Jurisdictions covered by the bilingual election requirement include the states of California, New Mexico, and Texas, and more than four thousand local jurisdictions in twenty-seven other states, from Alaska to Florida and New York to Arizona (C.F.R. pt. 55, app. (1990)). Eighty counties in seventeen states were covered because of their Indian populations.

Legislative History of the 1975 Amendments

During hearings on the 1975 amendments, Representative Peter Rodino, chair of the House Judiciary Committee, said that members of language minority groups, including American Indians, related “instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation.” According to Rodino, “the entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas.” (U.S. Congress 1975a, H4711). Representative Robert Drinan similarly noted during the floor debate that there was “evidence that American Indians do suffer from extensive infringement of their voting rights,” and that the Department of Justice “has been involved in 33 cases involving discrimination against Indians since 1970” (H4825). House members also took note of various court decisions documenting voting discrimination against American Indians, including Klahr v. Williams, finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength (927)4; Oregon v. Mitchell, noting that literacy “tests have been used at times as a discriminatory weapon against . . . Indians” (147)5; and Goodluck v. Apache County (16), finding that a county redistricting plan had been adopted to diminish Indian voting strength.6

The House report that accompanied the 1975 amendments of the act found “a close and direct correlation between high illiteracy among [language minority] groups and low voter participation.” The illiteracy rate among American Indians was 15.5 percent, compared to a nationwide illiteracy rate of only 4.5 percent for whites. The report concluded that these disparities were “the product of the failure of state and local officials to offer equal educational opportunities to members of language minority groups” (U.S. House 1975, 30).

During debate in the Senate, William Scott read into the record a report prepared by the Library of Congress, “Prejudice and Discrimination in American History,” which concluded:
Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores. . . . as late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society.

**FEDERAL AND STATE POLICY** United States policy toward American Indians has been remarkably volatile and contradictory. At various times in history, Indians have been regarded as independent nations, political communities that should be removed or placed on reservations, dependent wards of the federal government, and a race that should be assimilated, suppressed, or simply allowed to vanish, and whose lands sold or allotted to whites. In more modern times, and in an equally contradictory manner, Congress has provided that Indians be given citizenship, the tribes be firmly established as viable units of self-government, the reservation system be maintained, the reservation system be terminated and tribal governments dissolved, the states assume jurisdiction over Indians, and, most recently, the federal-tribal system be maintained, traditional Indian religions and culture and family units be protected, and Indians be given maximum opportunities for self-development and self-determination (Pevar 2002; Prucha, 1984; Tyler 1973).

Historically, Indians were described as dependents, or “wards of the nation” (United States v. Kagama, 118 U.S., 382), and were neither citizens nor foreigners, but a special dependent and administratively controlled class. As noncitizens, Indians had no federally protected right to vote or to direct representation, and thus lacked any power to pass or modify laws enacted by Congress to control their affairs. In upholding the state of Nebraska’s refusal to allow Indians to vote, the Supreme Court declared in a 1884 opinion that Indians “are not citizens,” and in the absence of being naturalized were not entitled to the franchise (Elk v. Wilkins, 112 U.S., 102).

One way that Indians could become citizens was by being assimilated. The General Allotment Act of 1887, also known as the Dawes Act, authorized Congress and the president to survey tribal reservation lands and allot plots to individual Indians to be held in trust by the federal government for twenty-five years with the remaining lands to be sold to the public (25 U.S.C. secs. 331–58). The act granted citizenship to any allotted Indian following termination of the trust, but only on condition that such Indian reside “separate and apart from any tribe of Indians therein and has adopted the habits of civilized life.” The purpose of the act, as explained by the Court, was the “eventual assimilation of the Indian population” and the “gradual extinction of Indian reservations and Indian tribes” (Draper v. United States, 164 U.S., 246).

In 1906 Congress passed the Burke Act, which allowed the secretary of the interior to bypass the trust period restrictions of the Dawes Act. As a result of allotments under these acts, sales of their allotments by impoverished Indians, and tax foreclosures, the number of acres of land owned collectively by Indian tribes shrank from 140 million in 1887 to 50 million by 1934. The allotment system was described by the American Indian Policy Review Commission as “an efficient device for separating Indians from their land and pauperizing them” (1977, 66–67).
Indians could also become citizens by serving in the armed forces. More than seven thousand Indians, most of whom were not citizens, served in the armed forces during World War I (Wolfley 1991, 179). In recognition of that service, Congress passed legislation in 1919 that all Indians who had served honorably in the armed forces were eligible for American citizenship (Act of Nov. 6, 1919, ch. 95, 41 Stat. 350). Subsequently, Congress enacted the Indian Citizenship Act of 1924, which gave Indians as a group, if born in the United States, U.S. citizenship, and at least in theory the equal right to vote (8 U.S.C. sec. 1401 (a)(2)). Many states, however, blunted the impact of the Indian Citizenship Act by making registration more difficult, canceling all voter registration, requiring re-registration, or simply denying registration altogether.

South Dakota, despite passage of the Citizenship Act, continued to deny Indians the right to vote and hold office until the 1940s (Buckanaga v. Sisseton Independent School District, 804 F.2d., 474). Even after the repeal of state law denying Indians the right to vote, the state as late as 1975 prohibited Indians from voting in elections in counties that were “unorganized” under state law (Little Thunder v. South Dakota, 518 F.2d, 1255–57). The three unorganized counties were Todd, Shannon, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of these counties from holding county office until as recently as 1980 (United States v. South Dakota, 636 F.2d, 244–45). Five other states—Idaho, Maine, Mississippi, New Mexico, and Washington—prohibited “Indians not taxed” from voting, though there was no similar disqualification of non-taxpaying whites (Wolfley 1991, 185). Arizona denied Indians living on reservations the right to vote because they were “under guardianship” of the federal government and thus disqualified from voting by the state constitution. The practice was not struck down until 1948, when the state supreme court ruled the language in the state constitution referred to a judicially established guardianship, and had no application to the status of Indians as a class under federal law (Harrison v. Laveen, 67 Ariz. 337, 196 P.2d, 463). Utah denied Indians living on reservations the right to vote because they were nonresidents under state law. The law was upheld by the state supreme court, but was repealed by the legislature after the Supreme Court, at the request of the state attorney general, agreed to review the case (Allen v. Merrell, 352 U.S. 889; Act of Feb. 14, 1957; see also Allen v. Merrell 353 U.S. 932, vacating the state court decision as moot). Montana amended its constitution in 1932 to provide that not only must a person be a “citizen” to be entitled to vote, but in respect to issues related to “the creation of any levy, debt or liability the person” must also be a “taxpayer,” unless that person had the right to vote “at the time of the adoption of this Constitution” (Article IX, Section 2). The state enacted a statute in 1937 requiring all deputy voter registrars to be “qualified, taxpaying” residents of their precincts (Mont. L. 1937, 527). Because Indians living on reservations were exempt from some local taxes, the requirement excluded virtually all Indians from serving as deputy registrars and denied Indians access to voter registration in their own precincts on the reservation. This provision remained in effect until its repeal in 1975 (Mont. L. 1975, ch. 205). Another statute enacted in 1937 cancelled the registration of all electors and required re-registration (Mont. L. 1937, 523). Indian
voter registration remained depressed after the purge until the 1980s. In Colorado, Indians living on reservations were not allowed to vote until 1970 (Cuthair v. Montezuma-Cortez, 7 F.Supp.2d, 1161–62).

The Indian Citizenship Act did not translate into significant Indian participation in the federal and state political processes. It did, however, reflect an increasing awareness and concern by Congress with the plight of Indians and set the stage for passage of additional federal legislation affecting the tribes.

The Indian Reorganization Act of 1934 (25 U.S.C. sec. 461 et seq.), enacted during the administration of President Franklin Roosevelt, was designed to restore Indian tribes as viable units of self-government. The bill was developed by Commissioner of Indian Affairs John Collier and sponsored by Senator Burton Wheeler of Montana and Representative Howard of Nebraska. The act repudiated the prior policy of allotment, extended existing periods of trust until otherwise directed by Congress, restored surplus land to tribal ownership, provided for the creation of new reservations for landless tribes, gave Indians preference in Bureau of Indian Affairs hiring, and in general established the tribal unit as a viable self-determining authority after a long period of attempts at suppression and assimilation. The various tribes were extended the power of local self-government as federal corporations with the right to organize for the common welfare and negotiate with federal, state, and local governments. The overall effect of the act was to emphasize modernization of tribal government, make them more equivalent to other local governmental units, and initiate more contacts between Indians and other governments and units of the private sector. According to Collier, the true significance of the act was that it emphasized responsible democracy, “of all experiences, the most therapeutic” (1947, 226).

The period following World War II, however, saw another dramatic change in federal Indian policy. In 1953, the House of Representatives adopted a resolution establishing a policy of terminating the federal-tribal relationship and declaring that federal benefits and services to various Indian tribes should be ended “at the earliest possible time” (U.S. Congress 1953). Central to the policy of termination was the relocation of Indians from reservation to urban areas for job training and education, and the transfer of federal responsibility and jurisdiction to state governments.

Indians in general, and some legislators, opposed the termination policy. Congressman Lee Metcalf of Montana, in a speech at the Thirteenth Convention of the National Congress of American Indians in Salt Lake City in 1956, described the new termination policy as a “most persistent and serious attack” on Indians and their property (Peterson 1957, 126). Despite such opposition, over the next decade Congress terminated its assistance to over a hundred tribes, and required them to distribute their land and property to their members and dissolve their tribal governments (Pevar 2002, 11). According to the U.S. Commission on Civil Rights, the termination policy “was aggressively carried out by Dillon Myer, former director of detention camps for Japanese Americans, who became the Commissioner of Indian Affairs in 1950” (1981, 23).

In a further effort to displace federal authority, Congress enacted a statute in 1953 giving five states complete criminal, and some civil, jurisdiction over Indian
reservations located within their states and authorized all other states at their option to assume similar jurisdiction (18 U.S.C. sec. 1162; 28 U.S.C. sec. 1360). The relocation of Indians was the subject of other legislation during the 1950s involving job training and education of tribal members in urban areas (for example, the Relocation Act of 1956). The legislation was designed to support the integration of Indians into the regional and national economies, and weaken their ties to the reservations.

Federal Indian policy changed abruptly once again during the administration of President Lyndon Johnson, which repudiated the policy of terminating the federal-tribal relationship. In 1968, in the wake of the Great Society and the War on Poverty, Congress amended the 1953 act authorizing the states to assume civil and criminal jurisdiction over Indian reservations to require the consent of the affected tribes. Johnson also articulated a national policy of “maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination” (1968, 440).

Numerous congressional and Civil Rights Commission reports of the 1960s and 1970s documented the extent and continuing effects of discrimination against Indians, supporting and setting the stage for further remedial federal legislation (see, for example, U.S. Senate 1969, 21, 53; U.S. House 1974, 1; 1976, 15; 1978, 4). In a message to Congress in 1970, President Richard Nixon summed up the plight of American Indians as follows:

The First Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. (1)

Nixon proposed to “break decisively” with past policies of termination and excessive dependence on the federal government and “create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions” (1970, 1).

During the decade of the 1970s Congress enacted a number of laws to implement the policies outlined by Johnson and Nixon, including the Indian Financing Act (1974), the Indian Self-Determination and Education Assistance Act (1975), the Indian Health Care Improvement Act (1976), the American Indian Religious Freedom Act (1978), and the Indian Child Welfare Act (1978). But one of the most critical was the Voting Rights Act and its extension to language minorities, including American Indians, in 1975. Of all the modern congressional enactments addressing the problems of American Indians, the Voting Rights Act was designed to give Indians a more active voice in the adoption of national, state, and local laws that directly affected their lives and well-being. For that reason, it was most likely to advance the goals of self-help, self-development, and self-determination articulated by the Johnson and Nixon administrations.
Section 2, one of the original provisions of the 1965 act, was also amended in 1982 to incorporate a discriminatory “results” standard. Section 2 was a permanent, nationwide prohibition on the use of voting practices or procedures that “deny or abridge” the right to vote on the basis of race or color, and protected the equal right of minorities “to elect representatives of their choice” (42 U.S.C. sec. 1973). In amending section 2, Congress relied on several decisions documenting discrimination against Indians, including United States v. Humboldt County, Nevada (Civ. No. R 70-0144 HEC), finding that registrars discriminated against Indians in voter registration; United States v. Board of Supervisors of Thurston County, Nebraska, a challenge to at-large elections as diluting Indian voting strength (No. 79-0-380); United States v. San Juan County, N.M. (Civ. No. 79-507), same; and United States v. Bartleme, Wisconsin (Civ. No. 78-C-101), finding purposeful discrimination against Indians in voting.

IMPLEMENTING THE ACT IN INDIAN COUNTRY

Despite the application of the Voting Rights Act to Indians, both in its enactment in 1965 and extension in 1975, relatively little litigation to enforce the act, or the constitution, was brought on behalf of Indian voters in the West until fairly recently. For example, from 1974 to 1990, only one lawsuit was brought in Montana challenging at-large elections as diluting Indian voting strength, despite the presence in the state of seven Indian reservations, a significant Indian population, and the widespread use of at-large voting (Windy Boy v. County of Big Horn, 647 F.Supp. 1002). In Georgia, by contrast, during the same period, lawsuits were brought by African Americans against ninety-seven counties and cities challenging their use of at-large elections (McDonald 1994, 81). Indian country was largely bypassed by the extensive voting rights litigation campaign being waged elsewhere, particularly in the South after the amendment of section 2 to incorporate a discriminatory results standard.

The lack of enforcement of the Voting Rights Act in Indian country was the result of a combination of factors. They included a lack of resources and access to legal assistance by the Indian community, lax enforcement of the act by the Department of Justice, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments. But where there has been litigation, the courts have invariably found patterns of widespread discrimination against Indians in the political process, including chronic racial bloc voting.

NEBRASKA: THURSTON COUNTY

Thurston County in eastern Nebraska is home to members of the Omaha and Winnebago tribes, whose members in 1975 made up approximately 28 percent of the county’s population. Historically, the county elected its board of supervisors from districts. Following the election of an Indian in 1964, and passage of the VRA of 1965, the county abandoned its district system and adopted at-large elections in 1971. The practice of switching from district to at-large elections following increased
minority registration or office holding was widespread in the South following passage of the VRA (McDonald 2003, 131–32, 141–42). As the Supreme Court has noted, “voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change [from to district to at-large] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting” (Allen v. State Board of Elections, 393 U.S., 569).

Seven years later, in 1978, the United States sued Thurston County, alleging that its adoption of at-large elections diluted Indian voting strength and violated both the Constitution and the VRA. The county, though specifically denying liability, entered into a consent decree returning to district voting and adopting a plan containing two (out of seven) majority Indian districts. The county also consented to being placed under section 5 for five years so that its compliance with the court’s order could be “more effectively monitored” (United States v. Thurston County, Nebraska, Civ. No. 78-0-380).

The 1990 census showed the Indian population in Thurston County had grown to nearly 44 percent, and that the supervisor districts were malapportioned. The county adopted a new plan to comply with one person, one vote, but the plan still contained only two majority Indian districts. Indians were “packed” in those two districts at 88 and 97 percent respectively, leaving the other districts majority white. Tribal members, with the assistance of the American Civil Liberties Union (ACLU), sued the county in 1993, alleging that the new plan diluted Indian voting strength in violation of both the Voting Rights Act and the Constitution. They sought the creation of a third majority Indian district to reflect the increase in Indian population in the county.

The district court, in ruling for the plaintiffs, found: “Native Americans vote together and choose Native American candidates when given the opportunity”; “whites vote for white candidates to defeat the Native American candidate of choice”; “it is obvious that Native Americans lag behind whites in areas such as housing, poverty, and employment”; and there was evidence of “overt and subtle racial discrimination in the community” (Stabler v. County of Thurston, Nebraska, CV93-00394, 14–16). The court invalidated the at-large plan under section 2 of the Voting Rights Act and held that plaintiffs were entitled to a new plan creating a third majority Indian district. The court, however, dismissed similar challenges brought by the plaintiffs against a county school board and the board of trustees of the Village of Walthill because Indians were not sufficiently compact to form a majority in a single member district. Both sides appealed, but the court of appeals affirmed the decision of the trial court (Stabler v. County of Thurston).

New Mexico

**LEGISLATIVE REDISTRICTING** Navajo and Pueblo Indians and Hispanics initially challenged New Mexico’s 1982 house redistricting plan on the grounds that it violated the one person, one vote standard of the Fourteenth Amendment. The
three-judge court agreed, noting that the state’s use of a “votes-cast formula” in constructing districts produced unacceptable population deviations (Sanchez v. King, 550 F.Supp. 13). The state was given an opportunity to adopt a remedial plan, which it did in June 1982. That plan was also challenged by minority voters as a racially motivated gerrymander and as diluting minority voting strength.

In a lengthy opinion, the three-judge court concluded that seventeen of the nineteen challenged house districts were in violation of section 2. Although Indians were more than eight percent of the population and were concentrated in certain geographic areas of the state, only one Indian was a member of the house. For the past decade, only two of the state’s 112 legislators had been Indian. No Indian had been elected to a national or statewide office, and only four had been elected to district boards of education or county commissions (Sanchez v. King, 550 F.Supp., 20).

The court found consistent patterns of political cohesion among Indians and racial bloc voting by whites. It noted the history of discrimination against Indians, including denial of the right to vote until 1948. And although the right of Indians to vote was no longer in dispute, “there are still regular attempts by certain legislators to deny that right to Indians living on land exempt from state taxation” (Sanchez v. King, Civ. No. 82-0067, 25).

Given the depressed levels of Indian voting, the votes-cast formula systematically discriminated against Indians. “This defect in the formula was not random or sporadic but inherent and systematic.” The perception among Indians, grounded in large part in the discrimination of the past, that the state is an enemy of the tribes was “the single biggest factor in the depressed political participation of Indians in New Mexico” (Sanchez v. King, Civ. No. 82-0067, 26–27).

Voter registration had increased in recent years, but this was the result of Indian led, not state sponsored, initiatives such as the registration campaigns of the All Indian Pueblo Council. While similar drives were conducted among blacks in the South decades ago, “they only began among New Mexico Indians in the past six years” (Sanchez v. King, Civ. No. 82-0067, 28).

White legislators claimed to be concerned with the needs of their Indian constituencies, but the record was to the contrary. There was “no evidence of any true legislative commitment to studying, addressing and helping to resolve the serious problems facing New Mexico Indians” (Sanchez v. King, Civ. No. 82-0067, 28–29).

Indians ranked “far behind other ethnic groups in educational achievement, employment rates and per capita income. . . Indians are the poorest of the poor” (Sanchez v. King, Civ. No. 82-0067, 30–32). Cultural and linguistic barriers were additional factors that “enhance the redistricting plan’s discriminatory effect on Indians,” the court held (35). Concentrations of rural Indian population were also systematically split and attached to urban areas, diluting Indian voting strength. The court found similarly with respect to areas of the state with concentrations of Hispanic population (50, 65, 67, 69).

The remedial plan drawn by the court avoided splitting concentrations of minority population and increased the number of majority minority house districts. The Supreme Court summarily affirmed the decision of the three-judge court (King v. Sanchez, 459 U.S. 801).
OTHER VOTE DILUTION LITIGATION

In other vote dilution litigation brought by Indians in New Mexico challenging at-large elections for local school boards and a county commission, the defendants entered into consent decrees adopting single member districts (see Largo v. McKinley Consolidated School District, Civ. No. 84-1751; Estevan v. Grants-Cibola County School District, Civ. No. 84-1752; Tso v. Cuba Independent School District, Civ. No. 85-1023; Bowannie v. Bernalillo School District, Civ. No. 88-0212; Felipe v. Cibola County Commission, Civ. No. 85-0301). In a challenge to at-large elections for the board of a public junior college, the court ordered into effect single member districts (Kirk v. San Juan College Board, Civ. No. 86-1053). In another case the court held that state law requiring cities with more than ten thousand people to use single member districts overrode a city’s home rule charter providing for at-large elections (Casuse v. City of Gallup, 746 P.2nd 1103).

Arizona: Legislative and Congressional Redistricting

The San Carlos Apache Tribe and several of its members, among others, challenged legislative and congressional redistricting in Arizona following the 1980 census as violating the Constitution and the VRA. Historically, the tribe had been kept intact within a single congressional district, as well as a single legislative district, each of which elected one state senator and two state representatives. Under the challenged plan, the tribe was divided into three legislative and three congressional districts.

After the complaint was filed, the Department of Justice precleared the congressional plan but objected to the state legislative plan on the grounds that the division of the San Carlos Apache Tribe “raises concerns which will not allow us to conclude that the legislative plan does not have a discriminatory purpose or effect.” The fragmentation of the tribe under the proposed plan, according to the district court, “has the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest” (Goddard v. Babbitt, 536 F.Supp., 541). The court also found that the plan contained unacceptable population deviations, and pursuant to the agreement of the parties adopted congressional and legislative plans that complied with one person, one vote and kept the tribe in the same district, as well as a state legislative plan that cured the dilution of Indian voting strength by keeping the tribe in a single legislative district. Given its disposition of the case, the court found it unnecessary to determine whether the challenged plans had been adopted with a discriminatory purpose.12

Montana

BIG HORN COUNTY

The first section 2 challenge in Montana was brought in 1983 in Big Horn County. The plaintiffs were members of the Crow and Northern Cheyenne tribes and were represented by the ACLU. They contended that the at-large method of electing the members of the county commission and one of the
school districts in the county allowed the white majority to control the outcome of elections and prevented Indian voters from electing candidates of their choice. At the time the complaint was filed, no Indian had ever been elected to the county commission or the school board, despite the fact that Indians were 41 percent of the voting age population of the county.

Following a lengthy trial, the district court issued a detailed order in 1986, finding that the challenged at-large system diluted Indian voting strength in violation of section 2. Among the court's findings were that "the right of Indians to vote has been interfered with, and in some cases denied, by the county"; "Indians who had registered to vote did not appear on voting lists"; "Indians who had voted in primary elections had their names removed from voting lists and were not allowed to vote in the subsequent general elections"; Indians were "refused voter registration cards by the county"; "evidence of official discrimination touching on the right to participate in elections concerned the failure of the county to appoint Indians to county boards and commissions"; "discrimination in the appointment of deputy registrars of voters and election judges limiting Indian involvement in the mechanics of registration and voting"; "in the past there were laws prohibiting voting precincts on Indian reservations and effectively prohibiting Indians from eligibility for positions such as deputy registrar"; "there is racial bloc voting in Big Horn County"; "there is evidence that race is a factor in the minds of voters in making voting decisions"; "when an Indian was elected Chairman of the Democratic Party, white members of the party walked out of the meeting"; "unfounded charges of voter fraud have been alleged against Indians and the state investigator who investigated the charges commented on the racial polarization in the county"; the size of the county "is huge (5,023 square miles), the roads are poor, and travel is time consuming"; "the use of staggered terms along with residential districts promotes head-to-head contests . . . making it more difficult for Indian supported candidates to successfully participate in the political process"; "Indians have lost land, had their economics disrupted, and been denigrated by the policies of the government at all levels"; there was "discrimination in hiring by the county"; "race is an issue and subtle racial appeals, by both Indians and whites, affect county politics"; "indifference to the concerns of Indian parents" by school board members; "the polarized nature of campaigns"; "a strong desire on the part of some white citizens to keep Indians out of Big Horn County government"; "the effects on Indians of being frozen out of county government remain and will continue to exist in years to come"; "English is a second language for many Indians, further hampering participation"; and a depressed socioeconomic status that makes it "more difficult for Indians to participate in the political process and there is evidence linking these figures to past discrimination" (Windy Boy v. County of Big Horn, 647 F.Supp., 1007–9, 1015–18, 1021–22).

The court concluded that "this is precisely the kind of case where Congress intended that at-large systems be found to violate the Voting Rights Act" (Windy Boy v. County of Big Horn, 647 F.Supp., 1022). Following the implementation of a remedial plan consisting of single member districts, an Indian (from a majority Indian district) was elected to the county commission for the first time in history.
LEGISLATIVE REDISTRICTING  Earl Old Person, the chair of the Blackfeet Indian Tribe, and other tribal members in Montana brought suit in 1996 challenging the 1992 redistricting plans for the state house and senate. They contended that the plans diluted Indian voting strength in the area encompassed by the Blackfeet and Flathead reservations (including portions of Flathead, Lake, Glacier, and Pondera counties) where an additional majority Indian house district and a majority Indian senate district could be drawn.13

Since 1972, the Montana constitution has granted the exclusive power to conduct legislative redistricting to a districting and apportionment commission. The commission is reconstituted every ten years in advance of the release of the federal census and consists of five members, four of whom are chosen by the majority and minority leaders of each house. The fifth member is selected by the four commissioners, and if they cannot agree, by the state supreme court. Upon the filing of the plan by the commission with the secretary of state, the plan becomes law and the commission is dissolved (Article V, Section 14, Constitution of Montana).

Based on the 1990 census, Indians were 6 percent of the total population and 4.8 percent of the voting age population (VAP) of Montana. Whereas between 1980 and 1990 the state population had increased by 1.6 percent, the Indian population had increased 27.9 percent. Approximately 63 percent of the Indian population lived on the state’s seven Indian reservations (Old Person v. Cooney, No. CV-96-004-GF, 4–5).

The preexisting 1982 plan contained only one majority Indian district, House District 9 on the Blackfeet Reservation in Glacier County (Old Person v. Cooney, No. CV-96-004-GF, 11–12). The 1982 plan also effectively fragmented the Indian population in other parts of the state by dividing the Fort Belknap Reservation between two senate districts, the Fort Peck Reservation among three senate districts, the Rocky Boy Reservation between two house districts, and the Blackfeet Reservation among four house districts. The Flathead Reservation was divided among eight house districts.

As a result of the growth in Indian population reflected in the 1990 census, three majority white districts under the 1982 plan had become majority Indian: House District 20, portions of Fort Peck; House District 99, portions of Crow; and Senate District 50, portions of Crow and Northern Cheyenne (Old Person v. Cooney, No. CV-96-004-GF, 11–13). Another district, House District 100, portions of Crow and Northern Cheyenne, was approximately 50 percent Indian in light of the new census.

The commission appointed in 1990 consisted of five non-Indians. They held twelve hearings on redistricting around the state, each of which was usually preceded by an afternoon work or planning session. All the sessions were recorded on audio tapes, which were later transcribed for use at trial. The statements made by the commissioners during their planning sessions, as opposed to during the public meetings, when they were more circumspect, can only be described as overtly racial and showed an intent to limit Indian political participation.

Commission members ridiculed the redistricting proposals submitted by tribal members as “idiotic” and “a bunch of crap.” As one commissioner put it when he
looked at a plan that would have created a majority Indian district in the area of the Rocky Boy and Fort Belknap Reservations, “I can feel anger coming on and I might as well spew it here tonight . . . before tonight, I mean. Now, just to be really blunt, this is a bunch of crap.” They called the tribes’ demographer, whom they had never met, a “jackass,” “some turkey from God-Knows-Where,” a “dingaling,” and an “S.O.B.” One commissioner said that if “that bugger” shows up at a meeting “I’ll toss him in the trees someplace.” When a staff member mistakenly gave some of the commissioners blank pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, “I got a blank one too . . . [t]his is typical of them Indians” (Old Person v. Cooney, No. CV-96-004-GF, 38, 44, 45).

In response to requests from tribal members that any districting plan provide equal electoral opportunities to Indian voters, commission members suggested that all the Indians in the state be packed in one district to minimize their voting strength. As one commissioner put it, “give them one District and we go from there.” The Indians, according to another commissioner, didn’t know what was going on: “you get somebody that’s getting in there and stirring them up, yeah, they’ll get to thinking hell’s an icebox.” Another commissioner declared that “if the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it.” When the commission felt obligated to draw a majority Indian district, one commissioner lamented that “we’re being had here, ladies and gentlemen.” Another commissioner added, “and we can’t do anything about it.” Placing white residents in a majority Indian district would, according to one commissioner, “emasculate” white voters (Old Person v. Cooney, No. CV-96-004-GF, 38, 44, 45).

The attitudes of members of the commission toward Indians were a reflection of a more general “white backlash” against Indians. The United States Commission on Civil Rights reported in 1981 that

During the second half of the seventies a backlash arose against Indians and Indian interests. Anti-Indian editorials and articles appeared in both the local and the national media. Non-Indians, and even a few Indians as well, living on or near Indian reservations organized to oppose tribal interests. Senator Mark Hatfield (R-Ore.) said during Senate hearings in 1977 said that “[w]e have found a very significant backlash [against Indians] that by any other name comes out as racism in all its ugly manifestations.” (1)

So-called White Rights groups have proliferated in Montana, including Montanans Opposed to Discrimination (MOD), Citizens Rights Organization (CRO), Interstate Congress for Equal Rights and Responsibilities (ICERR), and Citizens Equal Rights Alliance (CERA). In general, these organizations advocate that the states should have exclusive jurisdiction over all non-Indians and non-Indian lands wherever located. The organizations are also interested in eliminating or terminating the Indian reservations, and have clashed with the tribes over specific issues such as taxation, tribal sovereignty, hunting and fishing rights, water rights, and appropriation and development of tribal resources. Joe Medicine
Crow, a Crow tribal historian and anthropologist, says the mentality of MOD is “do not give the Indians the opportunity to enjoy those rights that have been traditionally the white man’s rights, don’t let them have it” (Windy Boy v. County of Big Horn, 647 F.Supp., 113).

A political party that is gaining a foothold in Montana is the Constitution Party, which has a controversial, distinctly anti-Indian platform. As appears from its Web site, its 2000 National Platform included repeal of the Voting Rights Act, opposition to bilingual ballots, an end to all federal aid except to military veterans, repeal of welfare, and abolishing the U.S. Department of Education.

In the 2000 general election for the Montana legislature, eleven Constitution Party candidates were on the ballot. Where they faced candidates from both major parties, they did poorly. Where they faced only one major party candidate, they did better, with one candidate getting 25 percent of the vote—except in House District 73 in Lake County, the home of the Flathead Reservation and where the only major party candidate was an Indian. There, the Constitution Party candidate got 49 percent of the total vote, 62 percent of the white vote, and came within fifty-four votes of being elected (Old Person v. Cooney, No. CV-96-004-GF, tables 1, 3).

Because of the polarization, white politicians are often reluctant to openly campaign or solicit votes on the reservations for fear of alienating white voters. According to Joe MacDonald, one of the plaintiffs in the Old Person case and the president of the Salish-Kootenai College at Flathead, when U.S. Representative Pat Williams, who was chair of a House education committee, visited the tribal college he didn’t want any publicity or even to attend a reception to meet members of the faculty. According to MacDonald, “he slid in the side door, he and I went around the campus, [he] went to his car and he was gone” (Old Person v. Cooney, No. CV-96-004-GF, vol. I, 178). Another plaintiff, Margaret Campbell, echoed MacDonald’s comments:

Non-Indians come to the Native Americans for their support, but they would prefer that . . . we do not support them publicly among the non-Indian community. For example, they don’t bring us bumper stickers and huge yard signs, that sort of thing. . . . If a non-Indian candidate were to make it known that they had the broad support of the Native American community, it would be the kiss of death to their campaign. (vol. IV, 650)

The plan ultimately adopted by the commission maintained the existing majority Indian districts and created an additional one in the area of the Rocky Boy and Fort Belknap reservations. It did not, however, create the additional house and senate seats in the area of the Flathead and Blackfeet reservations that the plaintiffs had sought.

Following a trial, the district court dismissed the complaint on the grounds that the redistricting plan did not dilute Indian voting strength. It was of the view that white bloc voting was not legally significant, and that the number of legislative districts in which Indians constituted an effective majority was proportional to the Indian share of the voting age population of the state. It did note, however,
“the history of official discrimination against American Indians during the 19th century and early 20th century by both the state and federal government” (Old Person v. Cooney, No. CV-96-004-GF, 39).

The district court also found that “Indians continue to bear the effects of past discrimination in such areas as education, employment and health, which, in turn, impacts upon their ability to participate effectively in the political process.” The effects of discrimination included low Indian voter participation and turnout, and very few Indian candidates (Old Person v. Cooney, No. CV-96-004-GF, 42, 44).

As for plaintiffs’ claim of purposeful discrimination, the court held that the challenged plan had not been adopted with a discriminatory purpose. The derisive and condescending comments made by the commissioners about Indians were dismissed as “moment[s] of levity” (Old Person v. Cooney, No. CV-96-004-GF, 51). Plaintiffs appealed and the court of appeals reversed and remanded for further proceedings (Old Person v. Cooney, 230 F.3d, 1131).

The court of appeals held that plaintiffs established the three primary factors identified in Thornburg v. Gingles, 478 U.S. 30 as probative of vote dilution under section 2 (geographic compactness and political cohesion of the minority group and legally significant white bloc voting), and that “in at least two recent elections in Lake County . . . there had been overt or subtle racial appeals” (Old Person v. Cooney, 230 F.3d, 1121). The court directed the district court to reconsider its ruling in light of its “clearly erroneous finding that white bloc voting was not legally significant” (1127) and its erroneous finding of “proportionality between the number of legislative districts in which American Indians constituted an effective majority and the American Indian share of the voting age population of Montana” (1129, 1131).

As for the anti-Indian comments made by the commissioners, the appellate court acknowledged that they were “inflammatory,” but declined to reverse the ruling of the district court that there was no discriminatory purpose in the adoption of the commission’s plan (Old Person v. Cooney, 230 F.3d, 1130). An unwillingness of many local federal judges, who are, after all, political appointees, to find that members of their state or community committed acts of purposeful discrimination, and the unwillingness of appellate judges to reverse those decisions, underscore the wisdom of Congress in dispensing with any requirement of proving racial purpose to establish a violation of section 2.

Before the court of appeals decision, a new commission was appointed by the legislature in 1999 to redistrict the state in anticipation of the 2000 census. The four appointed members could not agree on the fifth member, who would serve as chair, and accordingly the state supreme court did the appointing. It chose Janine Windy Boy, a Crow Indian who had been the lead plaintiff in the Big Horn County voting rights lawsuit. Having an Indian for the first time on the commission would ensure that the language of the commissioners would not be as inflammatory as it had been in the past. It would also help to ensure that Indians would be treated fairly in the redistricting process. The subsequent adoption of a redistricting plan creating a new majority Indian house district and a new majority Indian senate district in the area of the Flathead and Blackfeet reservations would also render the Old Person lawsuit moot.
The attorney general of Montana, Mike McGrath, who was also counsel for the defendants, appeared before the commission at its meeting in April 2001, to discuss the Old Person case. He publicly acknowledged that the existing redistricting plan violated section 2:

I think ultimately that we will not prevail in this litigation; that the Plaintiffs will indeed prevail in the litigation . . . I think the Ninth Circuit opinion is fairly clear and I think it’s ultimately the state of Montana is going to have to draw a Senate district that is at least somewhat similar to that that the Plaintiffs have requested. (Old Person v. Brown, 312 F.3d 1036, Exh. 3:14)

Joe Lamson, another member of the commission, shared McGrath’s views. He was of the opinion that the 1993 plan “did result in voter dilution of our Native American population in Montana. And that when you look at proportionality, they’re certainly entitled to another Senate district” (Old Person v. Brown, 312 F.3d, 20). A third commissioner, Sheila Rice, who was a member of the state legislature when the existing plan was enacted, said that “I actually sat on that House Committee that reviewed this exact plan that was taken to Court—it must have been the 1993 session, and argued pretty strenuously that we were diluting the Native American population, and that we should redraw that district” (28).

The commission conceded that the 1992 plan diluted Indian voting strength, and adopted a resolution to create “an additional majority Indian House District and an additional majority Indian Senate District in the region of Montana that is dealt with in Old Person, in recognition of the rights of Indians on the Blackfeet and Flathead reservations under section 2 of the federal Voting Rights Act of 1965” (Old Person v. Cooney, 230 F.3d, attachment 1).

A second trial was held in Old Person after the remand from the court of appeals, and the district court again dismissed the complaint. It held that the three Gingles factors continued to be met taking into account intervening elections in 1998 and 2000, and that the gap between the number of majority-minority districts to minority members’ share of the relevant population had increased based on the 2000 census. It reaffirmed the earlier findings that American Indians suffered from a history of discrimination, that Indians are generally lower on the socioeconomic scale than whites, that these social and economic factors hinder the ability of Indians in Montana to participate fully in the political process, and that in at least two recent elections in Lake County there had been overt or subtle racial appeals.

Despite these findings, the court ruled that three Indian-preferred candidates—one white, one Indian who had no major party opposition in the general election, and another Indian from a majority Indian district—had been elected to the legislature from the Blackfeet-Flathead area. The court also emphasized the difficulty of redistricting only part of the state using the 2000 census, and “the very real prospect that comprehensive and long-term relief designed to address vote dilution throughout the State of Montana is in the offing within a year under the auspices of the Montana Districting and Apportionment Commission” (Old Person v. Brown, 182 F.Supp.2d, 1012).
Plaintiffs appealed once again, but this time the court affirmed. It affirmed all the court’s earlier findings showing vote dilution. In addition, and setting aside the finding of the district court once again, the panel held that Indians’ share of majority-minority districts “is not proportional under either a four-county or a statewide frame of reference, [and that] the proportionality factor weighs in favor of a finding of vote dilution” (Old Person v. Brown, 312 F.3d, 1046, 1050). But despite proof of the Gingles and other factors showing vote dilution, including the lack of proportionality, the panel concluded that Indian voting strength was not diluted because of “the absence of discriminatory voting practices, the viable policy underlying the existing district boundaries, the success of Indians in elections, and official responsiveness to Native American needs” (Old Person v. Brown, 312 F.3d, 1046, 1050). The court ignored the evidence presented by the plaintiffs of the resolution of the 2000 Districting and Apportionment Commission, and statements of its individual members, that the 1993 plan diluted Indian voting strength. But in any event, the 2000 redistricting would shortly render the case moot.

After holding a series of hearings around the state, the new commission submitted its redistricting plan to the legislature for comments on January 6, 2003. The plan provided for 100 house districts, six of which were majority Indian, and fifty senate districts, three of which were majority Indian. An additional majority Indian house district (House District 1) was created that included parts of the Flathead and Blackfeet Indian reservations. House District 1, when combined with the preexisting majority Indian house district on the Blackfeet Reservation, House District 85, created an additional majority Indian Senate district, Senate District 1 (Old Person v. Brown, 312 F.3d, 1036, response). The districts for the house contained a total deviation of 9.85 percent.15

Both the house and senate immediately condemned the proposed plans and demanded that the commission adopt new ones. The house, in a resolution passed on February 4, 2003, charged that “the 5% population deviation allowance contained in the plan was used for partisan gain,” that the plan was “mean-spirited,” “unacceptable,” and that “the legislative redistricting plan must be redone.” It also condemned the creation of majority Indian districts as being “in blatant violation of the mandatory criterion that race may not be the predominant factor to which the traditional discretionary criteria are subordinated” (Montana House Resolution No. 3). The senate leveled virtually identical charges, and concluded that “the legislative redistricting plan must be redone” (Montana House Resolution No. 2).

The legislature then enacted House Bill 309, which the governor signed into law on February 4, 2003, which sought to invalidate the commission’s plan and alter or amend the provisions of the state constitution. Where Article V, sec. 14(1) of the state constitution provides that “all districts shall be as nearly equal in population as is practicable,” House Bill 309 provided that the districts must be “within a plus or minus 1% relative deviation from the ideal population of a district.” It further provided that “the secretary of state may not accept any plan that does not comply with the [1% deviation] criteria.”

On February 5, 2003, the commission formally adopted its plan for legislative redistricting and filed it with the secretary of state. The secretary of state, however,
refused to accept it and on the same day filed a complaint against the commission in state court for declaratory judgment that the plan was unconstitutional and unenforceable for failure to comply with the population equality standard of House Bill 309 (Brown v. Montana Districting and Reapportionment Commission, No. ADV-2003-72). Following a hearing, the state court ruled on July 2, 2003, that bill was in fact unconstitutional and that the secretary of state was required to accept the commission’s plan. The secretary of state did not file a notice of appeal but accepted the commission’s plan for filing. It thus became the state’s redistricting plan, superseding the 1993 plan and rendering the plaintiffs’ challenge to the prior plan moot. The Supreme Court, however, denied without comment a petition for a writ of certiorari seeking to vacate the final decision of the lower court on mootness grounds.

As a result of the litigation, which spanned eight years, and despite the concerted opposition of the legislature and secretary of state to the commission’s redistricting plan, eight tribal members, as of the 2004 elections, are now members of the Montana state house and senate, the most Indian members of any state legislature. A recent report by the First American Education Project described the success of American Indian members elected to the Montana state legislature as “a testament [to] the power of Native voters at the smaller geographic and jurisdictional levels” (2004, 7).

**BLAINE COUNTY**  Blaine County, located in north central Montana, is 45 percent Indian and home to the Fort Belknap Reservation, and members of the Gros Ventre and Assiniboine tribes. The county was sued in November 1999 for its use of at-large elections, which were alleged to dilute Indian voting strength in violation of section 2 of the Voting Rights Act (United States v. Blaine County, No. CV-99-122-GR-DWM). Both the district court and court of appeals agreed that the challenged system violated the statute. Indians were geographically compact and politically cohesive, while whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters (United States v. Blaine County, Montana, 363 F.3d, 909–11).

Turning to the totality of circumstances, the courts concluded: there was a history of official discrimination against Indians, including “extensive evidence of official discrimination by federal, state, and local governments against Montana’s American Indian population”; there was racially polarized voting which “made it impossible for an American Indian to succeed in an at-large election”; voting procedures, including staggered terms of office and “the County’s enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide,” enhanced the opportunities for discrimination against Indians; depressed socioeconomic conditions existed for Indians; and there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while “the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions” (Blaine County, 363 F.3d, 914–15).

Blaine County was represented by the Mountain States Legal Foundation, which agreed to represent the defendants on the condition they allow it to challenge the
constitutionality of section 2 as applied in Indian country. Both the district court and the court of appeals rejected the foundation’s arguments and held that section 2 was a valid exercise of congressional authority to enforce the Fourteenth and Fifteenth Amendments. In doing so, the courts relied on the Supreme Court’s recent “federalism” decisions, such as City of Boerne v. Flores (521 U.S. 507), which invalidated various acts of Congress on the grounds that they were not “congruent” and “proportionate,” or appropriately tailored to remedy constitutional violation. The court of appeals noted that when Boerne “first announced the congruence-and-proportionality doctrine . . . it twice pointed to the VRA as the model for appropriate prophylactic legislation,” and that “the Court’s subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation” (Blaine County, 363 F.3d, 904-05). The Supreme Court denied the county’s petition for a writ of certiorari (Blaine County, Montana v. United States, 544 U.S. 992).

OTHER LITIGATION Two other counties and a local school board in Montana were also sued for their use of at-large elections as diluting Indian voting strength, Rosebud County (Northern Cheyenne), Roosevelt County (Assiniboine and Sioux), and Ronan School District 30 (Flathead). Rather than face prolonged litigation, the three jurisdictions entered into settlement agreements adopting district elections (Alden v. Rosebud County Board of Commissioners, Civ. No. 99-148-BLG; United States v. Roosevelt County Board of Commissioners, No. 00-CV-54; Matt v. Ronan School District, No. 99-94).

The difficulty Indians have experienced in getting elected to office was particularly evident in the Ronan school district. From 1972 to 1999, seventeen Indians had run for the school board, and only one, Ronald Bick, had been elected. Bick, who had no formal or announced tribal affiliation at the time, was elected to the board in 1990. However, when he ran for reelection in 1993, and after it became known that he had joined the Flathead Nation, he was defeated. The settlement plan agreed to by the parties called for an increase in the size of the school board from five to seven members, and the creation of a majority Indian district that would elect two members to the school board. At the ensuing election held under the new plan, two Indians were elected from the majority Indian district.

Minnesota

CITY OF PRIOR LAKE Indian residents of a portion of the Shakopee Mdewakanton Sioux Reservation located within the city limits of Prior Lake, Minnesota, were historically allowed to vote in municipal elections and receive municipal services. In 1983, however, the city council passed a resolution excluding reservation land from the town, the effect of which was to deny reservation residents otherwise eligible from voting in municipal elections and from receiving municipal services. The tribe and several of its members brought suit alleging that the de-annexation violated the Constitution and the Voting Rights Act.
In ruling for the tribal plaintiffs, the court held the disputed portion of the reservation was a part of Prior Lake, and its residents were “citizens of Prior Lake” entitled to vote and receive city services (Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153).

South Dakota

ROBERTS AND MARSHALL COUNTIES A section 2 challenge was brought in South Dakota in 1984 by members of the Sisseton-Wahpeton Sioux Tribe in Roberts and Marshall counties. Represented by the Native American Rights Fund, they claimed at-large elections for the Sisseton Independent School District diluted Indian voting strength. The trial court dismissed the complaint but the court of appeals reversed. It held the trial court failed to consider “substantial evidence . . . that voting in the District was polarized along racial lines.” The trial court had also failed to discuss the “substantial” evidence of discrimination against Indians in voting and officeholding, the “substantial evidence regarding the present social and economic disparities between Indians and whites,” the discriminatory impact of staggered terms of office and apportioning seats between rural and urban members on the basis of registered voters which underrepresented Indians, and the presence of only two polling places (Buckanaga v. Sisseton Independent School District, 804 F.2d, 473–76). On remand, the parties reached a settlement utilizing cumulative voting for the election of school board members (Wolfley 1991, 200).

SHANNON COUNTY Joe American Horse, a tribal member and resident of the Pine Ridge Indian Reservation in Shannon County, attempted to register to vote prior to the November 1984 general election. His application was rejected, however, on the ground that it was received after the deadline for registration, despite the fact it was received by the auditor prior to the deadline that had been agreed upon by various county officials and publicly announced. In a lawsuit filed by American Horse on his own behalf, and on behalf of others whose applications had been similarly rejected, the court ordered the rejected applications be accepted and that the applicants be allowed to vote in the upcoming elections (American Horse v. Kundert, Civ. No. 84-5159).

DAY COUNTY The United States sued officials in Day County in 1999 for denying Indians the right to vote in elections for a sanitary district in the area of Enemy Swim Lake and Campbell Slough. Under the challenged scheme, only residents of several noncontiguous pieces of land owned by whites could vote. Residents of the remaining 87 percent of the land around the two lakes, which was owned by the Sisseton-Wahpeton Sioux Tribe and about 200 tribal members, were excluded from the electorate. In an agreement settling the litigation, local officials admitted that Indians had been unlawfully denied the right to vote and agreed on a new sanitation district that included the Indian-owned land around the two lakes (United States v. Day County, South Dakota, No. CV 99-1024).
LEGISLATIVE REDISTRICTING IN 1996

Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation and represented by the ACLU, filed suit in 2000 challenging the state’s 1996 interim legislative redistricting plan. In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian–state government relations. One of the staff reports of the commission concluded that “with the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted.” The report recommended the creation of a majority Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties (Task Force on Indian-State Government Relations 1974, 17, 25). Under the existing plan, there were twenty-eight legislative districts, all of which were majority white and none of which had ever elected an Indian. Thomas Short Bull, a member of the Oglala Sioux Tribe and the executive director of the task force, said the plan gerrymandered the Rosebud and Pine Ridge reservations by “divid[ing them] into three legislative districts, effectively neutralizing the Indian vote in that area.” The legislature, however, ignored the task force’s recommendation. According to Short Bull, “the state representatives and senators felt it was a political hot potato. . . . This was just too pro-Indian to take as an item of action” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 981).

After the release of the 1980 census, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority Indian district in the area of the Pine Ridge and Rosebud reservations. The committee issued a report in which it said the existing districts “inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district” (1980, 35, 52). The Department of Justice, pursuant to its oversight under section 5, advised the state it would not preclear any legislative redistricting plan that did not contain a majority Indian district in the Rosebud–Pine Ridge area. The state bowed to the inevitable and in 1981 drew a redistricting plan creating for the first time in the state’s history a majority Indian district, District 28, which included Shannon and Todd counties and half of Bennett County (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 981). Thomas Short Bull ran for the senate the following year from District 28 and was elected, becoming the first Indian to serve in the state’s upper chamber.

The South Dakota legislature adopted a new redistricting plan after the release of the census in 1991. The plan divided the state into thirty-five districts and retained the majority Indian district, renumbered as District 27, in the Todd, Shannon, Bennett counties area. The plan also provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district. The exception was new House District 28. The 1991 legislation provided that “to protect minority voting rights, District No. 28 shall consist of two single-member house districts” (1991 S.D. Laws 1st Spec. Sess. 1, 5). District 28A consisted of Dewey and Ziebach counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. District 28B consisted of Harding and Perkins counties and portions of Corson and Butte counties. According to 1990
Census data, Indians were 60 percent of the voting age population (VAP) of House District 28A, and less than 4 percent of the VAP of House District 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for the house to run in District 28 at-large (1996 S.D. Laws 45). Tellingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election (Minutes of House State Affairs Committee, January 29, 1996, p. 5). The reconstituted House District 28 contained an Indian VAP of 29 percent. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

The Emery plaintiffs claimed the changes in District 28 violated section 2 of the Voting Rights Act, as well as Article III, section 5 of the South Dakota Constitution, which mandated reapportionment every tenth year, but prohibited all interstitial reapportionment. The South Dakota Supreme Court had expressly held “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration” (In re Legislative Reapportionment, 246 N.W. 295, 297).

Plaintiffs analyzed the six legislative contests between 1992 and 1994 involving Indian and non-Indian candidates in District 28 held under the 1991 plan to determine the existence, and extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81 percent, and whites voted for the white candidates at an average rate of 93 percent. In all six of the contests, the candidate preferred by Indians was defeated (Emery v. Hunt, Civ. No. 00-3008, report of Steven P. Cole, tables 1, 2).

White cohesion also fluctuated widely depending on whether an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68 percent. In the Indian-white legislative contests, the average level of white cohesion jumped to 94 percent (Emery v. Hunt, Civ. No. 00-3008, report of Steven P. Cole, tables 1, 3). This phenomenon of increased white cohesion to defeat minority candidates has been called “targeting,” and illustrates the way in which majority white districts operate to dilute minority voting strength.16

Before deciding the plaintiffs’ section 2 claim, the district court certified the state law question to the South Dakota Supreme Court. That court accepted certification and held that in enacting the 1996 redistricting plan “the Legislature acted beyond its constitutional limits” (Emery v. Hunt, 615 N.W.2d, 597). It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

FAILURE TO COMPLY WITH SECTION 5    As a result of the 1975 amendments of the Voting Rights Act, two counties in South Dakota, Shannon and Todd, which are
home to the Pine Ridge and Rosebud Indian reservations respectively, became subject to section 5 preclearance (41 Fed. Reg. 784). Eight counties in the state, because of their significant Indian populations, were also required to conduct bilingual elections—Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh (41 Fed. Reg. 30002).

William Janklow, the attorney general of South Dakota, was outraged over the extension of section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the secretary of state, he derided the 1975 law as a “facial absurdity.” Borrowing the States’ Rights rhetoric of southern politicians who opposed the modern civil rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power “almost meaningless.” He quoted with approval Justice Hugo Black’s famous dissent in South Carolina v. Katzenbach, which held the basic provisions of the Voting Rights Act constitutional, that section 5 treated covered jurisdictions as “little more than conquered provinces” (383 U.S., 328). Janklow expressed the hope that Congress would soon repeal “the Voting Rights Act currently plaguing South Dakota.” In the meantime, he advised the secretary of state not to comply with the preclearance requirement. “I see no need,” he said, “to proceed with undue speed to subject our State’s laws to a ‘one-man veto’ by the United States Attorney General” (S.D. Op. Atty. Gen. 175).

Although the 1975 amendments were never in fact repealed, state officials followed Janklow’s advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd counties, but submitted fewer than ten for preclearance.

The Department of Justice, which has primary responsibility for enforcing section 5, was surely aware of the failure of the state to comply with the preclearance requirement. It had, for example, sued the state in 1978 and 1979 for its failure to submit for preclearance reapportionment and county reorganization laws affecting the covered counties. But after that, the department turned a blind eye to the state’s failure to comply with section 5.

A number of the voting changes which South Dakota enacted after it became covered by section 5, but which it refused to submit for preclearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements. A numbered seat provision, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single shot voting, or “concentrating on a single candidate” (Rogers v. Lodge 458 U.S., 627). Another unsubmitted change was the requirement of a majority vote for nomination in primary elections for United States senate, congressman, and governor (S.D.Laws 1966, 104, ch. 59; S.D. Laws 1985, 295, ch. 110). A majority vote requirement can “significantly” decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections (City of Rome, Georgia v. United States 446 U.S., 183–84). Still another voting change the state failed to submit was its 2001 legislative redistricting plan.
The 2001 plan divided the state into thirty-five legislative districts, each of which elected one senator and two members of the house of representatives (S.D.C.L. sec. 2-2-34). No doubt due to the litigation involving the 1996 plan, the legislature continued the exception of using two subdistricts in District 28, one of which included the Cheyenne River Sioux Reservation and a portion of the Standing Rock Indian Reservation. The boundaries of the district that included Shannon and Todd Counties, District 27, were altered only slightly under the 2001 plan, but the demographic composition of the district was substantially changed. Indians were 87 percent of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90 percent of the population, and the district was one of the most overpopulated in the state. As was apparent, Indians were more “packed,” or overconcentrated, in the new District 27 than under the 1991 plan. Had they been “unpacked,” they could have been a majority in a house district in adjacent District 26.

Indeed, James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27 that would have retained District 27 as majority Indian and divided District 26 into two house districts, one of which, District 26A, would have had an Indian majority. Bradford’s amendment was voted down fifty-one to sixteen. Thomas Short Bull criticized the way in which District 27 had been drawn because there were “just too many Indians in that legislative district,” which he said diluted the Indian vote. Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, said the plan “segregates Indians,” and denied them equal voting power (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 985).

Despite enacting a new legislative plan affecting Todd and Shannon counties, which were covered by section 5, the state refused to submit the 2001 plan for preclearance. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to submit its redistricting plan for preclearance. The plaintiffs also claimed the plan unnecessarily packed Indian voters in violation of section 2 and deprived them of an equal opportunity to elect candidates of their choice.

A three-judge court was convened to hear the plaintiffs’ section 5 claim. The state argued that because district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with section 5. The three-judge court disagreed. It held that “demographic shifts render the new District 27 a change ‘in voting’ for the voters of Shannon and Todd counties that must be precleared under § 5” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1154). The state submitted the plan to the attorney general who precleared it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect.

The district court, sitting as a single-judge court, heard plaintiffs’ section 2 claim and in a detailed 144-page opinion invalidated the state’s 2001 legislative plan as diluting Indian voting strength. The court found the plaintiffs had established the three Gingles factors. Turning to the totality of circumstances analysis, the court found there was “substantial evidence that South Dakota officially excluded Indians
from voting and holding office.” Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior “ranged from unhelpful to hostile.” Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded they have “intimidated Indian voters.” According to Dr. Dan McCool, the director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were “part of an effort to create a racially hostile and polarized atmosphere. It’s based on negative stereotypes, and I think it’s a symbol of just how polarized politics are in the state in regard to Indians and non-Indians” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1019, 1025–26).

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed “laws that added additional requirements to voting,” including a law requiring photo identification at the polls. Representative Van Norman said that in passing the burdensome new photo requirement “the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race.” During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, “I, in my heart, feel that this bill . . . will encourage those who we don’t particularly want to have in the system.” Alluding to Indian voters, he said “I’m not sure we want that sort of person in the polling place.” Bennett County did not comply with the provisions of the Voting Rights Act enacted in 1975 requiring it to provide minority language assistance in voting until prior to the 2002 elections, and only then because it was directed to do so by the Department of Justice (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1026, 1094).

The district court also found “numerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice.” Thomas Hennies, chief of police in Rapid City, has said, “I personally know that there is racism and there is discrimination and there are prejudices among all people and that they’re apparent in law enforcement.” Don Holloway, the sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were “true or accurate descriptions” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1030).

The court concluded that “Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process.” There was also “a significant lack of responsiveness on the part of elected officials to Indian concerns” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1041). Van Norman said in the legislature any bill that has “anything to do with Indians instantly is, in my experience treated in a different way unless acceptable to all. . . . When it comes to issues of race or discrimination,” he observed, “people don’t want to hear that.” One member of the legislature even accused Van Norman of “being racist” for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops (1046).
Some of the most compelling testimony in the Bone Shirt case, and which was credited by the district court, came from tribal members who recounted “numerous incidents of being mistreated, embarrassed or humiliated by whites.” Elsie Meeks, for example, told about her first exposure to the non-Indian world and the fact “that there might be some people who didn’t think well of people from the reservation.” When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, “somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me.” Meeks said that there is a “disconnect between Indians and non-Indians” in the state. “What most people don’t realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community. . . . Then their . . . reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don’t like them and don’t trust them” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1032, 1036).

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome “in Sioux Falls and a lot of the East River communities.” But in the towns bordering the reservations, the reception “was more hostile.” There, she ran into “this whole notion that . . . Indians shouldn’t be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don’t pay property tax . . . that we shouldn’t be allowed [to run for office]” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1035–36). Such views were expressed by a member of the state legislature, John Teupel, who said he would be “leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty and paying their fair share of the tax burden” (1046).

Craig Dillon, a tribal member living in Bennett County, told of his experience playing on the varsity football team of the county high school. After practice, members of the team would go to the home of the mayor’s son for “fun and games.” The mayor, however, “interviewed” Dillon in his office to see if he was “good enough” to be a friend of his son. Dillon says that he flunked the interview. “I guess I didn’t measure up because . . . I was the only one that wasn’t invited back to the house after football practice after that.” He found the experience to be “pretty demoralizing” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1032).

Lyla Young, who grew up in Parmalee, said that the first contact she had with whites was when she went to high school in Todd County. The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bused to the high school, then bused back to the dorm for lunch, then bused again to the high school for the afternoon session. The white students referred to the Indians as “GI’s” (government issue). Young said that “I just withdrew. I had no friends at school. Most of the girls that I dormed with didn’t finish high school . . . . I didn’t associate with anybody.” Even today, Young has little contact with the white community. “I don’t want to. I have no desire to open up my life or my children’s life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more.” Testifying in court was particularly difficult for her. “This was a big job for me to come here today. . . . I’m the only Indian woman in here, and I’m nervous. I’m very uncomfortable” (Bone Shirt v. Hazeltine, 336 F.Supp.2d, 1033).
The testimony of Young, Meeks, and the others illustrates the polarization that continues between the Indian and white communities in South Dakota, which manifests itself in many ways, including in patterns of racially polarized voting.

As for the other 600 odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux tribes in Shannon and Todd counties, and again represented by the ACLU, brought suit against the state in August 2002 to force it to comply with section 5. Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately enjoined implementation of the numbered seat and majority vote requirements absent preclearance, and directed the state to develop a comprehensive plan “that will promptly bring the State into full compliance with its obligations under Section 5” (Quick Bear Quiver v. Hazeltine, Civ. No. 02-5069, 3). The state made its first submission in April 2003, and thus began a process that is expected to take up to three years to complete.

CHARLES MIX COUNTY Another section 2 case was filed in March 2002 by Indian plaintiffs against the at-large method of electing the board of education of the Wagner Community School District in Charles Mix County. The parties eventually agreed on a method of elections using cumulative voting to replace the at-large system, and a consent decree was entered by the court on March 18, 2003 (Weddell v. Wagner Community School District, Civ. No. 02-4056). At the next election, John Sully, an Indian, was elected to the board of education.

In 2005, tribal members filed suit against the county alleging that the three districts for the county commission were malapportioned and had been drawn to dilute Indian voting strength. The total deviation among the districts was 19 percent, and almost certainly unconstitutional, while each had a majority white voting age population, despite the fact that Indians were 30 percent of the population of the county and a compact majority Indian district court easily be drawn. South Dakota law prohibited the county from redistricting until 2012 (S.D.C.L. 7-8-10). In an effort to avoid court supervised redistricting following a finding of a one person, one vote or Voting Rights Act violation, the county requested the state legislature to pass legislation establishing a process for emergency redistricting. The legislature complied and passed House Bill 1265, which the governor promptly signed, allowing a county to redistrict, with the permission of the governor and secretary of state, at any time it became “aware” of facts that called into question whether its districts complied with federal or state law. Despite the fact that the new law applied to every county in the state, including Shannon and Todd, and was thus required to be precleared under section 5 as well as the consent decree in the Quick Bear Quiver case, Charles Mix County immediately sought permission from the governor to draw a new plan. The plaintiffs in Quick Bear Quiver then filed a motion for a preliminary injunction before the three-judge court to prohibit the county from proceeding with redistricting absent compliance with section 5. The court granted the motion.

In a strongly worded opinion, the court noted that state officials in South Dakota “for over 25 years . . . have intended to violate and have violated the preclearance
requirements,” and that the new bill “gives the appearance of a rushed attempt to circumvent the VRA” (Quick Bear Quiver v. Nelson, 387 F.Supp.2d 1027, 1031, 1034). Implementation of the new emergency redistricting bill was enjoined until the state complied with section 5.

BUFFALO COUNTY One of the most blatant schemes to disfranchise Indian voters was used in Buffalo County, with a population of approximately 2,000 people, 83 percent of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three-member county commission, which had been in effect for decades, nearly all of the Indian population—some 1,500 people—were packed in one district. Whites, though only 17 percent of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218 percent, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and ensure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted its plan was discriminatory and agreed to submit to federal supervision of its future plans under section 5 of the Voting Rights Act through January 2013 (Kirkie v. Buffalo County, Civ. No. 03-3011).

CHEYENNE RIVER SIOUX RESERVATION In 1986 Indian residents of the Cheyenne River Sioux Reservation in South Dakota launched a campaign to register Indian voters. The auditor of Dewey County, however, limited the number of application forms given to voter registrars, who had to travel approximately eighty miles round trip to the auditor’s office in the courthouse, to ten to fifteen apiece. The Indians filed suit under the Voting Rights Act and the court concluded the county auditor had discriminated against Indians by limiting the number of application forms, ordered that more forms be provided, and extended the deadline for voter registration for an additional week (Fiddler v. Sieker, No. 85-3050).

The same year, Alberta Black Bull and other Indian residents of the reservation brought a successful section 2 suit against Ziebach County because of its failure to provide enough polling places for school district elections. Before the lawsuit, Indians had to travel up to 150 miles round trip to vote. The district court ordered the school district to establish four new polling places on the reservation (Black Bull v. Dupree School District, Civ. No. 86-3012).

CITY OF MARTIN Martin, the county seat of Bennett County, has a population of just over 1,000 people, nearly 45 percent of whom are American Indian. The city is near the Pine Ridge and Rosebud reservations, and like many border towns it has had its share of racial conflict. In the mid-1990s, there were deep racial divisions over the homecoming ceremony at the local high school, in which male
students wearing traditional Indian regalia designated as the “Big Chief” and “Little Chief” selected a “Princess” in a mock Indian ceremony. Also in the mid-1990s, the federal government successfully sued the local bank for systematic lending discrimination against American Indians (United States v. Blackpipe State Bank, No. 93-5115). In early 2002, Indians organized two peaceful marches in Martin to protest what they viewed as racial discrimination and police brutality by the non-Indian sheriff and his deputies.

Just weeks after the 2002 march, the ACLU sued the city on behalf of two Indian voters, alleging that the city’s recently adopted redistricting plan violated the constitutional principle of one person, one vote (Wilcox v. City of Martin, No. 02-5021). The city responded by changing its plan to correct the malapportionment, but did so in a way that fragmented the Indian community and gave white voters an overwhelming supermajority in all three council wards. The city also refused to reopen the candidate qualification period so that prospective candidates could decide whether to run under the new plan.

After a hearing in May 2002, the district court held, on technical grounds, that the plaintiffs could not challenge the city’s decision not to reopen the candidate qualification period because none of the plaintiffs had expressed an intention to run for office under the new plan. The court did, however, allow the plaintiffs to amend their complaint to allege the new plan violated section 2 and the Constitution.

After more than two years of discovery, the case went to trial in June 2004. The plaintiffs demonstrated, among other things, that no Indian-preferred candidate had ever been elected to the city council under the challenged plan. The court nonetheless ruled against the plaintiffs in March 2005, finding on the basis of county elections that the plaintiffs had not satisfied the third Gingles factor. Indians are a minority in Martin, but the majority in Bennett County.

The plaintiffs appealed, and on May 5, 2006, the Eighth Circuit reversed the decision of the district court. It held that “plaintiffs proved by a preponderance of the evidence that the white majority usually defeated the Indian-preferred candidate in Martin aldermanic elections” (Cottier v. City of Martin, 445 F.3d, 1117). The Court also noted the history of ongoing intentional discrimination against Indians in Martin:

For more than a decade Martin has been the focus of racial tension between Native-Americans and whites. In the mid-1990s, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Department sued and later entered into a consent decree with the local bank requiring an end to “redlining” loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans. (Cottier v. City of Martin, 445 F.3d, 1115–16).
Colorado

MONTEZUMA COUNTY  Members of the Ute Mountain Ute Tribe in Montezuma County, represented by the ACLU, brought a successful challenge in 1989 to the at-large method of electing their local school board. The court made extensive findings of past and continuing discrimination against Indians in voting and other areas, which are summarized here.

During much of the nineteenth century “the battle cry in Colorado seemed to be to exterminate the Indians.” The governor, for example, issued an appeal on August 10, 1864, for “the people to defend themselves and kill Indians.” This anti-Indian sentiment precipitated a surprise attack three months later by the state volunteers on a Cheyenne and Arapahoe village at Sand Creek in eastern Colorado. “Newspapers of the day greeted reports of the massacre with unanimous approval.” Citing the persistent efforts of whites to exterminate and remove the Utes and expropriate their land, the court said “it is blatantly obvious” that Native Americans “have been the victims of pervasive discrimination and abuse at the hands of the government, the press, and the people of the United States and Colorado.” The evidence revealed “a keen hatred for the Ute Indians and their way of life” (Cuthair, 7 F.Supp.2d, 1156–57, 1160).

Anti-Indian attitudes persisted in Colorado and in Montezuma County into the twentieth century. Communities surrounding the Ute Reservation “treated Indians as second-class citizens. They were discouraged from attending public schools. Discrimination was rampant against Ute children. They were perceived to be unhealthy, unsanitary, and most of all, unwelcome.” The plight of the Ute Mountain Utes among Indian tribes was especially dire. In the 1960s “there were only just over 900 tribal members and their infant mortality rate was so high that their death as a viable cultural group could be predicted” (Cuthair, 7 F.Supp.2d, 1159–60).

The attitude of whites changed somewhat after the tribe began to receive funds from oil and gas leases, as well as revenue from various federal programs and judgments before the U.S. Court of Claims reimbursing the tribe for land that had been ceded to the United States in the late nineteenth century at prices “so inadequate as to be unconscionable.” But despite the economic benefit to the surrounding community from this influx of new funds, “sharply divided interests and attitudes over Indian rights remained . . . and abuses abounded such as discrimination in law enforcement, health care, and employment as well as incidents of double pricing and disputes over hunting rights.” Disputes over land claims remained. “Water rights and tribal sovereignty issues were hotly contested and the local populous made clear their continuing objections to the nonpayment of taxes by Indians. . . . The public generally still harbored attitudes that Indians were lazy and not to be trusted.” The numerous and existing divides “made it extremely difficult for the Indians to establish any alliances with the whites in the cultural and political arena” (Cuthair, 7 F.Supp.2d, 1160–61).

Indians were not allowed to serve on juries in Montezuma County until 1956. They were historically denied the right to vote in Colorado, and not until 1970 was the state constitution amended to allow tribal members living on the reservation to
vote. Until the late 1980s or early 1990s, Utes were not allowed to register at the tribal headquarters at Towaoc, despite the fact the non-Indian population was allowed satellite registration at several communities in the county. Prior to the trial of the case in 1997, no Indian had ever been elected to public office in Montezuma County (Cuthair, 7 F.Supp.2d, 1161–62).

The court concluded that Indians were geographically compact and politically cohesive, and that the candidates favored by Indians were usually defeated by whites voting as a bloc. The court also found “a history of discrimination—social, economic, and political, including official discrimination by the state and federal government,” and a depressed socioeconomic status caused in part by the history of discrimination. As a remedy for the section 2 violation, the court ordered into effect a single-member district plan for election of school board members, containing a majority Indian district encompassing the reservation.18

THE “RESERVATION” DEFENSE

Defendants in Indian voting rights cases frequently argue that Indians are mainly loyal to their tribes and simply don’t care about participating in elections run by the state. In the lawsuit over the 1996 interim redistricting plan in South Dakota, the state conceded Indians were not equal participants in elections in District 28, but argued it was the “reservation system” and “not the multimember district which is the cause of [the] ‘problem’ identified by Plaintiffs” (Emery v. Hunt, defendant’s response, 26). The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying them the opportunity to develop a “loyalty” to state elections. As the court concluded in Bone Shirt, “the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process” (Bone Shirt v. Hazeltine, 336 F.Supp., 1022).

An alleged lack of Indian interest in state elections was also used by South Dakota to justify denying residents of the unorganized counties the right to vote or run for county office. In one case the state argued that a majority of the residents were “reservation Indians” who “do not share the same interest in county government as the residents of the organized counties.” The court rejected the defense noting that a claim that a particular class of voters lacks a substantial interest in local elections should be viewed with “skepticism,” because “all too often, lack of a ‘substantial interest’ might mean no more than a different interest, and ‘fencing out’ from the franchise a sector of the population because of the way they may vote.” The court concluded Indians residing on the reservation had a “substantial interest” in the choice of county officials, and held the state scheme unconstitutional (Little Thunder, 518 F.2d, 1255–56). In a second case, the state argued that denying residents in unorganized counties the right to run for office in organized counties was justifiable because most of them lived on an “Indian Reservation and hence have little, if any, interest in county government.” Again, the court disagreed. It held the “presumption” that Indians lacked a substantial interest in county elections “is not a reasonable one” (United States v. South Dakota, 636 F.2d, 244–45).
The "reservation" defense has been similarly raised—and rejected—in other voting cases brought by American Indians in the West.\textsuperscript{19} It may be convenient and self-reassuring for a jurisdiction to blame the victims of discrimination for their condition, but it is not a defense to a challenge under section 2.

Some Indians have undoubtedly felt that their participation in state and federal elections would undermine their tribal sovereignty. But the importance of the Indian vote in recent elections has convinced most that there is no downside to participating in elections that affect the welfare of the Indian community. In the 2002 election in South Dakota for U.S. senator, Democrat Tim Johnson defeated Republican John Thune by only 524 votes, a margin of victory credited to the increase in the number of Indian voters. The increasing awareness of the importance of the Indian vote is reflected in the dramatic growth in Indian participation in recent elections. In the 2000 presidential election, the average turnout for Buffalo, Dewey, Shannon, and Todd counties in South Dakota was 42.7 percent. Turnout in the same counties in the 2004 election, which was driven almost exclusively by Indian voters, grew to 65.2 percent, an increase of 22.5 percent, though turnout for the state as a whole grew by only 9.9 percent. (First American Education Project 2004, 37). Similar increases in Indian turnout were reported for reservation areas in other states, including Arizona, Minnesota, Montana, New Mexico, and Wisconsin.

THE NEED TO EXPAND SECTION 5

As is apparent from the extensive findings of past and continuing discrimination against Indians in recently litigated cases in Indian country, section 5 coverage needs to be significantly expanded to ensure the equal right to vote for all American Indians. One straightforward way of doing that would be to extend section 5 coverage to all jurisdictions currently required to provide minority language assistance in voting under section 203 because of their significant Indian populations.

As shown in table 9.1, eighty-one local jurisdictions in eighteen states are now required to provide bilingual language assistance in voting to American Indians (67 Fed. Reg. 144). Under the existing section 5 "trigger," thirty-one of these jurisdictions are already covered by the preclearance requirement. Some, like Shannon and Todd counties in South Dakota, Jackson County in North Carolina, and Apache, Coconino, Navajo, and Pinal counties in Arizona, are covered because of their American Indian populations. The rest are covered because of the presence of non-Indian populations in the jurisdiction. For example, Indians in Arizona benefit from the protection of section 5 because the entire state is covered due to its Hispanic population. Indians in Mississippi and Louisiana are protected because those states are covered in their entirety by section 5 due to the history of discrimination against African Americans. Once a jurisdiction is covered by section 5, and for whatever reason, the courts have applied the protection of preclearance to all racial or language minorities.\textsuperscript{20}
TABLE 9.1 / American Indian Languages

<table>
<thead>
<tr>
<th>State</th>
<th>Jurisdiction Covered by Section 203</th>
<th>Covered by Section 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Alaska</td>
<td>6 census areas or boroughs (Bethel, Dillingham, Kenai, North Slope, Wade Hampton, Yukon-Koyukuk)</td>
<td>All (6)</td>
</tr>
<tr>
<td>2. Arizona</td>
<td>9 counties (Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, Yuma)</td>
<td>All (9)</td>
</tr>
<tr>
<td>3. California</td>
<td>2 counties (Imperial and Riverside)</td>
<td>None</td>
</tr>
<tr>
<td>4. Colorado</td>
<td>2 counties (La Plata, Montezuma)</td>
<td>None</td>
</tr>
<tr>
<td>5. Florida</td>
<td>3 counties (Broward, Collier, Glades)</td>
<td>Collier (1)</td>
</tr>
<tr>
<td>6. Idaho</td>
<td>5 counties (Bannock, Bingham, Caribou, Owyhee, Power)</td>
<td>None</td>
</tr>
<tr>
<td>7. Louisiana</td>
<td>1 parish (Allen)</td>
<td>All (1)</td>
</tr>
<tr>
<td>8. Mississippi</td>
<td>9 counties (Attala, Jackson, Jones, Kemper, Leake, Neshoba, Newton, Scott, Winston)</td>
<td>All (9)</td>
</tr>
<tr>
<td>9. Montana</td>
<td>2 counties (Big Horn and Rosebud)</td>
<td>None</td>
</tr>
<tr>
<td>10. Nebraska</td>
<td>1 county (Sheridan)</td>
<td>None</td>
</tr>
<tr>
<td>11. Nevada</td>
<td>5 counties (Elko, Humboldt, Lyon, Nye, White Pine)</td>
<td>None</td>
</tr>
<tr>
<td>12. New Mexico</td>
<td>11 counties (Bernalillo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Santa Fe, Socorro, Taos, Valencia)</td>
<td>None</td>
</tr>
<tr>
<td>13. North Carolina</td>
<td>1 county (Jackson)</td>
<td>Jackson (1)</td>
</tr>
<tr>
<td>14. North Dakota</td>
<td>2 counties (Richland and Sargent)</td>
<td>None</td>
</tr>
<tr>
<td>15. Oregon</td>
<td>1 county (Malheur)</td>
<td>None</td>
</tr>
<tr>
<td>16. South Dakota</td>
<td>18 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, Ziebach)</td>
<td>Shannon, Todd (2)</td>
</tr>
<tr>
<td>17. Texas</td>
<td>2 counties (El Paso and Maverick)</td>
<td>All (2)</td>
</tr>
<tr>
<td>18. Utah</td>
<td>1 county (San Juan)</td>
<td>None</td>
</tr>
<tr>
<td>Total</td>
<td>81 local jurisdictions</td>
<td>31 currently covered</td>
</tr>
</tbody>
</table>

Source: Authors’ compilations.

Note: Currently there are eighty-one local jurisdictions across eighteen states required to provide minority language assistance in voting pursuant to section 203 because of their American Indian populations. Of these eighty-one jurisdictions, thirty-one are already covered under section 5.

However, if coverage were extended to all eighty-one of the language minority jurisdictions, Indians living in an additional fifty counties would enjoy the protection afforded by section 5 (see table 9.2). Although such an extension would not capture all of the problematic jurisdictions in Indian country, because not all counties with sizable native populations necessarily meet the criteria for section 203.
The Future of the Voting Rights Act

coverage, its benefit to Indians would be direct and palpable. More than doubling the number of local jurisdictions with sizable Indian populations covered by section 5 would be a significant improvement.

The expansion of section 5 in Indian country would promote the fundamental purpose of section 5, which is “to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims” (South Carolina v. Katzenbach, 383 U.S., 328). The bulk of litigation enforcing section 2 in Indian country, particularly since its amendment in 1982, has been brought by the Indian community, but only with the assistance of national civil rights organizations such as the ACLU, the National Indian Youth Council, the Native American Rights Fund, the Indian Law Resource Center, and legal services. Local Indian communities simply lack the resources to bring such litigation on their own. Requiring them to enforce the vote denial and vote dilution standards of section 2 is a prescription for nonenforcement and the perpetuation of discrimination in voting.

Litigation is not only expensive but can drag on for years. As Attorney General Katzenbach explained to Congress in 1965 in urging passage of the Voting Rights Act, “litigation on a case-by-case basis simply cannot do the job.” And even when a case is finally won, “local officials intent upon evading the spirit of the law are adept at devising new discriminatory techniques not covered by the letter of the judgment” (U.S. Senate 1965, 1:14). The oversight of state and local voting practices provided by section 5, as well as its undeniable deterrent effect, argue strongly for the expansion of preclearance in Indian country.

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**TABLE 9.2 / Additional Fifty American Indian Jurisdictions**

<table>
<thead>
<tr>
<th>State</th>
<th>Counties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. California</td>
<td>2 (Imperial and Riverside)</td>
</tr>
<tr>
<td>2. Colorado</td>
<td>2 (La Plata, Montezuma)</td>
</tr>
<tr>
<td>3. Florida</td>
<td>2 (Broward, Glades)</td>
</tr>
<tr>
<td>4. Idaho</td>
<td>5 (Bannock, Bingham, Caribou, Owyhee, Power)</td>
</tr>
<tr>
<td>5. Montana</td>
<td>2 (Big Horn and Rosebud)</td>
</tr>
<tr>
<td>6. Nebraska</td>
<td>1 (Sheridan)</td>
</tr>
<tr>
<td>7. Nevada</td>
<td>5 (Elko, Humboldt, Lyon, Nye, White Pine)</td>
</tr>
<tr>
<td>8. New Mexico</td>
<td>11 (Bernalillo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Santa Fe, Socorro, Taos, Valencia)</td>
</tr>
<tr>
<td>9. North Dakota</td>
<td>2 (Richland and Sargent)</td>
</tr>
<tr>
<td>10. Oregon</td>
<td>1 (Malheur)</td>
</tr>
<tr>
<td>11. South Dakota</td>
<td>16 (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Stanley, Tripp, Ziebach)</td>
</tr>
<tr>
<td>12. Utah</td>
<td>1 (San Juan)</td>
</tr>
<tr>
<td>Total</td>
<td>50 Local Jurisdictions</td>
</tr>
</tbody>
</table>

*Source: Authors’ compilations.*

*Note: List of fifty additional section 203 American Indian jurisdictions in twelve states that would be covered by section 5 using section 203 as a trigger.*
The “inequalities in political opportunities that exist due to vestigial effects of past purposeful discrimination,” and which the Voting Rights Act was designed to eradicate, still persist throughout Indian country (Gingles, 478 U.S., 69). Of all the modern legislation enacted to redress these problems, the VRA provides the most effective means of advancing the goals of self-development and self-determination that are central to the survival and prosperity of the Indian community in the United States.

APPENDIX: STATUTES AND REGULATIONS LIST

Article V, Section 14, Constitution of Montana.
Article IX, Section 2, Constitution of Montana (1932).
Mont. L. 1937, p. 523.
Mont. L. 1937, p. 527.
Mont. L. 1975, ch. 205.
18 U.S.C. sec. 1162
Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.
S.D.C.L. sec. 2-2-34.
67 Fed. Reg 144 (July 26, 2002).
Montana House Resolution No. 3 (February 4, 2003).
Montana Senate Resolution No. 2 (February 4, 2003).

NOTES

1. The preference in BIA hiring was “political rather than racial in nature” (Morton v. Mancari, 417 U.S., 554 n.24).
2. The Supreme Court has held that Indians would be entitled to the protection of a state law prohibiting discrimination on the basis of “race or color” (Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 76, 76), whereas the courts in a variety of contexts have held that Indians, in their capacity as a racial group, were entitled to the protection of the constitution and federal civil rights laws, for example, in legislative redistricting (Klahr v. Williams, 339 F.Supp. 922, 927), jury selection (United States v. Iron Moccasin, 878 F.2d 226), and public education (Natonabah v. Board of Education, 355 F. Supp. 716, 724).

3. Three of the counties in Arizona—Apache, Navajo, and Coconino—were allowed to “bail out” from section 5 coverage after the court concluded that the state’s literacy test had not been discriminatorily applied against American Indians (Apache County v. United States, 256 F. Supp. 903, 913). The state of Alaska, with its substantial Alaskan Native population, was also allowed to bail out and for similar reasons (Alaska v. United States, Civ. No. 101-66). As a result of subsequent amendments to the act, both Alaska and Arizona were “recaptured” by section 5.

7. 82 Stat. 79.
12. A resident of Holbrook Unified School District No. 3 in Navajo County filed a Section 2 challenge to the at-large method of electing the school board as diluting Indian voting strength. Although Indians were 42 percent of the population of the school district, the complaint alleged that “Native Americans have been unsuccessful in electing a member to the Board . . . because of racially polarized voting.” The defendants filed a motion to dismiss, which the district court denied because of “insufficient evidence in the record” to support the motion. The record does not reflect further activity in the case.
13. Plaintiffs also challenged redistricting in the area encompassed by the Fort Peck, Fort Belknap, and Rocky Boy Reservations, but those claims were later abandoned.
16. “When white bloc voting is ‘targeted’ against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race” (Clarke v. City of Cincinnati, 40 F.3d, 457).
17. Ordering state to submit reapportionment plan for preclearance (United States v. Tripp County 1979); enjoining implementation of law revising system of organized and unorganized counties absent preclearance (United States v. South Dakota 1980).
18. In addition to the vote dilution and vote denial litigation discussed above, the United States has brought a number of suits to enforce the bilingual election provisions of the

19. See, for example, Windy Boy v. County of Big Horn (“racially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government” (647 F.Supp., 1021); Cuthair v. Montezuma-Cortez (the alleged “reticence of the Native American population of Montezuma County to integrate into the non-Indian population” was “an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past”) (7 F. Supp.2d, 1161); United States v. Blaine County (rejecting the argument that low Indian voter participation was a defense to a vote dilution claim) (363 F.3d, 911).

20. For example, in City of Port Arthur, Texas v. United States, where the state was covered because of its Hispanic population, the Court denied preclearance to proposed voting changes because of their discriminatory impact on black voters (517 F.Supp., 1023–24).

CASES CITED

The Future of the Voting Rights Act

City of Rome, Georgia v. United States, 446 U.S. 156 (1980).
Clarke v. City of Cincinnati, 40 F.3d 807 (6th Cir. 1994).
Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006).
Draper v. United States, 164 U.S. 240 (1896).
Elk v. Wilkins, 112 U.S. 94 (1884).
In re Legislative Reapportionment, 246 N.W. 295, 297 (S.D. 1933).
Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975).
Old Person v. Brown, 312 F.3d 1036 (9th Cir. 2002).
Old Person v. Cooney, 230 F.3d 1113 (9th Cir. 2000).
Shakopee Mdewakanton Sioux Community v. City of Prior Lake, Minnesota, 771 F.2d 1153 (8th Cir. 1985).
Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997).

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United States v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004).
United States v. County of San Juan, New Mexico, Civ. No. 79-508 JB (D. N.Mex. April 8, 1980).
United States v. Iron Moccasin, 878 F.2d 226 (8th Cir. 1989).
United States v. Roosevelt County Board of Commissioners, No. 00-CV-54 (D. Mont. March 24, 2000).
United States v. Socorro County, New Mexico, Civ. No. 93-1244 (D. N.Mex. 1994).
United States v. South Dakota, 636 F.2d 241 (8th Cir. 1980).
Wilcox v. City of Martin, No. 02-5021 (D. S.D.).

REFERENCES

The Future of the Voting Rights Act


Chapter 10

Election Administration and Voting Rights

Stephen Ansolabehere

In November 2000, Caltech and MIT formed a new venture—the Voting Technology Project. The project, which I headed from its inception through 2004, is a collaborative effort of social scientists and engineers seeking to find solutions to the failures in voting technology observed in the contested Florida election between George W. Bush and Albert Gore, Jr.

As we began our examination of the problems in the Florida election we immediately saw that election administration is a complex system. The machines that record and count votes are integral to that system, but their operation is embedded in a larger context. The security and integrity of the system is ensured not just by the programming of the voting machines, but also by the mechanism for authenticating voters—registration—and the staff that manage precincts and central election offices. The usability and accessibility of the system depends on how ballots are formatted, and on how polling places are staffed and operated. Poll workers today are often called on to straighten out errors in voter registration lists and instruct voters on how to use sometimes confusing voting machines. Failures in one aspect of the system, then, affect other aspects. Confusing ballot designs can create long lines as staff are taken away from normal activities to instruct voters.

The problems observed in Florida in November of 2000 went far beyond the difficulties with punch cards observed in Palm Beach County, and those difficulties went far beyond Florida. Throughout the country, journalists and other observers documented difficulties with recording and counting votes, with voter registration, and with the operation of polling places and the handling of absentee ballots. Our group estimated that 4 to 6 million people tried to vote but that their votes were lost because of one failure or another. Approximately 3 million registered voters who tried to vote could not vote owing to errors in voter registration; at least 1.5 million voters did not have their votes for president recorded or counted because of difficulties with voting machines; and another million felt deterred from voting by polling place locations and long lines. Additional problems lie in the absentee voting system, though their magnitude is difficult to gauge (Caltech/MIT Voting Technology Project 2001).

These problems were not, on the whole, new. The inadequacies of the voter registration system and the uneven quality of polling place operations have long been targets of progressive reformers and civil rights groups. The history of election
fraud, poor administration, and discrimination in the United States is long and often ugly. Although little known outside the field of election administration, administrators and academic observers in this area have long understood the difficulties with voting technologies. Studies of punch card failures, for example, date to the 1960s and 1970s, when this technology was being widely deployed (on lever machines and paper ballots, see Mather 1964; on electronic voting equipment, see Ansolabehere and Stewart 2005).

But, the scope and scale of the difficulties in the 2000 election came as an enormous surprise to most observers of American politics, political professionals, and activists. Election administration is a technical aspect of governing whose successful operation most of us take for granted. And yet, one in twenty people—approximately 5 million of the 100 or so million voters—who wanted to vote could not. If we were to think about the operation of our telecommunication system, our sewer system, or any other highly engineered public system, a five percent error rate would surely be unacceptable.

This is a strikingly high rate of “error.” Election administration has been the subject of intense reform over the past century. The first half of the twentieth century witnessed the widespread adoption of voting equipment and voter registration to rationalize the electoral process and root out fraud and other election irregularities. Over the course of this past century, especially in the latter half, election administration emerged as a bureaucratic enterprise, in the best sense of that term. Conduct of elections shifted from party organizations into offices of government staffed by professionals. State and local election directors organized in the 1970s and 1980s to address many of the challenges they face, to share information, and devise solutions. These organizations, particularly the National Association of State Election Directors, spearheaded efforts to create technical standards and certification of voting machines. Congress, although it has kept these issues at arm’s length, has occasionally taken on the operation of elections. As recently as 1995, Congress sought to make voter registration less of a barrier through the National Voter Registration Act. And the Voting Rights Act, perhaps the most significant federal elections legislation, aimed explicitly at improving access to the polls for African Americans and Hispanics.

Failures in the administration of election raise the prospect that many elections are decided incorrectly, or at least their determination is cast into doubt. In the 2000 presidential election, the winner and the loser in five states were separated by less than 1 percent of ballots cast. The 1960, 1968, 1976, and 2000 presidential elections were decided by similarly slim margins, and doubts lingered about the 2004 presidential election, especially the contest in Ohio.

Beyond questions about the outcome of the election, problems with election administration present two sorts of voting right claims. The first is a matter of equal protection broadly, as expressed in the Fourteenth Amendment and its subsequent interpretations. The 5 percent reliability figure is an average. Some communities evidently do much better, and some do much worse. For example, the voting machine error rate in some counties in Florida in 2000 was as high as low as one percent and in other counties as high as 12 percent—one in eight ballots did
not record a vote for president. If one community has less capable election administration or uses inferior voting technology, then on average the people in that community have a lower chance of having their votes counted than the voters in communities with exceptional administration or superior voting technology. Such differences may have sizable political ramifications if the performance of election offices is correlated with partisan, economic, or social interests.

Perhaps the strongest evidence of such equal protection problems arises in the contrast between rural and urban areas. Rural areas have much less administrative capacity; election offices in rural counties typically consist of one staff person, who may work on elections only part-time. Urban areas typically have substantial offices and staffing, as well as equipment storage facilities. Studies of voting machine error document significantly worse performance in rural areas (Ansolabehere and Stewart 2005; see also Knack and Kropf 2003). Such differences might be remedied by more expenditures on elections by rural counties or by several rural counties sharing resources and gaining the economies of scale enjoyed by urban counties.

A second matter is the prospect that election administration today, either intentionally or unintentionally, discriminates against racial minorities. If there are fewer polling places and longer lines in each or inferior voting technology is used in areas with more African Americans or Hispanics, the votes of those groups may be less likely to be counted. Such practices may violate the Fifteenth Amendment and the Voting Rights Act. The NAACP and other civil rights groups sued the state of Florida in November of 2000 to protect the voting rights of African Americans. The settlement of this suit included the creation of various administrative procedures aimed at improving administration of voting rolls.2

Racial discrimination in voting is of particular importance given the historical problems African Americans faced in election administration, especially in the South. V. O. Key’s classic *Southern Politics* details the variety of administrative procedures introduced at the end of the nineteenth century to keep blacks from the polls and to secure Democratic dominance of the region. Blacks were excluded from primary elections. They were subjected to poll taxes and literacy tests. They were subjected to irregular voter registration procedures that required potential voters to wait in lines, sometime for days (see, for example, Taper 1963). In some extreme cases, they were subject to intimidation at the polls on election day. As a result, only about one in five blacks were registered throughout the South and those who were often encountered administrative obstacles to voting (Davidson and Grofman 1994, 39–40).

The election controversy in Florida echoed this bleak history. In addition to the well-publicized problems with punch cards, the postelection reform commission in Florida reported of improper purges of registration rolls, unusually long lines in polling places with large numbers of African Americans, and state troopers’ road blocks preventing people from reaching the polls (Governor’s Select Task Force 2001, 10). Were these isolated instances or the tip of a more extensive problem?

This chapter focuses on the racial voting rights issues raised by the Florida election. Does election administration exhibit systematic discrimination against minorities?
Is there evidence that the administration of elections had disparate impact on African Americans and Hispanics compared with whites? I will focus on each of the three main areas of the election system—registration, polling place operations, and voting technology.

REGISTRATION AND POLLING PLACE OPERATIONS

The Voting Rights Act was a stunning success. In 1960, approximately 20 percent of southern blacks were registered to vote, compared with over 60 percent of whites. By the 1990s, the registration rates of blacks and whites had converged. Nationwide, the same is true. Although the registration rates of blacks were much higher outside the South before 1965, today approximately 60 percent of black and white citizens of voting age are registered to vote. Curiously, Hispanic registration has lagged. Only one-third of Hispanics are registered to vote today (Day and Holder 2004).

Getting people registered, though, is just the first hurdle in getting them to vote. Additional difficulties may arise in the registration process when registration forms are not handled properly, when voters are purged from the rolls either by accident or because the individual has not voted and becomes inactive, when errors occur in the creation of registration databases and lists used at polling places, or simply when a poll worker misreads the registration list. Assuming the registration process works, voters may encounter problems at the polls that discourage them from voting. These include inaccessible buildings, long lines, incorrect instructions, language problems, and inconvenient locations.

In recent elections, it is possible to gauge the extent to which these features of the electoral system prevent people from voting. The Census Bureau’s current population survey ascertains the reasons that registered voters did not participate in the election. In the weeks following the election, a national sample of approximately 100,000 people is drawn as part of the bureau’s ongoing survey of populations. The election survey includes a battery of questions asking whether the respondents voted, are registered, how they voted, and why they did not vote.

Focusing on the last question we can estimate the barrier posed by administrative practices.

The census questionnaire first asks whether the person voted and whether they were registered to vote. It then asks of those who did not vote and are registered “what was the main reason for not voting.” Eleven categories are offered to the respondent: illness or disability, out of town or away from home, forgot, not interested, too busy, transportation problems, didn’t like the candidates, registration problems, bad weather, inconvenient polling place locations, lines, or hours, and other. By far the most commonly cited reasons are that the respondent was “too busy” (23 percent), did not like the candidates or was not interested in the election (22 percent), was ill or disabled (16 percent), or was away (11 percent). Next, however, came registration problems: 7.4 percent of registered nonvoters cited registration problems. Polling place problems, cited by 2.8 percent of respondents, appear to deter one-third as many people from voting as registration problems.
Transportation was selected by just 2.5 percent of respondents, and weather accounted for less than 1 percent.

On one level it is encouraging that the main reasons for not voting among those registered to vote have nothing to do with election administration. Those who did not register are today even more likely to cite lack of interest in or disdain for the campaign and politics in general as reasons.

Even so, these figures highlight significant problems in the voter registration system. There are roughly 40 to 50 million registered nonvoters in the United States—7 percent of them, or approximately 3 million people—did not vote in 2000 because of problems with their registration. It should also be noted that registration problems can create polling place problems, especially long lines. If an individual is not listed on the rolls and believes he or she has been excluded in error, an election judge or poll worker must call the central office. Those telephone lines are often busy during peak hours of polling, and such calls can take up to half an hour. The voter in question waits and the polling staff making the call cannot work on anything else, slowing the rate at which the poll workers can process voters.

A second effect of registration on turnout is that the laws themselves deter some from voting. It is a hassle to register or reregister if one has moved, and registration often closes a month before election day. It is estimated that shrinking registration dates to election day would increase votes cast by about 5 million people (Wolfinger and Rosenstone 1978). Although registration laws are not the focus of this analysis, these findings do help put in perspective results here concerning the number of registered voters who cite mix-ups with their registration as a reason for not voting. The barriers to voting posed by internal errors and inconsistencies in the registration system are approximately of the same magnitude as if the nation were to adopt election day registration.

Errors in the registration system, then, are substantial enough that they warrant fixing. The Help America Vote Act (HAVA) took initial steps that have proved to be quite successful locally. Most notably, HAVA requires that voters who believe they are registered but are not on the registration rolls at the precinct where they showed up on election day be given a provisional ballot. This is analogous to an in-precinct absentee vote. After the election, the central election office validates all provisional ballots by checking the names, addresses and signatures against the central office’s registration records.

Provisional balloting has proved very successful in many local jurisdictions. Los Angeles County, for example, reports that two-thirds to three-quarters of their provisional ballots are in fact valid. Also, having provisional ballots allows precinct workers to deal with registration questions quickly without contacting the central office. Of course, the success of provisional ballots depends on how they are implemented. Some states have taken an unduly restrictive approach, counting the voter’s ballot only if the individual showed up at the right precinct. A better approach follows the California system, in which votes for all statewide offices on a provisional ballot are counted if the voter is registered, and votes on local offices are counted as well if the person voted in the correct precinct.
Maryland has perhaps the most expansive implementation, allowing the voter’s affidavit at the polls to serve as registration if the individual is not in the county’s registration records.

The NAACP’s lawsuit in Florida suggests, however, that the local registration and polling place practices continue to discriminate against African Americans. It is unclear from the evidence presented in that suit how many voters were affected and whether these problems were statewide. What is also unclear is the extent to which whites and Hispanics were as likely to experience the same difficulties.

The current population survey allows us to address this question directly, albeit not with a specific state in mind. The data for this analysis come from the 2000 Current Population Survey because at the time of writing the voting and registration data from the November 2004, CPS are not yet available. The 2000 election is of particular interest because it was the source of many allegations of improper election administration. The survey measures many of the respondents’ demographic characteristics, including age, race, education, marital status, and residence. It is possible, then, to assess the extent to which blacks, whites, and Hispanics cite registration and polling places as obstacles to voting, and to control for many other factors in making these comparisons.

The short answer is that race does not matter. Registration and polling places are problems for everyone.

Table 10.1 presents the fractions of CPS respondents who were registered and did not vote who cited registration or polling places as their reasons for not voting. The classification of white and black draws from the CPS’s race question, which also includes categories for Asian/Pacific Islander and for American Indians. These groups were sufficiently small that I exclude them from the table. They did not look appreciably different. Hispanic identification comes from a separate question, as some whites and blacks also identify as Hispanic.

Table 10.1 tells an interesting and encouraging story. Race plays no factor in election administration. Throughout the country, the fraction of white registered voters who identified registration or polling place problems as obstacles to voting was approximately the same as the fraction of black registered voters who cite those as reasons for not voting. In fact, the percent of respondents offering election administration as an explanation for not voting is slightly higher among whites than among nonwhites. Within the South, the differences are even more

<table>
<thead>
<tr>
<th></th>
<th>All States</th>
<th>South</th>
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<tbody>
<tr>
<td></td>
<td>White</td>
<td>Black</td>
</tr>
<tr>
<td>Registration</td>
<td>7.5%</td>
<td>7.0%</td>
</tr>
<tr>
<td>Polling place</td>
<td>3.0%</td>
<td>1.9%</td>
</tr>
<tr>
<td>Combined</td>
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</table>

Source: Authors’ compilations.
pronounced. One in eight white registered voters said that they did not vote because of problems in registration or polling place operations, compared with one in nine southern Hispanics and just one in eleven southern blacks. Among southerners these differences are statistically significantly different from zero, and suggest that today whites are somewhat more likely to encounter problems of election administration.

I find this a stunning and surprising finding given the history of southern electoral politics.

Who is more likely to experience difficulties voting because of registration and poll place practices? I performed a multivariate statistical analysis in which the probability of stating registration or polling place as a reason for not voting is predicted using several factors. These are: race, age, education, length of time at current residence, whether one is a student, type of community one resides in (urban, rural, or suburban), size of SMSA, and region of the country. Race had no statistically significant effects, and the estimated coefficients had the unexpected signs—if anything whites were more likely than blacks to report problems. The complete results from these analyses are in the appendix (see table 10.A). Here, I contrast the profiles of the registered nonvoters who were more likely to report registration and polling places as reasons for not voting.

First, consider registration. Of the factors included in the analysis, one variable proved overwhelmingly important: length of residence in a community. Other things being equal, a person who lives in a community for less than six months is more than twice as likely to report that they couldn’t vote because of problems with registration than a person who has lived in a community more than a year. Of those living in a community more than a year, just under 5 percent report registration as a reason. By contrast, 11 percent of registered voters who lived in a community less than six months report registration as their main reason. These differences still exist, it should be noted, after the implementation of the National Voter Registration Act, which included provisions to ease them.

Education also proved highly important in predicting the incidence with which registration was offered as a reason for not voting. Interestingly, though, the correlation is positive: students, for example, were more likely than nonstudents to offer registration problems as their primary reason. That is, better-educated registered voters are more likely to experience registration problems as a barrier to voting. It may be attributable to the interaction between the ways people register and the ways they vote. Better-educated people are also more likely to request absentee ballots, and that system may involve more difficulties. Whatever the reason, this correlation does point to an unexpected political effect of registration practices today. Better-educated people are, on the whole, Republican—except at the very highest end of the education spectrum. If this correlation is not spurious, it suggests that registration practices today keep disproportionately more Republicans from voting than Democrats.

The type of residential community, region of the country, age, and most notably race had no statistically discernible effect on the likelihood that a registered voter encountered problems with the registration.
One policy variable emerged as important. Those in states using election day registration were much less likely to be denied the vote on the basis of problems with registration. The difference was 5 percentage points. About 5 percent of those in EDR states reported that registration problems kept them from voting, compared with 10 percent in other states. EDR does not eliminate problems, but it does have the potential to reduce them by half.

Second, registered voters encountering difficulties at polling places had a different profile. Those finding that polling place lines and locations kept them from voting were on the whole younger, lived in rural areas, and lived in the South. Race, education, gender, length of residence, use of election day registration, and other factors had little part in explaining the incidence of polling place barriers to voting.

On the whole, polling place problems appear to be less systematic and much less common than registration problems. The incidence of polling place problems is roughly one-third to one-half that of registration problems. Little of the variation in reports of polling place problems could be accounted for by the usual demographic factors. The three factors that did prove important did not explain much of the variation. Polling place problems, then, appear to not be a source of particular difficulties that are hard to control and not a source of systematic discrimination against one group or another.

In terms of voting rights, the upshot of these analyses is that polling place operations and registration procedures do not have disparate effects across racial groups. Blacks and Hispanics are not more likely to encounter obstacles to voting because of understaffed precincts, inaccessible polling places, registration errors, or improper purges. In fact, whites are slightly more likely to encounter such problems.

This is quite a turnaround from just forty years ago. The registration gap between blacks and whites has virtually vanished throughout the country and in the South. Perhaps the clearest evidence that there is not systematic, widespread discrimination in the election administration comes from the reports of nonvoters themselves. Roughly the same fractions of blacks and whites report not voting because of problems encountered with their registrations or at polling places. If there is a gap in the exercise of voting rights among racial groups in America, it lies in the very low registration rates of Hispanics. It is unclear if the low rate reflects low levels of acculturation, language difficulties, or administrative practices. It seems unlikely to be a problem in the administrative system, because registered Hispanics are not more likely to report problems with their registration or at polling places as the main reason for not voting.

VOTING TECHNOLOGY

The methods used to cast and count votes present many specific voting rights issues. Voting relies heavily on familiarity with the sort of technology used, from pen and paper to computers. Those less literate in a particular technology face
greater difficulties voting and may choose not to vote altogether. Non–English
speakers cannot vote in secrecy without ballots translated into their native tongue. With most technologies, blind voters are unable to cast secret ballots. Solving problems of literacy, language, and accessibility often requires the adoption of new technologies, some of which may already exist but some may not.

In the wake of the 2000 election, another sort of voting rights claim was made regarding voting machines. Punch card voting machines, some academics, journalists, and activists claimed, may present more problems for minorities than for whites. There are two strains of reasoning here.

First, areas with higher concentrations of minority voters might use inferior technologies. This could be for the simple reason that minority areas tend to be poorer and thus less able to purchase new equipment or afford necessary maintenance. The situation might also be an accident of history: cities, which have highest concentrations of minorities, bought punch card voting machines in the 1970s when they were the newest available technology, but have yet to move to a new system.

Intensive academic study of election technology in the wake of the 2000 election has come to the universal conclusion that punch cards perform less well than scanners and electronic voting machines. Lever machines do very well for the top of the ticket, but horribly down the ballot. Lever machines and punch card ballots, then, come out as inferior technologies (Ansolabehere and Stewart 2005). There is some debate about the relative performance of scanners and electronics. Analyses conducted for the Caltech/MIT Voting Technology Project show that scanners and hand-counted paper ballots have historically performed best (2001; Ansolabehere and Stewart 2005). Henry Brady and his colleagues (2001) also argue that electronic voting equipment has performed well, and preliminary analyses of electronics in 2004 suggest that the differences between electronics and optically scanned paper ballots may have vanished (Stewart 2005). If nonwhite voters, for whatever reason, are more likely to use punch cards or lever machines, their votes are less likely to be counted.

Second, specific voting technologies may magnify the difficulties that minority voters face. Several academic researchers and journalists argue that voting machine performance does interact with race. Michael Tomz and Rob VanHouweling (2003) perform a statistical analysis on the election returns of the fifty-four counties of South Carolina. They find that those with a high fraction of African American voters that used punch cards and scanners had higher residual votes than their counterparts that used electronic voting equipment. Voting equipment showed no differences in performance in counties with largely white electorates. Henry Brady (2005) studied the recent adoption of electronic voting in Fresno County, California, and found disproportionately large improvements in the rate of under- and overvotes in precincts with higher fractions of black and Hispanic voters.

What is the evidence for each of these two claims? First, are nonwhite voters more likely to use inferior technologies? Second, does race magnify the problems experienced with voting machines?
In the first instance it was indeed the case that in 2000 counties with relatively more minority voters were more likely to use inferior technologies—especially punch cards. It is in fact the case that white voters were less likely than nonwhites to use punch cards or lever machines (see table 10.2). The following statistics show the differences in voting technology use in relation to county percent white (Ansolabehere 2002).

These differences, however, were not intentional. Equipment is purchased by counties, and whiter counties were more likely to use punch cards and lever machines. However, owing to the high density of racial minorities in a few counties that use lever machines and punch cards—especially New York City, Los Angeles, California, Chicago, Illinois, and Miami, Florida—minority voters were disproportionately more likely to encounter these machines when they went to the polls.

The picture of voting machine usage in 2000 is changing rapidly in the wake of state and federal initiatives. Florida, California, Georgia, Maryland, and several other states have eliminated or begun to phase out their old technologies. The Help America Vote Act authorizes expenditure of up to one billion dollars for a nationwide buyout of equipment by 2006, though the appropriations process has slowed the roll out of this program. However, it is expected that very few states will keep their punch cards and lever machines beyond 2006. Obsolescence alone has placed the slothful lever machines on the list of endangered species. By 2008, I expect a radically different picture, with scanners and electronics dividing the voting machine market roughly evenly.

The second argument—that race and technology interact—requires close scrutiny through careful data analysis. Here I will use a standard methodology for studying the ability of different voting technologies to capture and count votes reliably. The *residual vote* is the percentage of total ballots cast for which a vote for a particular office is recorded. It contains some intentional nonvoting. Exit polls from recent presidential elections indicate that approximately one-half of 1 percent of voters intentionally do not vote for a presidential candidate. That is approximately the rate of voting for “none of the above” in Nevada, the only state

<table>
<thead>
<tr>
<th>County Percentage White</th>
<th>Percentage of Voters Using Each Technology</th>
<th>Percentage of Population</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>DRE</td>
<td>Lever</td>
</tr>
<tr>
<td>15 to 50 %</td>
<td>7.5</td>
<td>31.4</td>
</tr>
<tr>
<td>50 to 75</td>
<td>14.1</td>
<td>10.1</td>
</tr>
<tr>
<td>75 to 90</td>
<td>11.3</td>
<td>18.9</td>
</tr>
<tr>
<td>90 to 100</td>
<td>11.4</td>
<td>19.5</td>
</tr>
<tr>
<td>All counties</td>
<td>11.7</td>
<td>18.1</td>
</tr>
</tbody>
</table>

*Source: Authors’ compilations.*
to allow that option on the ballot. However, over 2 percent of all ballots cast for president in 2000 recorded no vote, indicating that 1.5 million votes for president were not counted.

This measure ought to be independent of the voting technology used, and one can measure the reliability of different types of voting machines by measuring the average rate of residual votes for each type of machine. Such a calculation reveals that punch cards perform relatively badly and optical scanning, hand-counted paper, and, for the top of the ticket, lever machines perform relatively well.5

Of course many other factors may explain residual votes, such as other offices on the ticket, size of electoral jurisdiction, turnout, and race. Analysts, including the work of Tomz and VanHouweling, include these factors using a linear regression in which the residual vote rate in the county is predicted as a linear function of other variables, as well as indicators for which type of voting technology is used. Many important factors, however, such as literacy rates, cannot be measured this way. Such variables can be captured using a panel design in which the average residual vote rate in the county is first subtracted. This process removes the effect of any variable that is relatively constant over time. In a short panel, such as that studied here, this assumption is reasonably sound. A related method looks at the relationship between changes in the residual vote rate when technology changes. Here I will present both sorts of analyses to show the robustness of the patterns observed.

The argument that race affects the reliability of voting machines predicts a particular pattern in county-level residual vote rates. Most of the legal wrangling over this issue concerns punch cards, though other technologies might also raise questions. If the argument is right, then in predominantly white counties we expect only slight differences in residual vote rates across counties using different technologies. However, in counties with higher proportions of nonwhite voters, the residual vote rate of the questionable technologies, it is thought, will rise faster than the residual vote rates associated with other technologies.

Before examining whether such an effect exists nationwide, consider South Carolina, the case studied by Tomz and VanHouweling. Performing similar statistical analyses to those in their article yields similar findings to their study. Among counties that used electronic voting, there was little correlation between the fraction of nonwhite voters in the county and the residual vote rate. Among counties that used punch cards and optical scanners, however, there was a strong positive correlation. More blacks and Hispanics corresponded with greater incidence of problems with these systems.

There is, of course, good reason to question these findings. Perhaps most important, they lack a clear basis in theory. Why would someone’s race make it easier to use an electronic machine or harder to use a punch card? The common story goes as follows. Voter familiarity with a basic technology may be lower in some communities, leading people in those communities to make more errors. Older people, for example, are commonly thought to be more likely to make errors using electronics because they have less experience with computers. Differences in
machine reliability across racial groups also may result from the capacities of the counties or the operations at the polling places. It may indeed be the case that some technologies are harder to store, program, format, deploy, and secure, and counties with more minorities lack the resources to do the job well. Of course, such arguments likely predict that electronics magnify the effects of race, rather than paper based systems, such as scanners.

The more immediate question is whether these results are in fact general or specific to South Carolina or a spurious correlation. I replicated Tomz and VanHouweling’s analysis for South Carolina counties from 1988 to 2000. I even improved on their estimates by controlling for other unmeasured county-level factors in a fixed effects regression. The results from this analysis were consistent with their earlier findings.

I then expanded this approach to encompass the entire nation. Data for this analysis are described in Ansolabehere and Stewart (2005).6 This analysis is based on 6,418 observations. I include indicators for each state and year, and use the panel model to control for factors that I cannot measure. Included in the analysis are indicators for which counties use punch cards, or paper ballots, or scanners, or electronic equipment. Lever machines serve as the baseline case against which comparisons are made. Also included are interactions between indicators of machine types and the percent white in each county.

Nationwide, the pattern looks extremely different from the South Carolina case. The results of this analysis are shown in table 10.3. As in South Carolina, punch cards have a higher residual vote rate than lever machines, paper ballots, or scanned ballots in counties that are predominantly nonwhite. The residual vote rate in counties using punch cards was 70 percent higher than in those using lever machines. Electronic machines, however, have an even higher residual vote rate in minority counties nationwide, 83 percent higher than that for lever machines. Scanners had slightly higher rates in presidential elections than lever machines, but the difference was not statistically distinguishable from zero difference.

Only one interaction between voting technologies and county percentage white proved statistically significant: the interaction for electronic voting equipment. It had a coefficient of -.513, which meant that the higher the percentage white the lower the residual vote rate in counties using electronics. Nationwide, electronics seem to discriminate among races. The implication of this interaction is that in a county that is 100 percent nonwhite, the residual vote rate is 83 percent higher if the county uses electronics rather than lever machines. In a county that is 100 percent white, the corresponding rate is 30 percent higher.

Comparing electronics and punch cards reveals that electronics are on the whole better, but their gains come in the white counties. In the nonwhite counties, the differences in performance, all else being equal, are minimal. Punch card performance is not correlated with county percentage white, but electronic voting machine performance is. As a result, in whiter counties electronic voting machines perform much better than punch cards, though the same cannot be said in majority-minority counties.
The interaction between electronic voting and race in these data comport with commonly offered mechanisms to explain why such interactions may exist. To truly show these links as causal will require intensive study of individual behavior in lab tests. However, the strong correlation between race and performance of electronics in the national data reveal that any conclusions from the Tomz and VanHouweling paper are limited to the state under study. Using the same methodology, I find the opposite pattern in data drawn throughout the nation.

A better approach focuses on counties that change technology. These cases give us the most leverage to measure the performance of technology because we can truly hold the counties constant in these instances and observe within these counties whether residual vote rates drop as a result of the new technology.

I begin with two baseline cases: counties that use lever machines and counties that use punch cards. In 1988, the beginning of the study period, these are the two most common technologies in use. I then identify all counties that changed from punch cards or lever machines to electronics or scanners and the years of these changes. For each county, for each year, I created the change in the residual vote, an indicator of whether the county changed to electronics in that year, an indicator of whether the county changed to scanners in that year, and interactions between percent white and these two indicators. I regress the change in the residual vote on these variables as well as percentage white, county population (in logarithms), and indicators for each state in each year. I present separate specifications for each of these sorts of cases. One includes lagged residual vote as an error correction; the other does not. The error correction lowers the standard errors appreciably, but, at least for the variables of interest, has little effect on the estimated coefficients. That is the preferred specification.

<table>
<thead>
<tr>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Punch</td>
<td>.694</td>
</tr>
<tr>
<td>Paper</td>
<td>-.581</td>
</tr>
<tr>
<td>Scanner</td>
<td>.198</td>
</tr>
<tr>
<td>DRE</td>
<td>.834</td>
</tr>
<tr>
<td>Percentage White × Punch</td>
<td>-.208</td>
</tr>
<tr>
<td>Percentage White × Paper</td>
<td>.557</td>
</tr>
<tr>
<td>Percentage White × Scanner</td>
<td>-.053</td>
</tr>
<tr>
<td>Percentage White × DRE</td>
<td>-.513</td>
</tr>
</tbody>
</table>

The results are strongly consistent with the panel analysis for the nationwide data (see Table 10.4). First, changing to electronics raises the residual vote rates. The coefficient on change to electronics is large and highly significant in all models. I expect some bump up owing to the adjustment associated with any change. Such an adjustment, however, is much larger than that associated with optical scanning. Second, there is a strong interaction between percentage white and change to electronics, and the magnitude of the interaction nearly equals the coefficient. These coefficients, along with that on percentage white, indicate that the reliability of electronic voting machines over this time frame depends substantially on the racial composition of the counties.

Predicted values generated from these estimates aid the interpretation. Consider specification two for the punch card counties. In a county that is 100 percent white, the introduction of electronics is predicted from these data to yield better performance over previous elections conducted using punch cards. The expected improvement is approximately 2.2 percentage points (that is, 0.75—(0.061+.031)*1.00). Now consider a county that is 85 percent nonwhite (the other extreme in the observed data). The residual vote rate is predicted to worsen by 6.1 percentage points (that is, 0.75—(0.061+.031)*.15).

Similar results are predicted, albeit not as dramatic, in counties that switch from lever machines to electronics. In 100 percent white counties, the introduction of
electronics is expected to lower the residual vote rate by seven-tenths of 1 percent (that is, \(0.033 - (0.024 + 0.016) \times 1.00\)). But, in 85 percent nonwhite counties, the introduction of electronics is expected to raise the residual vote rate by 2.7 percentage points.

Second, the introduction of optical scanning has more modest effects. In punch card counties, switching to scanners lowers the residual vote rate by about 2 percentage points, and in lever machine counties, it raises them 2 to 3 points. Interactions with race proved statistically insignificant, as in the panel estimates.

Overall, these results differ strikingly from the narrower study conducted by Tomz and VanHouweling. The differences, I believe, stem from the scope of the data available. The results here rely on data drawn from the entire nation, rather than one state, and with roughly sixty times as many cases to exploit. Two patterns bear emphasis.

First, I find that the reliability of punch card and optical scanning voting equipment does not correlate with the racial composition of the county.

Second, I find clear evidence that the reliability of electronic voting is lower, on average, in counties with fewer white voters. This is consistent with commonly offered conjectures about local governments’ administrative capacity or voter familiarity with certain sorts of technology. I do not think it reasonable to assert that race is the cause of this correlation. Rather, if real, it likely stems from other factors strongly correlated with race, such as education levels or local government resources. In the lingo of the voting rights cases, though, it does suggest that electronics have disparate impacts on different racial communities.

These results do not vindicate punch cards, however. Nor do they necessarily damn all electronics. The voting rights issues raised by punch cards stem from their generally inferior performance overall, rather than from any interaction with racial composition of counties. Voters in counties that use punch cards can expect those machines to fail to register their votes at a much higher rate than alternative technologies, including electronics.

For their part, electronics represent an evolving technology. The usability and security of these machines is not nearly as settled as the properties of optical scanning. One can expect improvements in the future, but their past has shown some specific problems, including higher average residual vote rates than optical scanners and, as the evidence mustered here indicates, greater difficulties in counties with large minority populations.

The conflict between the nationwide and South Carolina data suggest further caution. Digging deeper into the data reveals a much more mixed picture. I ran the basic model presented in table 10.3, which is akin to that elsewhere in the academic literature, for each state separately. In a majority of states, no statistically significant interactions could be detected. To the extent that there were significant interactions they tended to look like those in table 10.3, but there were several notable cases (including South Carolina) where the interactions ran in the opposite direction, with scanners showing progressively worse performance in counties with lower percent white.
Overall, one clear conclusion is borne out by these data. Voting rights issues emerge when a county uses inferior technology. There is reasonable consensus among academic researchers that punch cards and, down the ballot, lever machines perform less well than alternatives. Voters voting with those alternatives can vote with greater assurance that their votes will be counted. To the extent that blacks and Hispanics are more likely to vote with inferior technologies, they are more likely to see their votes lost.

Whether race magnifies the difficulties of some voting technologies remains an open question. Very small scale studies assert that performance of technologies differ across racial groups. In particular, Tomz and VanHouweling’s study of South Carolina suggests that blacks do relatively better with electronic than with paper-based systems. This study has been picked up by the legal and advocacy community seeking to improve voting rights of African Americans and Hispanics.

Nationwide data examined here do not support such a conjecture. Electronic voting machines show relatively worse performance in counties with higher percent blackage or Hispanic. From these data one may reach one of two conclusions. Either electronics may make matters worse for minority groups or the experiences within states are varied enough that no clear conclusions can be drawn about the interaction between race and voting equipment. Either way, the data reveal that electronics are not a surefire means of protecting minority voting rights.

CONCLUSIONS

The Voting Rights Act and other efforts at reform over the past three decades have succeeded. They have lowered the once-high barriers to participation that racial minorities faced in the administration of elections. Poll taxes, literacy tests, white primaries, and other instruments of discrimination are long gone. Today, there appear to be no differences in the rates at which whites and blacks register to vote and none in the rates at which racial groups report obstacles to voting because of voter registration and polling place operations. This is not to say that the potential for abuse does not exist. Problems certainly arise locally, but they are limited in scope and do not seem to create greater obstacles overall for racial minorities than for whites. Rather, election administration no longer has disparate effects on racial groups.

To the extent that any group faces particular difficulties voting, it is Hispanics. The rate at which registered Hispanics report obstacles is not different from whites and blacks, but Hispanic registration lags very behind the other groups. The current population survey data examined here do not speak to why. The difference may reflect language difficulties or lack of Spanish voting materials, or lower levels of political organization and socialization within this segment of American society. The matter certainly deserves closer scrutiny.

Election technology has a much less controversial history than polling place practices and registration, but it too may present voting rights obstacles. About
1.5 percent of votes cast—over 1.5 million votes for president—are not counted. There is no regular and reliable evidence, however, that racial minorities experience disproportionate difficulties with specific types of voting technologies. Rather, some types of technologies are simply inferior. Any voters, regardless of race, are less likely to have their votes counted if they vote on punch card ballots. Historically, cities have tended to use punch cards and have a much higher concentration of racial minorities. The minority voting rights issue with election technology, then, emerges from the use of inferior technologies in areas with higher concentrations of blacks, Hispanics, and other minorities.

The voting rights challenges arising from election administration practices have thus changed. Once, voting rights issues in election administration reflected intentional efforts to disfranchise blacks. Now they are technical problems stemming from the difficulties with designing and maintaining equipment, with creating accurate voter lists, and with adequate staffing of polling places. These problems appear to affect all of us with equal frequency, and difficulties arise for about one in twenty voters.

This situation today, however, raises a much trickier question of democratic rights than addressed in the Voting Rights Act. The right to vote entails the right to cast a vote and to have that vote counted. But, as a practical matter, perfection in counting is very difficult to obtain. In that context, what does the right to vote mean? This right does not appear to be absolute. Administrative practices in the United States tacitly accept a trade-off between the right to vote and the cost of conducting elections, and the public has come to accept something of a statistical notion of the right to vote. We are willing to tolerate an error rate of 5 percent as long as it does not affect some groups disproportionately. It is perhaps luck, and the persistence of advocates, that the errors we do observe in election administration in the United States today are not correlated with race. It is an open question, however, what level of error might be acceptable.

Equal protection may further demand uniformity. Each U.S. county has considerable discretion over election administration, including the choice of voting technology, polling place staffing, and registration system maintenance. Voters in areas with inferior technologies, inadequate staffing, or registration lists with large numbers of errors have a higher chance of not being allowed to vote or of not having their votes counted. Residual vote rates, for example, are much higher in counties using punch card technologies and lower in those using optical scan voting. Does equal protection ultimately require that the states move to uniform voting technologies and uniform registration systems?

The Supreme Court broached these matters in Bush v. Gore. The federal government and the states have grappled with these questions in recent reform efforts. We are far from answers, and few states have moved to uniform systems. However, the experience of the last two federal elections suggests that public concern with the performance of the voting system is not subsiding. The election of 2000 has made the technical perfection of the voting system into the voting rights issues of the twenty-first century.
APPENDIX


<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Registration Problems</th>
<th>Polling Place Problems</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coefficient</td>
<td>Standard Error</td>
</tr>
<tr>
<td>Black (versus white)</td>
<td>−.024 (−.074)</td>
<td>−.199 (.108)</td>
</tr>
<tr>
<td>Hispanic (versus not)</td>
<td>−.022 (.089)</td>
<td>−.076 (.118)</td>
</tr>
<tr>
<td>Age</td>
<td>.001 (.002)</td>
<td>−.007 (.002)**</td>
</tr>
<tr>
<td>Education (versus grade sch)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Some high school</td>
<td>−.073 (.127)</td>
<td>−.039 (.182)</td>
</tr>
<tr>
<td>High school degree</td>
<td>−.023 (.111)</td>
<td>.190 (.155)</td>
</tr>
<tr>
<td>Some college</td>
<td>.163 (.114)</td>
<td>.170 (.160)</td>
</tr>
<tr>
<td>College degree</td>
<td>.365 (.124)**</td>
<td>.147 (.177)</td>
</tr>
<tr>
<td>Grad school</td>
<td>.353 (.155)**</td>
<td>.051 (.236)</td>
</tr>
<tr>
<td>Student</td>
<td>.496 (.139)**</td>
<td>−.033 (.206)</td>
</tr>
<tr>
<td>Residence (versus less than six months)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Six months. to one year</td>
<td>−.191 (.094)**</td>
<td>−.048 (.161)</td>
</tr>
<tr>
<td>One to two years</td>
<td>−.301 (.068)**</td>
<td>.149 (.110)</td>
</tr>
<tr>
<td>Three to four years</td>
<td>−.788 (.086)**</td>
<td>.121 (.115)</td>
</tr>
<tr>
<td>Five years or more</td>
<td>−.900 (.063)**</td>
<td>.152 (.100)</td>
</tr>
<tr>
<td>Male (versus female)</td>
<td>−.122 (.048)**</td>
<td>.006 (.062)</td>
</tr>
<tr>
<td>Urban Area (versus rural)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Center city</td>
<td>−.080 (.099)</td>
<td>−.288 (.141) **</td>
</tr>
<tr>
<td>Suburb</td>
<td>−.033 (.092)</td>
<td>−.012 (.120)</td>
</tr>
<tr>
<td>Size of metro area</td>
<td>−.005 (.019)</td>
<td>.058 (.025)**</td>
</tr>
<tr>
<td>Region (versus west)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northeast</td>
<td>.056 (.085)</td>
<td>−.004 (.123)</td>
</tr>
<tr>
<td>Midwest</td>
<td>.014 (.082)</td>
<td>.161 (.112)</td>
</tr>
<tr>
<td>South</td>
<td>.101 (.071)</td>
<td>.293 (.100)**</td>
</tr>
<tr>
<td>Election day registration</td>
<td>−.806 (.201)**</td>
<td>−.087 (.161)</td>
</tr>
<tr>
<td>Constant</td>
<td>−1.033 (.156)</td>
<td>−2.136 (.225)</td>
</tr>
<tr>
<td>N</td>
<td>6918</td>
<td>6918</td>
</tr>
<tr>
<td>Log likelihood</td>
<td>−1638.85</td>
<td>−855.93</td>
</tr>
<tr>
<td>Pseudo-R-squared</td>
<td>.10</td>
<td>.04</td>
</tr>
</tbody>
</table>

Source: Authors’ compilations.
** Statistically significant at p < .05.

NOTES


3. The CPS’s November income data concern wages, and are not generally useful for gauging household incomes.

4. One may break the classification of whites into white non-Hispanic and Hispanic, but the numbers do not change appreciably.

5. The failings of lever machines down the ballot are readily attributed to alignment problems by voters using the machines and by poll workers reading the tallies at the end of the day.

6. In fact, I examine all states for which the residual vote could be calculated. 11 states do not report total ballots cast.

7. The residual vote rate exceeded 2 percentage points in the 2000 presidential election and exit polls and votes for Nevada’s “none of the above” reveal that about one-half of one percent intentionally did not vote for this office.

CASE CITED


REFERENCES


The Future of the Voting Rights Act


Chapter 11

Options and Strategies for Renewal of Section 5 of the Voting Rights Act

Nathaniel Persily

When originally passed, section 5 of the Voting Rights Act (VRA) (U.S.C. 42 secs. 1973b-1973c) represented an extraordinary measure for an extraordinary time. The law remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws. No other statute on the books applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law. Such a remedy was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures hell-bent on depriving African Americans of their right to vote, regardless of what a federal court might order (Issacharoff, Karlan, and Pildes 2002, 546–47).

The expiration of this section of the Voting Rights Act was intended to force the nation to take stock of its progress, or lack thereof, in achieving equal voting rights, as well as adapt the law to new challenges and changing political realities. Those who originally crafted the law could not foresee, however, how the VRA would become, in both substance and symbolism, an irremovable part of the architecture of federal election law and civil rights guarantees. As each election reminds us of how far we need to go in securing the equal right to vote, the notion that we might allow this most successful of civil rights protections to die on the vine has become so unacceptable that Congress is now considering reauthorization for another twenty-five years.

In a fundamental way, however, the reauthorization process taking place in 2006 represents a glance backward rather than a step forward. We have become stuck as a nation by our former evaluations of particular wrongs by particular wrongdoers. The specter of returning to the age and political environment first disciplined by the Voting Rights Act, as well as the political and judicial constraints that have been placed on the reauthorization debate, has paralyzed any attempt to use this opportunity to address the most pressing voting rights challenges.

This chapter explores the roots of the decisions made and the roads not taken in the 2006 reauthorization process. The politics of reauthorization were such that both political parties saw more to gain from maintaining the status quo than from gambling on a different regime of voting rights protections. Moreover, the uncertainty as
to what a Supreme Court protective of states’ rights might do with any variation on
the current law has both limited the available options for updating the law and pro-
vided an incentive for those who might otherwise object to pass the buck. The result
has been a calcified deliberation and the maintenance of a regime that is unrespon-
sive to the principal threats to equal voting rights that have appeared in recent years.

WHY EXPIRATION IS UNACCEPTABLE

Today, the chorus of voices can be heard admonishing that section 5 should be a vic-
tim of its own success (Issacharoff 2004; Pildes 2002). Indeed, the Jim Crow-inspired
barriers to voting, such as literacy tests and poll taxes, have largely disappeared.
The numbers of black and Hispanic officeholders are at historic highs, as are levels
of minority electoral participation (Issacharoff 2004). Civil rights advocates are
quick to point out, however, that new barriers to participation have taken the place
of Jim Crow, making relevant again historic concerns about obstacles to minority
voting and influence that motivated the original Voting Rights Act (People for the
American Way and the NAACP 2005).

Others have described in detail the problems minority voters confronted in the
2000 and 2004 elections (NAACP, People for the American Way, and Lawyers
Committee for Civil Rights Under Law 2004). In some instances, the law itself
erected the barrier to voting. In others, incompetence, partisan administration, or
simple mistakes caused these problems. Civil rights advocates categorize these
problems—and this is hardly an exhaustive list or one limited to problems for
minority voters, in particular—along the following lines:

FELON DISENFRANCHISEMENT  This includes both the actual disenfran-
chisement of felons as well as people erroneously placed on the list of felons and
then removed from the registration rolls. Approximately 4.7 million Americans,
1.4 million of whom are black men, are disenfranchised because of such laws
(Fellner and Maller 1998).

REGISTRATION PROBLEMS  The process of voter registration used in most states
relies on voters to reregister after each change of address (Wolfinger, Highton, and
Mullin 2004). The most notorious recent problems involved individuals who regis-
tered to vote through private drives and had their registration forms destroyed
(Becker and Edsall 2004). In other cases, voters or interest groups mailed in regis-
tration forms by the appropriate deadline but swamped local offices were unable to
process them in time for those voters to show up on the rolls.1 Other problems con-
cerned technical violations on registration forms, such as when a person failed to
check the boxes attesting to citizenship or mental competence, but affirmed that
they were qualified to vote (Advancement Project 2005, 2–3).

BARRIERS TO VOTING BY REGISTERED VOTERS  Under this category would fit
all the factors that inhibit participation at the polling place, such as burdensome voter
identification requirements, long lines at polling places, too few voting machines or
ballots, or polling places unable to handle voters with disabilities or language difficulties. One might also place in this category problems related to absentee ballots or early voting. In some areas, for instance, early voting stations were placed far away from areas with high concentrations of minorities.

**PROVISIONAL BALLOTS** The most litigated aspect of the 2004 election occurred before any ballot was cast. In particular, Democrats sought to establish that provisional ballots cast by registered voters would be counted regardless of the precinct in which they were cast. As it turned out, states differed greatly in their propensity and procedures for counting provisional ballots (Election Reform Information Project 2005). In addition, many polling places had too few provisional ballots on hand, and poll workers often failed to give such ballots to those who had a right to them and gave them instead to those who had a right to cast a normal ballot. Of the 1.9 million provisional ballots cast in the last election, close to 1 million were cast in counties with substantial non-English-speaking populations covered by section 203 of the Voting Rights Act (Brace and McDonald 2005).

**PRECINCT MALADMINISTRATION** This category includes the many ways polling place administrators misapplied the law or incorrectly advised voters concerning who could vote and how to vote. This would include requiring identification from voters despite there being no legal obligation for them to provide it and giving voters the wrong ballots or incorrect advice on how to vote. One might also include in this category the misinformation, whether intended or not, given to voters before voting, for example, giving them the wrong address for a polling place or mailing them an inaccurate sample ballot. Perhaps the greatest obstacle to effective minority participation has been the underfunding of election administration in poorer neighborhoods with the concomitant long lines and shortage of voting booths.

**ERRORS OR FRAUD IN VOTE TABULATION** This category includes any failure to count a legal vote or counting of an illegal or nonexistent vote.

**VOTING TECHNOLOGY AND BALLOT DESIGN** After the 2000 Florida fiasco, most states bought some new voting equipment for the 2004 election. However, in many states, such as Ohio, the old error-prone punch cards remained. In others, transitions to new technology, such as electronic voting machines, caused new problems or raised much publicized concerns about security of the vote. Underappreciated, though, are problems with ballot design, such as the famed butterfly ballot, that often confuse first-time voters, or long ballots, which on electronic voting machines will lead voters to spend several minutes scrolling through different offices.

**VOTER “SUPPRESSION” OR “INTIMIDATION”** In the weeks preceding the 2004 election, much was made of anticipated challenges to voters. On election day, widespread challenges to voter qualifications did not materialize. Nevertheless, with each election and each added qualification for voting (such as identification requirements), civil rights groups often will point to the increased risk that the
presence and actions of poll watchers will be a source of intimidation deterring certain groups of voters from showing up on election day.

In delineating these categories I presage the later argument that these types of problems, as opposed to the high profile legal issues of redistricting and vote dilution, remain largely unaddressed in the proposed section 5. Perhaps it is so obvious that it need not be said, but the important difference between the classic forms of disenfranchisement and these new barriers to minority participation and influence concerns the transformation of partisan politics, particularly but not exclusively in the South, and the place of minority voters caught in the crossfire. When Congress first passed the Voting Rights Act, the Republican Party was almost completely absent from the “Solid South.” The burdens of section 5 fell on white Democratic legislatures and local jurisdictions that generally felt threatened by minority enfranchisement (Issacharoff 2004, 1712–14). Although President Johnson reportedly said “there goes the South” when he signed the Civil Rights Act the year before the passage of the VRA (Noah 2004), the nascent Republican Party did not pose a real threat to Democratic hegemony in the region until the late 1980s. Today, black voters are solidly Democratic, though the South is anything but (Lublin 2004). As a result, the rough and tumble of partisan politics, as taken out on the most loyal and growing share of Democrats, presents itself as obstacles to minority participation and influence.

Both parties have incentives to diminish minority influence. Republicans have an incentive to inhibit participation by blacks who vote overwhelmingly for Democratic candidates. However, the Democrats too have an incentive in the redistricting process to spread minority voters most efficiently in order to maximize the number of Democratic seats. Although sporadic, old-style, race-based discrimination of the Jim Crow vintage remains, this new partisan context for hindering minority influence requires different tools than those mandated for a time when race, rather than party, dominated election policy and southern politics, in general.

WHY RENEWAL “AS-IS” IS UNACCEPTABLE

Given such recurring problems, the natural course of action is not to budge on what has been perhaps the most effective piece of civil rights legislation in American history. This is especially true at a time when the political environment is not exactly conducive to expanding voting rights protections, given the fact that election law changes, in general, are now often viewed as a zero-sum game between the parties. Anyone who urges tampering with the VRA must confront the legitimate criticism that we simply do not know how bad politics could be if the stranglehold of section 5 were removed. Indeed, the fact that DOJ rarely objects to voting changes in covered jurisdictions may suggest section 5 is working as intended, just as it may suggest it has outlived its usefulness. If changing section 5 or allowing it to expire would lead us to a politics similar to that of pre-1965, no one could possibly argue in favor of such a development. However, the question now, as in previous discussions over reauthorizations, is whether the current section 5 deals with the principal
problems that minority voters face in a political context that has changed dramatically since the enactment of the VRA.

First, the coverage formula or trigger found in section 4 of the VRA is inadequate to the task of preventing the kinds of abuses detailed above. Those jurisdictions that are currently covered are hardly the worst or most notorious offenders when it comes to erecting barriers to minority participation and influence (National Commission on the Voting Rights Act 2006). Neither Ohio nor Florida (except for a few counties), for example, are covered jurisdictions, nor are any number of other areas with large minority populations and levels of partisan competition that make these types of problems both likely and electorally significant. Of course, we should not merely care about such problems in areas of heavy competition, and for that matter, uncompetitive states may contain competitive areas, competitive primaries, or idiosyncratic competitive elections that make such tactics likely. However, the states that had tests or devices and low voter turnout in 1964 or 1968 or English-only ballot materials and low turnout in later years (and are therefore covered under section 5 today) do not appear to be characteristically different than the next ten voting rights offenders, however we choose to identify them.

Second, as Richard Hasen has argued, it is far from clear that renewing section 5 with the outdated coverage formula would be constitutional (2005). Given the renewed vigor with which the Supreme Court has been striking down “incongruent” and “disproportionate” laws enacted under Congress’s power under section 5 of the Fourteenth Amendment, one can only wonder whether the historic precedents upholding congressional power to enact the Voting Rights Act and its amendments would suffice to uphold a reauthorized VRA with an old coverage formula. Even though a majority of the current Court probably does not have the nerve to strike down the VRA,3 renewing the VRA with the old coverage formula is incongruent, as a policy matter, to the prevention or remediation of the problems concerning minority participation and influence.

Third, concerns about politicization of the preclearance process have caused some to question whether current preclearance procedures are adequate to the task of combating the new challenges to minority participation and influence. In the last two elections and throughout the current redistricting cycle, the DOJ has rarely objected to changes in voting practices and procedures in covered jurisdictions. Some have argued that the preclearance process has become subtly infected with partisan motives and the Voting Section of the Civil Rights Division at the DOJ has lost much of its historical independence (see Eggen 2005; Mittelstadt 2005). As a result, there is great risk that political appointees, of whichever political affiliation, at the DOJ will deny preclearance to changes that might be detrimental to their party, while granting it to laws that might retrogress with respect to minority voters yet benefit their party. Allegations of partisanship arose with respect to the preclearance of the Georgia law requiring photo identification for voters, the mid-decade Republican gerrymander of Texas’s congressional districts, and the DOJ’s use of its preclearance authority to hold up a state court plan for Mississippi’s congressional districts.4

The risk of partisan application of the VRA with respect to redistricting plans increased with the Supreme Court’s decision in Georgia v. Ashcroft (539 U.S. 461).
Having articulated a standard for retrogression that is vague and manipulable, the Court left the DOJ with the difficult job of evaluating the effect of a redistricting plan on minority influence and control. Although it is too early to know how such a standard will work in practice, the decision leaves open the possibilities either that the DOJ could object to all kinds of redistricting changes that excessively concentrate or overly disperse minority communities of whatever size or that section 5 may be virtually toothless in regulating redistricting. Ashcroft gutted the retrogression standard established by Beer v. United States (425 U.S. 130), and appears to allow a covered jurisdiction to opt for any range of redistricting policies, eschewing more formulaic rules such as “no decrease in the number of majority-minority districts” or even “no decrease in the number of districts where minorities can elect their candidates of choice.” Rather, a jurisdiction can opt for minority influence (however defined) or control: that is, a jurisdiction could justify the creation of several 25 to 35 percent minority districts or a few 60 percent districts and not retrogress. Georgia v. Ashcroft has its defenders (Pildes 2004) and insofar as the Beer standard may have led to dilution by way of packing, it needed to be changed. However, the effect of Ashcroft is to make pointless the preclearance procedures for redistricting plans, or worse, to leave open the possibility that an amorphous standard will succumb to the partisan whims of those who will enforce it.5

TRANSFORMING THE VOTING RIGHTS ACT

Because neither expiration nor mere reauthorization provided acceptable options, Congress was left with the more difficult course of action of updating section 5 of the VRA. To do so, it chose to work within the current structure of section 5 rather than to discard that complicated architecture altogether and think broadly about what measures could best protect minority participation and influence.

WORKING WITHIN AND UPDATING THE CURRENT STRUCTURE

Inertia and familiarity, as well as the inherent political difficulties in crafting any election law with partisan consequences, were strong factors leading to a presumption in favor of keeping the basic structure of section 5. Its salient features are the section 4 trigger and coverage formula, bailout requirements, preclearance procedures, definition of covered changes, and the standard for denying preclearance (otherwise known as retrogression).

TRIGGER AND COVERAGE

As described in greater detail earlier, the old triggers for section 5 coverage are necessarily overinclusive and underinclusive of the jurisdictions of concern for
minority voting rights violations. Jurisdictions that are currently covered operated a test or device, such as a literacy test, in the 1960s and had low voter registration and turnout or used English-only ballot materials and had low voter turnout in later years pursuant to the VRA amendments (see U.S.C. 42 sec. 1973c). This coverage formula captures some jurisdictions that need not be covered, for example, townships in New Hampshire and Michigan, and leaves uncovered many areas that have seen the greatest number of problems, including Ohio and most of Florida (U.S. Department of Justice 2006). The questions for this most recent renewal of sections 4 and 5 are whether the universe of covered jurisdictions should remain the same; and if not, whether a formula akin to that used in the past or one completely different should be used to identify covered jurisdictions. As long as section 5 is going to apply to certain parts of the country and not others, it seems that the coverage formula needs to reflect the areas of greatest concern for violations of minority voting rights.

The challenge now, as before, is to figure out how to apply a constitutionally defensible and neutral coverage formula to capture a foreseeable group of jurisdictions. At the time of the passage of the original VRA, rates of voter turnout and the presence of a literacy test provided a rough metric of the propensity of a jurisdiction to enact racially discriminatory voting laws. Developing a new trigger today that captures a foreseeable group of jurisdictions with the greatest potential to discriminate in voting and that will withstand constitutional challenge turns out to be a very difficult task. It is no wonder that Congress has chosen merely to keep the current trigger in place rather than gamble on one the Supreme Court has not previously considered.

One can better understand Congress’s resignation by exploring other possible triggers, each of which covers too many or too few jurisdictions, is politically unpalatable to one or the other party, or would be deemed unconstitutional. One option would be a formula that combines a measure of the racial diversity of a jurisdiction with another measure indicating either a history of racial discrimination or a likelihood that racially disparate barriers to voting or influence might materialize. Measuring racial diversity is hardly a difficult task and is already a part of the language assistance provisions (section 203) of the VRA (U.S.C. 42 sec.1973aa-1a(b)(2)(A)(i)(I)). The racial diversity part of the trigger could be as simple as requiring coverage for any jurisdiction where the racial minorities combined amount to some share of the population: 20 percent, 30 percent, or some other figure. Indeed, if feasible (that is, if Congress were willing to pass it), the measure of racial diversity alone might be a sufficient trigger.

Leaving aside the exponential increase in cost from administering a section 5 regime with broader coverage, a trigger based solely on racial percentages would run into concerted opposition in Congress and in the courts. The first type of constitutional difficulty confronting a broad trigger concerns congressional power to enact a new section 5. Without evidence of past or potential future racial discrimination or unconstitutional deprivation of the right to vote, a law passed through the enforcement clauses of section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment would not be congruent and proportional
to the constitutional violations the law seeks to prevent or remedy. Second, coverage based solely on racial percentages could run afoul of the rule laid out in Miller v. Johnson (515 U.S. 900), and its progeny. Those cases struck down congressional districts in which race was the predominant factor in their creation. So too with a trigger based solely on the presence of a certain percentage of racial minorities could one argue that the law was excessively race-based.

Fearing these potential constitutional pitfalls and avoiding a massive expansion of the geographic reach of section 5, Congress could still have attempted to follow the tradition of a dual pronged trigger while investigating options other than the one currently in the Act. Doing so presents the difficult problem of finding some factor that indicates the likelihood that a threat to minority voting or influence will materialize. Voter registration or turnout statistics did this at a time when discrimination manifested itself in ways that inhibited minority participation in measurable ways. Michael McDonald’s contribution to this volume suggests such statistics would not do so today (see chapter 13, this volume). A trigger based on evidence of preclearance denials or successful voting rights suits would likely cover too few jurisdictions, though, and runs into the problem that the heretofore successful operation of section 5 may have prevented the development of evidence that would justify its renewal. In other words, the absence of litigated voting rights violations or preclearance denials could mean either that a jurisdiction is a good actor or that it is a bad actor successfully constrained by the VRA. No one knows the ratio of bad to good actors covered under the current section 5 or how bad actors would behave were they not subject to the preclearance requirements.

Besides those based on some pattern of legal violations, other formulas for the trigger might include some measure of partisan competition (if the hypothesis presented above is true about the use of certain tactics becomes more likely in a competitive environment), the number of complaints received on election day, the number of spoiled ballots (undervotes and overvotes) in recent elections, the number of provisional ballots cast or the share that were counted, the share of the minority community legally disenfranchised, or other data indicating incompetent or unequal election administration. However, even if able to overcome the high political hurdles that would be obstacles to enactment, any trigger based on those types of concerns will be less parsimonious and transparent than those historically upheld by the Supreme Court and might lead to considerable debate as to which jurisdictions are, in fact, covered by the VRA. If Congress were to experiment with a more adventurous trigger for section 5, it should also legislate a “backup trigger” akin to the one presently in force that would take effect in the event the Court declares the experiment unconstitutional.6

**BAILOUT**

Depending on how many states and local jurisdictions would be covered after application of a new trigger, it might make sense to change the process for bailing out of coverage.7 As the coverage formula includes more and more jurisdictions,
it might be desirable to make it easier for “good” jurisdictions to bail out. The fact that very few jurisdictions have bailed out of section 5 coverage might indicate that the conditions for bailout need to be rethought (Francis et al. 2003). It does remain somewhat of a mystery why certain jurisdictions, especially those with no history of preclearance denials or voting rights lawsuits, have not attempted to bail out. Perhaps the relevant actors do not want to take the political heat for seeming to oppose coverage by the Voting Rights Act, coverage may not present much of a burden for others, and still for others, coverage might be desirable as a way to get a federal stamp of approval for changes to their voting laws. If Congress were to enact a coverage formula that captured more jurisdictions, though, a different bailout provision might provide greater incentives for jurisdictions to adopt best practices that protect minority participation and influence. Indeed, if, as I have argued, many of the worst offenders are currently uncovered and increased coverage threatens the constitutionality of a revised VRA, a more permissive bailout regime may make the VRA more effective and more likely to be declared constitutional.

If the coverage formula were to be expanded, a more permissive bailout formula could be predicated on the erasure of voting inequalities between racial groups. In other words, if a jurisdiction could show that participation rates had achieved a certain base threshold and that no racial differences in participation (or disenfranchisement) were present, perhaps it could be freed of the strictures of preclearance. Other criteria for bailout could include the achievement of some goal concerning minority influence or electoral success. Whatever the target, a regime that is focused on rewarding good behavior may be more effective at achieving the goals of the Voting Rights Act than is one preoccupied with deterring and punishing the guilty.

PRECLEARANCE PROCEDURES

The salient features of the preclearance process that Congress might reform would be the roles of the DOJ and U.S. District Court for the District of Columbia as well as, perhaps, the timetable for the preclearance process and the implications of a denial or grant of preclearance. Under the current structure, covered jurisdictions must get permission (preclearance) from the Attorney General (DOJ) or the D.C. District Court before they can implement or administer any “standard, practice or procedure with respect to voting” (U.S.C. 42 sec. 1973c). Because of the interests in expedited preclearance of such submissions, there is no right to appeal a favorable grant of preclearance.

If evidence grows that DOJ is unreliable as a protector against retrogression, then perhaps more cases should be thrown into the federal courts—either in the District of Columbia or the local district court. Of course, the scope of the current section 5, which applies to all practices and procedures with respect to voting, is too broad to throw all cases of preclearance into the courts. However, one could envision a new section 5 that requires certain voting changes (such as redistricting plans) to be
precleared only by a federal court or that allows for some appeal from a grant of preclearance by the DOJ. In particular, allowing those who have submitted letters to the DOJ in the process of a preclearance submission to a right to appeal from a DOJ grant of preclearance (akin to that for other administrative agency proceedings) could mitigate the alleged partisanship infecting the preclearance process.

It turns out that requiring judicial review of DOJ preclearance decisions presents significant procedural challenges or runs the risk of duplicating the process of litigation under section 2.9 If one were to follow an administrative agency model, those who object to preclearance could appeal to a court to review the DOJ decision. Presumably, some criteria as to who could object would be necessary, such as limiting it to those who submitted letters to the DOJ when it was considering the preclearance submission. In addition to defining the universe of objectors, the proper defendant needs to be determined: the DOJ, the jurisdiction seeking preclearance, or both. Most important, the burden of proof needs to be determined. Under current preclearance procedures the jurisdiction has the burden to prove to the DOJ or the U.S. district court that a change is not retrogressive. Under the administrative agency model, the burden would shift to the appellant, in this case the person or group arguing against preclearance, who would argue that the covered change retrogresses or that the DOJ’s decision was otherwise legally deficient.

If a new VRA places the burden of proof on the person or group claiming a law retrogresses, then the litigation becomes strangely similar to normal litigation under section 2 of the Voting Rights Act, which provides for a private right of action against voting laws enacted by any jurisdiction in the country that have a discriminatory effect. To be sure, the legal standard with a revised section 5 would be lower: proving retrogression requires showing that the law makes minorities worse off than the status quo, whereas proving a section 2 violation requires a more difficult showing of discriminatory effect. However, after Georgia v. Ashcroft, the inquiries with respect to redistricting require similar investigations and showings. It would be the rare case indeed when a plaintiff could merely prove that a redistricting plan makes minorities worse off by reducing their influence or ability to elect their candidates of choice, without also proving that the plan dilutes the minority vote. The similarity between the claims is not itself a reason to bar judicial review. It shows instead that once the burden has shifted, the intended virtues of the section 5 architecture greatly diminish.

Moreover, establishing judicial review of DOJ decisions with the intended goal of preventing partisanship from infecting the preclearance process could have the unintended effect of gaming by litigants seeking to hold hostage a voting law or redistricting plan. If all grants of preclearance could end up in federal court, then any politically aggrieved or ornery litigant—whatever his or her motives—might be able to tie up the law in litigation for just enough time to make it unenforceable for the upcoming election. The more permissive the regime of judicial review, the more tied up the courts will be in an election season, and the more likely these machinations become. Given this potential downside, it may make sense simply to require judicial review for certain changes to go to the U.S. District Court in the first instance for preclearance. Statewide redistricting plans or statewide measures
governing voter qualifications could be left to the courts, and DOJ could still have the task of preclearing minor changes.10

SCOPE

One area that is unlikely to require modification is the definition of a covered change, that is, a “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” (U.S.C. 42 sec. 1973(c)). The Court has read this expansively, and because the newest challenges to minority participation and influence do not necessarily fit within the categories of historical changes, advocates will be unlikely to retreat from the expansive definition. Some changes that have required preclearance may have proven to pose no threats to minority participation and influence, and Congress could specifically exempt them. If a new section 5 were to have a greater geographic scope, more burdensome preclearance procedures, or a stricter standard for retrogression, perhaps narrowing the laws in its purview could be one way to relieve the administrative burden on the states and the federal body charged with oversight.

Although the scope of section 5 is unlikely to change, it may make sense to recognize in the law what all who work in this field recognize implicitly: a clear distinction can be made between changes to redistricting plans, which have generated the most controversy, and all other voting changes, concerning which the DOJ rarely denies preclearance. Indeed, it may make sense to craft different procedures or standards for redistricting plans than for other changes. As I have indicated, I believe that the nonredistricting election law changes are a greater threat to minority voting rights than redistricting plans, although others hold the opposite point of view. In either case, there is little reason to hold to the view that the procedures and standards for review of the moving of a polling place should be the same as those for a congressional districting plan. In fact, the comparatively close attention DOJ has given to redistricting plans, as well as the new Georgia v. Ashcroft standard seemingly applicable only to redistricting, have already separated out redistricting for different treatment under section 5. One decision Congress could make in the process of reauthorizing section 5 is to recognize this difference explicitly in the law by requiring certain types of laws to undergo more rigorous review than others.

PRECLEARANCE STANDARDS

The standard for denial of preclearance has undergone substantial change in the last decade or so. The triumvirate of Reno v. Bossier Parish I and II (520 U.S. 471; 528 U.S. 320), and Georgia v. Ashcroft has left a section 5 considerably different than the one that began the 1990s or existed in earlier decades. In deciding whether to reauthorize section 5, Congress should consider whether it ought to overturn or respond to these decisions and if so, how. The relevant questions then

Options and Strategies for Renewal
are whether section 5 ought to encompass violations of section 2 or other laws and constitutional provisions; whether discriminatory purpose, rather than mere retrogressive purpose, can serve as a basis for denial of preclearance; and whether the standard for retrogressive effect ought to be flexible or rigid.

THE INTERACTION BETWEEN SECTIONS 2 AND 5

Reno v. Bossier Parish I made clear that the retrogression standard for section 5 differs considerably from the vote dilution standard of section 2. Section 5, the Court held, requires a more manageable standard than section 2, one that focuses only on whether the voting change makes minorities worse off (471–72). Congress could make clear in a revised section 5, however, that the DOJ or U.S. District Court for the District of Columbia can deny preclearance on the basis of a plan’s discriminatory effect or purpose, rather than merely its retrogressive effect or purpose.

The greatest criticism of such a move would come from those who see the section 2 standard as particularly onerous or the relevant litigation as overly complicated and drawn out for an administrative preclearance process. Historically, it has been easier to identify whether a law makes minority voters worse off than it is to identify whether a law discriminates. The latter inquiry for redistricting plans, for example, required a multifactor test concerning the extent of racially polarized voting in a jurisdiction and the required minority percentages needed for those voters to have an equal opportunity to elect their candidates of choice (Thornburgh v. Gingles, 478 U.S. 30, 50–51; Johnson v. DeGrandy, 512 U.S. 997). However, with the Court’s decision in Georgia v. Ashcroft (if not before), the preclearance process, especially for redistricting plans, has required a level of proof from a jurisdiction comparable to section 2 litigation, as noted above.

If Congress wishes to get more imaginative, not only could it collapse section 2 into the section 5 inquiry, but it could give the DOJ or a court or other administrative body the right to deny preclearance for any legal violation. Congress could give the DOJ the power to deny preclearance if the law violates one person, one vote, the constitutional prohibition on racial gerrymandering, or any number of other statutes from the Help America Vote Act (U.S.C. 42 secs.15301 to 15545) to the Americans with Disabilities Act (U.S.C. 42 secs.12101 to 12213). Expanding DOJ authority in this way would dramatically change the preclearance process and would make judicial review of DOJ decisions that much more important. However, it would not continue to place the DOJ in the uncomfortable position of giving its partial blessing to a law that it will later seek to have a court strike down.

DISCRIMINATORY OR RETROGRESSIVE PURPOSE?

Reno v. Bossier Parish II established that voting changes motivated by a discriminatory purpose deserve preclearance as long as their purpose or effect is not retrogressive (328). One simple change Congress is planning to make to the law
clarifies that a voting change with a discriminatory purpose will not receive preclearance. This change may invite closer scrutiny as to whether a new VRA is disproportionate and incongruent to violations of the Fourteenth or Fifteenth Amendments, which require both discriminatory purpose and effect. However, apart from the general complaints about DOJ misuse of the preclearance process, it is difficult to justify DOJ acquiescence to a law that it knows is motivated by an attempt to discriminate against racial minorities. Perhaps some might fear that DOJ lawyers will dedicate themselves to finding discriminatory purpose where there is none. Even if there is some truth to that statement, Congress could specify the evidence that constitutes discriminatory purpose, constrain DOJ’s ability to deny preclearance on that basis, and provide for judicial review of such decisions.

REDEFINING RETROGRESSION

The most significant change in the proposed legislation is the attempt by Congress to overturn Georgia v. Ashcroft. As mentioned, the Court’s decision in Georgia v. Ashcroft defangs section 5 considerably, allowing multiple types of arguments as to how some splitting or packing of the minority community by a redistricting plan maintains minority influence or control. The current proposal attempts to correct the Court’s decision by clarifying that voting changes should not be precleared if they have the purpose or effect of “diminishing the ability of citizens of the United States on account of race or color . . . to elect their preferred candidates of choice.” Indeed, the bill goes so far as to say “[t]he purpose . . . of this section is to protect the ability of such citizens to elect their preferred candidates of choice” (Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, 109th Cong. (2006)).

It is far from obvious what the move to an “ability to elect” standard means. To most observers, the bill attempts to reinstate the standard from Beer v. United States, which arguably placed primacy both on the number of districts in which minority voters constituted a majority as well as the racial breakdown of such districts. The bill therefore rejects the holding of Ashcroft that a jurisdiction can opt for a greater number of influence districts at the expense of “control districts” in which minorities can elect their candidates of choice. This newly legislated standard would seem intended to prevent retrogression by way of “cracking,” in which, for example, the jurisdiction eliminates a 60 percent minority district in order to create two 30 percent minority districts. It is less clear whether the standard prevents retrogression by way of “packing,” as when a jurisdiction consolidates two 40 percent minority districts into one 80 percent super-majority-minority district.

So long as Congress eschews a rigid rule that reifies the position of majority-minority districts—that is, districts in which minorities constitute a majority of the voting age population or citizen voting age population—what is meant by an “ability to elect their preferred candidates of choice” will still be context dependent. In order to evaluate whether a drop in the minority percentage of a district retrogresses even under this standard one would need to know several things: the
extent of racial polarization in voting patterns in the district; the partisanship of white voters and the probability they will vote for the minority-preferred candidate; the incumbency status of the district (whether it is an open seat and if not, what is the party and race of the incumbent); the ability of the given minority group to control the outcome in the primary election; and the rates of registration, turnout and eligibility among the various racial groups. Although these questions are necessarily complex and no universal truths can govern voter behavior and district character across the vast array of covered jurisdictions, Congress should at least make clear that this new standard does not somehow sanction retrogression by way of increased packing of minorities.

If Congress fails to do so, the Court may nevertheless interpret the words “ability to elect,” in such a way as to avoid constitutional difficulties and reinstitute a standard akin to that articulated in Ashcroft. Constitutional challenges to the new standard will take two forms. First, some will argue that Congress does not have the power under the Enforcement Clauses to prevent states from reducing the number of “ability to elect” districts. There is nothing inherently unconstitutional about moving from a few of such districts toward a greater number of influence districts, and therefore the new VRA is an incongruent and disproportionate remedy for the problem of racially discriminatory redistricting plans. Second, challengers will argue that the standard necessarily uses race predominantly and runs afoul of the Court’s decisions in Miller v. Johnson (515 U.S. 900) and its progeny. Those cases hold that the courts should strictly scrutinize and usually strike down districts that were predominantly drawn on the basis of race. Challengers to the “ability to elect” standard will argue that such language is itself a command to use race predominantly in the construction of districts or at least makes the creation of such unconstitutional districts more likely.

TRANSFORMING THE VRA: PLACING OTHER ISSUES ON THE TABLE

Although Congress has chosen to work within the existing framework of section 5, the reauthorization debate ought to provide an opportunity to think broadly about the barriers to minority political access and influence that remain unaddressed by that particular law. In a sense, the compromise worked out by the two parties exists almost like a fragile sculpture, with everyone wanting to keep their distance for fear that touching it would lead to it crashing to the ground and shattering into a thousand pieces. Indeed, bipartisan compromise is so rare nowadays, and especially so when the issue is one that will affect the political fortunes of those voting on the law, that one must appreciate the delicacy of the political deal that appears to have been reached and the impulse not to rock the pedestal on which it stands. To put the matter simply, how could anyone possibly be against reauthorizing the Voting Rights Act, the most successful piece of civil rights legislation in American history?

While recognizing that election law reform is almost always the product of second-best solutions, it would be unfortunate if the energy that has animated
the debate over the VRA’s reauthorization ended with its passage. At some point, the nation will deal with the problems of increasing rates of felon disfranchisement, for example, or iron out a compromise between the anti-fraud and greater access sides of the voter identification debate. The politics of those issues may make resolution unlikely in the short term, but any discussion over voting rights and minority political participation would be anemic if it ignored those problems and focused all its energies on the more difficult and abstract questions, such as redistricting.

The same should be said concerning three intractable and uniquely American problems with our electoral system: election oversight by partisan officials, entrusting administration in the polling places often to incompetent volunteers, and decentralization of authority that leads to inconsistency with respect to voting rights. These problems do not plague minority voters, in particular; they have defined business-as-usual when it comes to the process we use for choosing those who govern us. Nevertheless, if we were to address these deep structural problems in our system, many of the most contentious issues that have occupied election lawyers’ attention in recent years would fade away in importance.

The successful reauthorization of the Voting Rights Act ought to be a cause for introspection rather than celebration. It represents another milestone, the meaning of which should be judged by our ultimate destination, rather than our success in running one more lap as a nation around the same track. Just as we should not allow our naïveté to shield us from the inherent political difficulties involved in more substantial election reform, nor should we mistake a reaffirmation of past achievements for victory in an ongoing and ever-changing battle over the right to vote.

APPENDIX: STATUTES AND REGULATIONS LIST


NOTES

1. I base this observation on my personal discussions with registrars of voters in New Jersey, Pennsylvania, and Delaware, some of whom had thousands of new registration forms dumped on them just thirty days before the 2004 general election (see also Reign 2004).

3. Indeed, even Justice Antonin Scalia recently suggested that for reasons of stare decisis he would allow for greater congressional authority under section 5 of the Fourteenth Amendment in the realm of remedying racial discrimination (see Tennessee v. Lane, 124 S. Ct. 1978, 2012–13).

4. “The main business of the Voting section is still passing judgment on legislative redistricting in areas that have a history of discrimination. Under Ashcroft, its actions have consistently favored Republicans—for instance, in Georgia, where the department challenged the Democrats’ gerrymander, and in Mississippi, where the Voting section stalled the redistricting process for so long that a pro-Republican redistricting plan went into effect by default” (see Toobin 2004, 56).

5. In their contribution to this volume, David Epstein and Sharyn O’Halloran argue quite effectively that the presence of a back-up of federal court review and potential section 2 litigation constrains the potential for partisan mischief at the DOJ. However, in the time-pressured environment of a redistricting process or other last-minute election legislation, a DOJ thumb on the scales can have a serious effect on the rules or lines that could govern an upcoming election.

6. One other controversy surrounding the trigger Congress could resolve with a reauthorized VRA concerns the relationship between covered counties, boroughs and townships and uncovered states. In Lopez v. Monterey County, the Court held that state voting laws enforced by covered jurisdictions in uncovered states must still satisfy section 5’s preclearance requirements. The dissenters in that case warned of the serious federalism costs exacted by such an approach, which holds state redistricting plans and other laws hostage as the covered jurisdiction seeks preclearance. If Congress is similarly troubled or if the status of these jurisdictions could be part of a larger bargain concerning the coverage formula or scope of section 5, Congress may want to revisit the holding in Lopez v. Monterey County (525 U.S. 266).

7. Among other requirements, the current bailout provision requires a covered jurisdiction to prove that in the previous ten years they have not committed any voting rights violations (see U.S.C. 42 sec. 1973b(a)(1)).

8. Between 2000 and 2005, 88,748 preclearance requests were received by the Voting Section of the DOJ (see U.S. Department of Justice 2005, Changes by Type and Year at http://www.usdoj.gov/crt/voting/sec_5/changes.htm).

9. I am indebted to Samuel Issacharoff for raising these points.

10. Indeed, if Congress wants to get really creative, it could take away the preclearance process from the DOJ or U.S. District Court altogether and place it with the Federal Election Commission, Electoral Assistance Commission, or some other putatively independent body.
11. “When considered in light of our longstanding interpretation of the ‘effect’ prong of sec. 5 in its application to vote dilution claims, the language of sec. 5 leads to the conclusion that the ‘purpose’ prong of sec. 5 covers only retrogressive dilution” (Reno v. Bossier Parish School Board, 328).

CASES CITED

Tennessee v. Lane, 124 S. Ct. 1978.

REFERENCES

Determine which jurisdictions must comply with the preclearance provisions is perhaps the most important issue in the debate about whether Congress should renew provisions of the Voting Rights Act (VRA) that expire in 2007.¹

Other criticisms of the section 5 preclearance process—such as the assertion that it is too intrusive—seem overstated. Preclearance is much less burdensome than litigation, as it enjoys the advantages of ex ante over ex post decisionmaking (Breyer 1979). Employing a few paralegals at the federal and state levels to identify and prevent problems over a sixty-day period is much more efficient and inexpensive than the teams of lawyers, years of interrogatories and depositions, legions of experts, and judicial resources that accompany litigation. Similar preventative procedures in other areas of the law deter misconduct and reduce litigation costs, like the Hart-Scott-Rodino antitrust review process and environmental impact statements. Although litigation remains essential to resolve some voting rights matters, there is no reason that voting rights law must be relegated to litigation as its sole enforcement tool.

Further, technology has made the preclearance process even less intrusive than it was in 1982, when Congress last renewed the relevant portions of the Voting Rights Act. Software that can be used on a personal computer makes compliance with section 5 easier than ever. Most jurisdictions already own such software—they buy it for a few thousand dollars to comply with one person–one vote requirements. Compliance with section 5 that twenty-five years ago demanded weeks of tedious trial and error now requires a few hours.

And despite analogies to affirmative action, the preclearance process does not entitle minority candidates to a certain quota of legislative seats or give them extra votes to remedy past discrimination. Asian Americans, Latinos, and African Americans make up approximately 33 percent of citizens and 28.5 percent of registered voters in states covered in whole by section 5, but account for less than 13 percent of the local, state, and federal elected officials. Section 5 is not a quota system, but resembles other laws that prevent racial discrimination by protecting voters from election practices that diminish their right to cast an undiluted vote.
Although many concerns about the preclearance process seem inflated, the question of which jurisdictions must comply with the process merits serious consideration. Section 5’s requirements apply to all of nine states, and particular localities in another seven states. The remaining thirty-four states are exempt from preclearance requirements. In March 2005, the editorial page of Alabama’s Mobile Register commented:

In today’s United States, 140 years after the Civil War and 40 years after passage of the original Voting Rights Act of 1965, there is no reason to treat Southern states differently than other states. Indeed, in the last 30 years, some of the most violent racial dust-ups have occurred in other parts of the country, such as Boston in the 1970s. . . . The problem with the current system is that it treats the Southern states as guilty until proven innocent, and makes all those states’ residents into second-class citizens compared to the rest of the country. (“Jackson’s Plan Would Extend Voting Wrongs,” Mobile Register, March 12, 2005, p. A12)

Section 5 covers nine of the eleven states of the former Confederacy—including all of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, significant parts of North Carolina, and a few counties in Florida. Only Arkansas and Tennessee need not preclear their election changes. Section 5 touches on only 18 percent of states outside of the former Confederacy, including all of Alaska and Arizona, and parts of California, Michigan, New Hampshire, New York, and South Dakota.2

Why should the South remain disproportionately covered? The attitudes toward race in the South, the argument goes, have changed since the early 1970s. The influx and exodus of residents in the past forty years has shifted our nation’s population—including minorities. Between 1995 and 2000 alone, for example, 5 million migrated into the South and 3.2 million left (Franklin 2003, 2). Assuming that nationwide application is off the table,3 the question is whether the states currently covered by section 5 continue to pose the greatest threat to minority voters.

A NEW BASELINE

The section 5 preclearance requirements apply to jurisdictions that meet a formula enumerated in section 4(b) of the Voting Rights Act. Roughly stated, these areas in 1964, 1968, or 1972 required that voters pass a literacy test or similar device and had voter registration or turnout rates of less than 50 percent. Section 5 also applies to localities or states that in 1972 provided election materials only in English, yet had a language minority group that accounted for over 5 percent of voting-age citizens and total voter registration or participation rates of less than 50 percent (sec. 4(a), sec. 4(f)(4)).

Michael McDonald’s chapter, Who’s Covered?, provides a fine historical account that documents the contentious debates over the coverage formula during each
period preceding reauthorization (see chapter 13, this volume). His analysis is satisfying if one thinks Congress should mechanically build on the original formula and simply modify the voter participation component to update coverage.

But a more complete overhaul of the existing formula might be in order—or at least a more penetrating analysis to determine whether the existing formula actually covers the most problematic jurisdictions. Although the appeal of Professor McDonald’s focus on turnout in the 2004 presidential election is its simplicity and clarity, it fails to fully capture the underlying problems. For example, tests focusing on low voter participation among all voters and could overlook a jurisdiction that had very high voter participation among whites but low participation among minorities. Although the appeal of Professor McDonald’s focus on turnout in the 2004 presidential election is its simplicity and clarity, it fails to fully capture the underlying problems. For example, tests focusing on low voter participation among all voters and could overlook a jurisdiction that had very high voter participation among whites but low participation among minorities. Like any simple bright-line rule, a formula based largely on turnout of all voters is both overinclusive and underinclusive. Some uncovered jurisdictions would have racially dysfunctional political markets, and some covered jurisdictions would have minimal problems. New Hampshire, for example, is covered under the existing formula but has very few minority voters, and rumor has it that New Hampshire voter turnout was low in the November 1968 election due to a snowstorm.

In assessing whether the existing formula adequately measures where preclearance coverage is most needed today, we should consider a more comprehensive and penetrating array of factors that focus on the core problems. The Mobile Register is right to suggest that we should not design policy based on outdated stereotypes about the South. But facts must be more recent, quantifiable, and related to actual voting patterns than the “violent racial dust-ups” in “Boston in the 1970s” that the Register used to suggest that Alabama is no different than the uncovered state of Massachusetts.

But how do we know that a jurisdiction should no longer be covered? New York University law professor Samuel Issacharoff claims that “no longer are blacks political outsiders” and that “the Southern political process is highly attuned to black political claims.” Loyola law professor Richard Hasen asserts politicians no longer engage in much intentional racial discrimination, and notes that

Bull Connor, the notorious commissioner of public safety in Birmingham, Alabama who once turned attack dogs on civil rights marchers, died in 1973. Most state legislators active in the pre-1965 days are no longer in office, and those who remain have taken much more conciliatory public positions on questions of race. (chapter 5, this volume)

What is the baseline that justifies immunity from preclearance coverage? Is it refraining from spraying minority voters with hoses and tear gas? Certainly, today’s South is more “attuned to black political claims” than it was in the 1960s, but problems still exist in Arizona, Virginia, Mississippi, Louisiana, and other parts of the nation that might go unresolved for years absent voting rights protections. Using a 1960s Bull Connor standard of race relations as a baseline for coverage also goads some civil rights activists into hyping stories about racist conspiracies. As the U.S. Senate report on the Voting Rights Act amendments in 1982 explained,
requiring that we label “individual officials or entire communities” as racist is “divisive, threatening to destroy any existing racial progress in a community” (USCCAN 1982, 36).

There is no uncontested baseline that clearly separates intolerable racial dysfunction that warrants federal preclearance procedures from improper but tolerable dysfunction that does not justify congressional intervention. Any judicial proclamation that purports to draw such a line is based on nothing other than value judgments that creep dangerously into the political thicket. Does Congress need testimony on two or two hundred instances of “discrimination” to warrant preclearance coverage in a particular jurisdiction? Must such instances involve intentional discrimination, or will discriminatory impact do? If intent is a requirement, must the evidence establish “Bull Connor” racial animus, or can it simply show that a political operative intentionally excluded voters of color because he believed those voters were prone to cast ballots against the political operative’s favored candidate?

Despite the fact that no objective baseline exists, we can identify symptoms of racial dysfunction in a political process and measure which jurisdictions present such symptoms to a greater extent than others. Opposition to the Voting Rights Act’s different treatment of states is based on an assumption that covered states like Alabama are no different than uncovered states. Such an assumption raises the question of whether Alabama’s political process is in fact similar to or better than that of uncovered states. Is Alabama still near the bottom of the class? Eight factors—measured over the last ten years—seem most relevant:

- number of voting rights violations and claims
- number of voting rights observers and monitors
- racial disparities in voter turnout
- amount of political party competition for minority voters
- racial disparities between voters and statewide elected officials
- racial disparities between voters and all elected officials
- size of the largest single minority group
- size of the low-English proficiency citizen population

Note that any such analysis does not saddle Alabama with its problems from 1965. Nor does it suggest that minorities in Alabama must, on a per capita basis, match or exceed the political influence of whites for a state to escape preclearance coverage. Instead, these factors are applied to all states, and Alabama’s continued coverage is based on its performance relative to these other states. Thus, if racial disparities in voter turnout, the number of voting rights violations, and other indicators show that Alabama’s political process is much more healthy than that of the uncovered state of Massachusetts, the question becomes why we should continue section 5 coverage in Alabama when Massachusetts
remains exempt. But if the problems in Alabama are more significant, the question becomes why Congress should consider suspending section 5 coverage in Alabama.

This diverse array of factors may seem overwhelming, but the diversity of the factors provides a more comprehensive measurement of racial dysfunction. Alabama may be among the top states in voting rights investigations, for example, but is not when it comes to racial disparities in voter turnout. Northeastern states such as Connecticut, Delaware, Massachusetts, New Jersey, and New York lead this category. Rather than adopt these factors as a legal test, Congress and courts should use them as a metric to assess the effectiveness of the existing coverage formula and proposed alternative formulas.

As in most ventures, the factors used in ranking are themselves subject to debate. Whether it is the checklist a professor uses to grade student examination answers, the components U.S. News and World Report uses to rank law schools, or the particular fairway width and green speed that tournament officials adopt in setting up the U.S. Open Golf Championship, some will argue that the metrics selected are arbitrary and unfair. Unhappy with the results, losers sometimes develop their own set of factors that show that they should be considered among the best in the bunch. No set of factors will please all. Therefore, in developing standards through which to rank states, each item is discussed separately so that a reader can discount any variables he or she believes are less relevant.

ASSESSING WHICH STATES DENY RIGHTS TO MINORITY VOTERS

The first component of the existing formula is that a jurisdiction maintained on November 1 of 1964, 1968, or 1972 any “test or device” as a prerequisite for registering to vote or casting a ballot. Such devices include a literacy test, a test requiring that a voter interpret a particular constitutional provision, or a requirement that a voter possess good moral character. Where a simple language minority group comprised over 5 percent of the voting age citizens on November 1, 1972, election materials provided exclusively in English also constitute a test or device.

The number of recent voting rights violations and investigations brought by the Justice Department in the past ten years provide a better predictor of future hurdles than tests or devices from 1965. Politicians no longer use literacy tests, interpretation tests, and similar devices to exclude all minority voters, as the Voting Rights Act in 1975 was amended to permanently prohibit such devices. Instead, politicians use sophisticated measures like annexations, precinct changes, conversion from nonpartisan to partisan elections, and redistricting to dilute the voting strength of minority communities. These techniques are best reflected through the Justice Department’s recent voting rights investigations and violations.
Before I examine which states rank high in the number of voting rights violations and investigations, however, let me explain why I have chosen not to focus on other factors that disproportionately exclude minority voters.

Some have characterized felon disenfranchisement rules and voter ID requirements as modern-day voting tests. More than one out of eight African Americans cannot vote due to a felony conviction in the three states that bar voting by all ex-felons who have completed their sentences—Florida, Kentucky, and Virginia (states either fully or partially covered by the existing preclearance coverage formula appear in italics here and throughout the remainder of the chapter). African Americans are also disproportionately disenfranchised in the seven other states that ban voting for life by certain classes of felons who have completed all terms of their sentences—Alabama, Arizona, Maryland, Mississippi, Nevada, Tennessee, and Wyoming.

Existing studies also suggest people of color are much less likely than whites to possess photo identification and bring it to the polls. As of 2005, only Georgia and Indiana required that voters present a photo identification as an absolute requirement to vote. Ten additional states required that voters present documentary identification (non-photo identification like a bank statement or utility bill was sufficient) as an absolute requirement to vote: Alabama, Alaska, Arizona, Colorado, Missouri, Montana, New Mexico, South Carolina, Virginia, and Washington.

Thus, states covered or partially covered by section 5 are more than twice as likely as uncovered states to prohibit voting for life by former felons who have completed their sentences and to require that citizens produce a photo or non-photo documentary identification as an absolute requirement to vote.

Socioeconomic factors such as racial disparities in income and education might also be relevant to preclearance coverage. People who are poorer and less educated are less likely to vote and be engaged in the political process. Those who do vote are more likely to fail to comply with the regulatory minutiae of voting, such as perfectly perforating a punch card ballot, standing in two-hour lines, or flawlessly completing a detailed voter registration form. Some politicians may oppose spending more on elections because they believe that poor and less-educated minority voters will likely cast ballots for their opponents. Those with less education and income are often less able to organize, make large political contributions, or use other tools to engage in the political process. Educational and income disparities along racial lines may also reflect a political process’s failure to respond to the needs of particular communities. The fifteen states with the largest percentage gaps between the median household income of whites and the largest racial minority group in the state are Louisiana, Wisconsin, Rhode Island, Mississippi, Minnesota, Texas, Connecticut, California, South Carolina, Alaska, Iowa, Massachusetts, Arkansas, Illinois, and Colorado. The fifteen states with the largest gap in those who hold a bachelor’s degree between whites and the largest racial minority group in the state are California, Alaska, Arizona, Colorado, Idaho, Texas, Nevada, Wyoming, Nebraska, Utah, New Mexico, South Dakota, South Carolina, Montana, and Connecticut.
Recognizing the numerous tools today’s politicians can use to exclude voters, however, felon disenfranchisement, ID rules, and socioeconomic factors are not the same litmus tests of racial dysfunction that literacy and character tests arguably were in the Jim Crow South. Further, some would assert that felon disenfranchisement and voter ID requirements are justified, and others might claim that the nexus between socioeconomic factors and the political process is not enough to warrant preclearance coverage. The number of recent voting rights violations and investigations brought by the Justice Department, however, are good predictors for where problems might arise in the immediate future.

Most Voting Rights Violations

With regard to section 5 violations, eight of the sixteen covered states account for 94 percent of the objections entered by the Justice Department since 1982—Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. On a per county basis, the covered areas with the most objections are New York (eight objections for five counties), South Carolina (seventy-two objections for forty-six counties), and Louisiana (ninety-six objections for sixty-four counties). But section 5 numbers tell only part of the story. Violations of section 2, which applies nationwide, and section 203, bilingual ballots and other language-assistance requirements, in cases brought by the Justice Department are also relevant. As a result, I have listed the fifteen states with the largest number of objections and claims per capita of sections 2, 5, or 203 of the Voting Rights Act in matters initiated by the Justice Department for the ten years from January 1995 to December 2004.

Of course, even numbers about recent hurdles may not reveal the whole picture. The numbers of Voting Rights Act violations and claims in section 5 and 203 states may be inflated because they must comply with requirements from which other areas are exempt. This inflation, however, might be offset because the certainty of federal review deters section 5 states from creating exclusionary election rules, which in turn might reduce the number of section 2 violations in preclearance states. Among all fifty states, the 30 percent with the most Voting Rights Act objections and claims per capita are South Carolina, Louisiana, Mississippi, Montana, North Dakota, South Dakota, Georgia, Virginia, New Mexico, Texas, North Carolina, Alabama, Arizona, New Jersey, and Massachusetts.

Most Voting Rights Investigations

We should also look at the states that have received the most federal observers or monitors per capita between January 1995 and December 2004. Some will claim that states covered by section 5 have a built-in bias because the law requires investigations for preclearance purposes and forces the Department of Justice to search for problems. That is true to some extent, but several states with full section 5 cov-
verage—such as Virginia, Alaska, and Texas—did not prompt the number of investigations that occurred in Mississippi, Arizona, and Alabama. Further, New Mexico and six other states which are currently not covered by section 5 also appear on the list.

The states that received the most federal observers per capita are: Mississippi, New Mexico, Arizona, New Jersey, Utah, Alabama, Michigan, Washington, Indiana, California, Louisiana, South Carolina, New York, Pennsylvania, and Illinois.

**VOTER PARTICIPATION AND RACIAL HEALTH OF POLITICAL MARKETS**

The second factor of the original coverage formula measured voter engagement. The provision restricted preclearance coverage to areas where less than 50 percent of the voting age residents were registered on November 1 of 1964 or 1968 or voted in the November presidential elections during those years (or less than 50 percent of voting age citizens were registered or voted in November 1972).

In the 2000 or 2004 presidential elections, only a few states had voter participation of less than 50 percent of voting age residents. These included four states currently covered by the preclearance provisions: Arizona, California, Georgia, Hawaii, Nevada, and Texas. As mentioned, however, the existing test does not measure racial disparities in turnout or other factors of political dysfunction, such as racially polarized voting.

The following components that indicate the engagement of voters of color in politics should be considered in determining preclearance coverage: racial disparities in voter turnout, amount of political party competition for minority voters, racial disparities between voters and statewide elected officials, racial disparities between voters and all elected officials, size of the largest single minority group, and size of low-English proficiency population.

**Racial Disparities in Voter Turnout**

With regard to the largest disparities in voter turnout between minority and white voting age citizens in the 1996, 2000, and 2004 presidential elections, turnout might be skewed in swing states. For example, Democrats in the 2004 election might invest heavily in African American turnout in the swing state of Ohio but ignore it in a solidly red state such as Alabama. Although this is a valid concern, the single date and identical candidates of the presidential elections facilitate comparative analysis better than alternatives. For example, comparing turnout among people of color in Democratic gubernatorial primary races across the nation would introduce a diverse set of political issues, candidates, and other variables. In fact, Alabama and most of the South, other than Florida, Texas, and Virginia, escape the bottom tier of this category—in part because Democrats rely on black voters and mobilize them to the polls in these states.
Among all fifty states, the 30 percent with the largest average gap in voter turnout between white voting age citizens and the largest group of minority citizens in the state in the 1996, 2000, and 2004 presidential elections are Nevada, California, Arizona, Colorado, Texas, Connecticut, Massachusetts, New Mexico, Florida, New York, Delaware, Oklahoma, Virginia, New Jersey, and Indiana.

**Party Competition**

The extent to which both major parties compete for minority voters and whether whites are willing to vote for a minority candidate for statewide office are rough proxies for racially polarized voting. We lack a nationwide assessment of racial bloc voting because such data is usually collected only for specific localities challenged in section 2 lawsuits. Data identifying states where one of the major party’s presidential candidates repeatedly receives the smallest percentage of the minority vote relative to other states, however, provide some insight. Political candidates and parties that do not compete for minority voters often benefit the most from suppressed turnout of minority voters.

Some might complain this approach is unfair because “blacks just aren’t Republicans.” But the analysis of minority voters also includes other groups with which the Republican party is competitive, such as Latinos in Florida. Further, a “minorities just aren’t Republicans” approach assumes a fixed, dominant party structure to which minority voters must conform, rather than a system of vibrant parties that evolve to respond to the desires of minority voters and compete for their votes. In some states, for example, the Republican Party is actively reaching out and doing better among black voters than in other states. Healthy political markets encourage political actors to work to win over, rather than exclude, a greater percentage of voters of color.

Among all fifty states, the 30 percent where the two major party presidential candidates have been the least competitive with voters of color in the 1996, 2000, and 2004 presidential elections are: Mississippi, Louisiana, Maryland, Illinois, Georgia, Tennessee, Alabama, New York, Arkansas, Florida, Michigan, Pennsylvania, South Carolina, North Carolina, and Delaware.

**Statewide Elected Officials**

There is a significant difference between total number of all elected officials in a state and statewide elected officials. A state may have a large number of Latino elected officials, for example, because Latinos are segregated in particular districts and are able to elect their candidates of choice. The number of statewide elected officials often shows the extent to which whites and minorities join to elect a candidate. In other words, rather than mandating or testing for proportional repre-
sentation, a relative comparison of statewide elected officials is another proxy for racially polarized voting.

The fifteen states with the largest gaps between the voting-age minority citizens as a percentage of all citizens and the top-of-the-ticket statewide elected officials (governors, attorneys general, U.S. senators, and secretaries of state) who are both minority and are the candidate of choice of most minority voters, as a percentage of statewide elected officials of all ethnicities for the ten years from January 1995 to December 2004, are Mississippi, Maryland, Louisiana, New York, California, South Carolina, Texas, Florida, Alabama, Virginia, Georgia, North Carolina, Delaware, Arizona, and Arkansas.

All Elected Officials

The fifteen states with the largest gaps between voting age minority citizens as a percentage of all voters and elected minority officials as a percentage of all elected officials in the ten years from January 1995 to December 2004 are Texas, New York, California, Maryland, New Jersey, Florida, Mississippi, Delaware, Georgia, Nevada, Virginia, Louisiana, Illinois, South Carolina, and Connecticut.

Largest Single Minority Group

Preclearance coverage is most important in areas that have a significant percentage of minority voters. In such areas, discrimination may be more rampant because minorities likely carry more political weight, though this may not be the case in cities and counties that are over 70 percent minority, like the city of Detroit, Michigan. States with the largest single minority group as a percentage of the total citizen voting age population are Hawaii, New Mexico, Mississippi, Louisiana, South Carolina, Georgia, Maryland, Texas, Alabama, California, North Carolina, Virginia, Delaware, Arizona, and Arkansas.5

Largest Low-English Proficiency

Section 203 requires language assistance in jurisdictions in which more than 5 percent of the voting age citizens, or more than 10,000 voting age citizens, belong to a single language minority community and have limited English proficiency and the illiteracy rate of the language minority citizens is higher than the national illiteracy rate. The statute’s coverage formula reflects concentrations of language minorities. The 15 states with the highest percentage of counties covered by section 203 include: New Mexico, Arizona, Hawaii, Alaska, Texas, Connectcut, California, New Jersey, Massachusetts, Rhode Island, Colorado, Florida, Nevada, New York, and Idaho.
WHICH STATES ARE AT THE BOTTOM OF THE CURVE?

Of the eight categories examined, some states appear repeatedly:

Six categories: Arizona, California, Louisiana, Mississippi, New York, South Carolina, and Texas

Five categories: Alabama, Delaware, Florida, Georgia, New Jersey, New Mexico, and Virginia

Four categories: Maryland and North Carolina

Three categories: Arkansas, Connecticut, Illinois, Massachusetts, and Nevada

Two categories: Colorado, Hawaii, Indiana, Michigan, and Pennsylvania

One category: Alaska, Idaho, Montana, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Washington

No categories: Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Oregon, Vermont, West Virginia, Wisconsin, and Wyoming

Although the state ranking helps identify whether section 5 properly covers particular states, it has shortcomings.

The analysis focuses on states, and perhaps it should instead examine specific counties. For example, if a few counties in Michigan, South Dakota, and North Carolina remain relatively bad actors, they should not escape coverage simply because other counties in these states are good actors.

Further, the chart fails to consider intangibles that evade objective measurement. For example, within the past ten years, one could argue that politicians in Mississippi, Georgia, and South Carolina have used the Confederate flag debate in a way that polarizes voters along racial lines. Politicians in California, Texas, and other states have shown their willingness to manipulate district lines to protect incumbents or give advantage to one party. But quantifying variables like the Confederate flag or the willingness of politicians to manipulate election rules is difficult, at least in ranking states.

Startling reports about recent voting discrimination against American Indians and a failure of covered jurisdictions to preclear election changes in South Dakota have also emerged, and perhaps the state should remain covered.

Also, the chapter does not balance or weigh the factors. All states that fall in the top 30 percent of states in a particular factor (the reason for choosing the “top fifteen states”) join the list. The problem, however, is that the chart fails to deal with differences in degree. Thus, if Mississippi ranked number one and Texas number fifteen in six categories, both states would be listed each time, even though Mississippi would arguably be more dysfunctional than Texas (I do list the states from most to least extreme within the top 30 percent). Any attempt to numerically
CONCLUSION

Some might be nervous about discussing the coverage formula, fearful that the exercise opens a Pandora’s Box that leads toward the death of section 5. Once we start to discuss a new coverage formula, the argument goes, politicians who receive few minority votes will jockey to manipulate the test to avoid coverage of their state—not unlike politicians who maneuver to keep open their states’ antiquated U.S. military bases. I understand some may attack the coverage formula as a political strategy to eliminate section 5. On the other hand, a U.S. Supreme Court focused on federalism might question whether a 1960s coverage formula most accurately targets voting problems in the twenty-first century. Certainly, Congress should examine contemporary voting problems in states covered by any renewed coverage formula. At the same time, however, by developing factors of racial dysfunction—and examining states relative to one another with the metric—Congress and courts can measure the effectiveness of any coverage formula.

NOTES

1. The section 5 preclearance process requires selected states and localities to submit changes to their election practices and laws to the federal government, either the Department of Justice or a panel of three federal judges in Washington, D.C., to ensure that such changes do not worsen the position of voters of color. For a general background on the section 5 preclearance process, see chapter 2 this volume.

2. Most recently, six counties and three cities in Virginia have “bailed out,” and no longer have to preclear their election changes.

3. Recognizing the changes in the South and the effectiveness of section 5 in fighting voting discrimination, one might ask why not just expand the law so that it is both permanent and applies nationwide. Some argue that nationwide application would make section 5 susceptible to constitutional attack. The U.S. Supreme Court has held that federal laws must be “congruent and proportional” to the harms they are intended to address to avoid federalism concerns. Also, laws that categorize by race must be “narrowly tailored.” There are other practical concerns. In the past, Section 5 skeptics proposed nationwide application as a means to sink the entire law, speculating that congressional representatives might oppose the law if their home states were covered. Expanding the law might also hamper Justice Department efforts to effectively concentrate resources on the most problematic areas.

4. Compare Richard Pildes: “In theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right” (1999, 1612).
5. If we were to exclude states that lack a single minority group that makes up at least five percent of the population, we would release New Hampshire from current coverage. We also would not consider expanding coverage to Iowa, Maine, Minnesota, North Dakota, Vermont, or West Virginia. A better approach would apply the 5 percent test to counties within these states, thereby allowing coverage for a single county with heavier concentrations of voters of color.

REFERENCES


The Voting Rights Act of 1965 and its extensions are credited with greater participation and more effective representation for minorities. At the same time, several sections of the Voting Rights Act (VRA) apply nationally, and others apply specifically to jurisdictions that meet criteria found in section 4 of the act. In the immediate wake of the act’s passage, section 4’s “covered jurisdictions” were forbidden to use literacy tests and other such discriminatory election devices and the federal government was empowered to send registrars and election observers into these jurisdictions to aid minority electoral participation. Although these provisions have largely ceased in relevance, a provision with a profound and continuing effect on election administration is found in section 5, which requires covered jurisdictions to “preclear” changes in election administration rules to ensure that they do not interfere with minority voting, most notably changes to district boundaries, with either the Department of Justice or the District Court of the District of Columbia before taking effect.

The section 5 preclearance procedures are often confused with the section 4 coverage formula and related procedures that allow covered jurisdictions to escape, or bail out, of coverage, so much so that VRA renewal is often expressly discussed in terms of renewal of section 5. Section 4 governs when and where section 5 is applied. Contrary to conventional wisdom, it is section 4 of the act, not section 5 itself, that expires on June 29, 2007. When section 4 expires, the special provisions that apply to covered jurisdictions effectively end.

In past VRA reauthorizations, section 4 was amended to extend the coverage formula for a set time, to extend covered status to additional jurisdictions, and to modify the bailout mechanism that allows jurisdictions to escape coverage. The history of section 4 reveals a tension between expanding and shrinking the scope of covered jurisdictions. As 2007 approaches, revisiting the coverage formula and the bailout mechanism is prudent given that they have been amended in past reauthorizations and must be amended again if section 4 is to be extended. Here I discuss the history of congressional action on section 4, examine potential amendments to section 4 and their political implications, and recommend ways to improve existing section 4 language.
A HISTORY OF SECTION 4 COVERAGE FORMULA
AND BAILOUT MECHANISM

At the core of the Voting Rights Act is a formula that defines where specific proactive remedies apply to address discrimination in elections (Comments 1966, 496; McKay 1973, 112). The section 4(b) coverage formula codifies an objective measure of discriminatory intent by jurisdictions to deny voting rights. Sections 4(a) and 4(d) provide a mechanism for covered jurisdictions to bail out their covered jurisdiction status. Together, the coverage formula and bailout mechanism identify covered jurisdictions. Which jurisdictions should be covered and the method by which they can escape it has been hotly debated in the legislative history of the Voting Rights Act, in its original inception in 1965 and the reauthorization in 1970, 1975, and 1982. Although proponents of a broad scope of coverage have been largely successful in maintaining and increasing the number of covered jurisdictions, their successes have often come in the face of strong opposition that has at times been nearly successful in eliminating the proactive remedies of the act.

The 1965 Voting Rights Act

The section 4(b) coverage formula conceived in the original Voting Rights Act of 1965 has two components: that a jurisdiction used a “test or device” to deny minority voting and that voter participation in the jurisdiction is low. The first component is a finding by the attorney general that a jurisdiction on or before November 1, 1964 “engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color” (89–110, sec. 4(d)). Tests and devices are defined in section 4(c) and include literacy tests or other educational tests, tests of good moral character, or a demonstration of qualification to vote by the voucher of another person. Twenty-one states were found to have used at least one such discriminatory test. The second component is a finding by the director of the census that within these jurisdictions, less than 50 percent of persons of voting age were either registered to vote or voted in the 1964 presidential election. The entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and specific counties in Arizona, Hawaii, Idaho, and North Carolina met the criteria of the coverage formula.

Congress recognized that although many jurisdictions were appropriately covered, the coverage formula was to some extent arbitrary—it did not even consider the percentage of minorities within a jurisdiction—and that it might not cover all jurisdictions that discriminated or that it might capture jurisdictions that had not discriminated (Hancock and Tredway 1985, 392). For the former, federal courts were empowered to assign covered status if the courts found a jurisdiction violated the protections found in the Fourteenth or Fifteenth Amendments. For the latter, states could initiate litigation on behalf of their covered jurisdictions in the District Court of the District of Columbia to bail out of coverage if the jurisdiction had not
used a discriminatory test for five years (89-110, sec. 4(a)). The purpose of the bailout mechanism was to provide immediate escape from coverage for jurisdictions that had used an electoral test for nondiscriminatory purposes, which six jurisdictions, including the state of Alaska, successfully did between 1965 and 1970 (Hancock and Tredway 1985, 389–90). For other jurisdictions, the mechanism was originally designed to cover jurisdictions until they demonstrated they had not used a discriminatory electoral test for five years. Because the 1965 Voting Rights Act prohibited covered jurisdictions from employing such tests, all covered jurisdictions would be theoretically capable of bailing out in 1970.

The 1970 Reauthorization

When the proactive remedies of the Voting Rights Act were set to expire in 1970, the House passed a bill, HR 4249, repealing parts of sections 4 and 5 (O’Rourke 1983, 778–79). The Senate rejected the House version, reinstated the proactive remedies, and extended them for another five years. Along the way, southern senators offered amendments, which were rejected, seeking to reduce VRA coverage. One such amendment offered by Ervin (D-NC) would apply the coverage formula only to jurisdictions that had used a discriminatory electoral test in the last presidential election, rather than the 1964 election. Another amendment offered by Ervin would have effectively reduced the number of covered jurisdictions by calculating turnout rates used in the coverage formula for the voting-eligible population, rather than the voting age population (CQ Almanac 1970, 196). The House accepted the Senate version in its entirety, partially because key House members feared a conference committee would strip out a provision lowering the voting age to eighteen (CQ Almanac 1970, 192).

Despite attempts to reduce the scope of coverage, the formula was amended to expand coverage. In addition to jurisdictions covered by the 1965 coverage formula, jurisdictions that used a discriminatory electoral test in the 1968 presidential election and where less than 50 percent of persons of voting age were either registered to vote or voted were added to the list of covered jurisdictions. The attorney general determined among jurisdictions that were not currently covered, twelve states and parts of three others had used a discriminatory test. The new list essentially comprised those states that the attorney general found had a test or device pursuant to the 1965 coverage formula minus the jurisdictions currently covered and thus prohibited by section 4 from using such a test. The revised coverage formula resulted in the additional partial coverage of ten states. Newly covered jurisdictions included the boroughs of Manhattan, Brooklyn, and Bronx in New York, one county in Wyoming, two in California, and five in Arizona. Some states that had successfully bailed out were again covered: three counties in Arizona, one in Idaho, and three election districts in Alaska. In 1974, townships in Connecticut, Maine, Massachusetts, and New Hampshire were added to the list of covered jurisdictions (CQ Almanac 1975, 525).

The bailout mechanism would need to be reconfigured because all currently covered jurisdictions could theoretically petition for bailout in 1970, given that
they had been prohibited from using a discriminatory electoral test since 1965 and therefore met the five-year probationary period. To address this issue, in the amendments of 1970, Congress extended the period since the last use of a discriminatory electoral test from five to ten years, effectively extending section 4 of the Voting Rights Act to 1975 (PL 91-285). In 1973, the states of Alaska and New York successfully sued for bailout for their covered jurisdictions, with the finding that their electoral tests did not have a discriminatory purpose or effect. However, New York’s jurisdictions were covered again in 1974 after related litigation—Torres v Sachs (381 F.Supp. 309)—found that the state had used a discriminatory test or device (Hancock and Tredway 1985, 396).

The 1975 Reauthorization

When the provisions of the Voting Rights Act were effectively set to expire in 1975, Congress again acted. Members from covered states, such as Flowers (D-AL), continued to be annoyed that “the Act requires only seven states... to do certain things that no other state in the union has to do, and that’s wrong” (CQ Almanac 1975, 525). Members again sought to reduce the scope of covered jurisdictions, this time through changes to the bailout mechanism. Scott (R-VA) offered a House amendment that sought to reverse a finding in Gaston County v. United States (395 U.S. 285), where the U.S. Supreme Court ruled that history of segregation prior to 1964 could be factored into bailout decisions (O’Rourke 1983, 779–80). Butler (R-VA) offered his “impossible bailout” House amendment, so named because even though it provided a way for jurisdictions to escape coverage, Butler felt it would be a high hurdle to overcome. The amendment would have “exempted (states) from coverage if (1) more than 60 percent of all voters and minority voters cast ballots in the previous presidential election, (2) the states met specific criteria in their voting laws and (3) the state or local jurisdiction remained free of Voting Rights Act violations for at least five years” (CQ Almanac 1975, 528). Amendments seeking to reduce coverage were again rejected.

The appetite of the majority in 1975 was to expand coverage, not to reduce it. Voting rights protections were extended to “language minorities” by amending the definition of test or device to include jurisdictions where members of a single language minority constituted 5 percent or more of the citizen voting age population and election material was provided in English only. The participation component of the coverage formula was amended to additionally cover jurisdictions where less than 50 percent of the citizen voting age population—in contrast to the 1964 and 1968 voting age population participation denominator—were either registered to vote or voted in the 1972 presidential election. The attorney general and the director of the census released joint reports listing covered jurisdictions, and thus it is unknown how many jurisdictions continued to use a discriminatory electoral test under the 1965 definition or conducted English-only elections (see, for example, 41 FR 783). The application of the new formula covered additionally the states of Alaska, Arizona, and Texas; and parts of California, Colorado, Florida, Michigan,
New Mexico, New York, North Carolina, Oklahoma, and South Dakota (see 40 FR 49422 and 41 FR 34329).

Modifying the duration of time since the use of a discriminatory electoral test under the 1965 definition from ten to seventeen years finesse the bailout issue and essentially extended the temporary provisions of the Voting Rights Act to 1982 (PL 94-73). One bailout lawsuit filed between 1975 and 1982 allowed eighteen Maine townships to escape coverage under the 1965 definition of test or device (Hancock and Tredway 1985, 403). Additional jurisdictions covered by the new language minority definition of test or device and wished to bail out had to establish that they had not used such a test for ten years or that the language minority was fluent in English. Three New Mexico and two Oklahoma counties successfully bailed out between 1975 and 1982 after the Department of Justice determined that the language minorities in these counties were sufficiently fluent in English (Hancock and Tredway 1985, 403).

The 1982 Reauthorization

When the Voting Rights Act was revisited in 1982, it was amended to “reflect both the views of those who argued for continuation and strengthening of the Act’s provisions, and those. . . who pressed for a new bailout mechanism to give states an incentive to change their questionable practices” (O’Rourke 1983, 765–66). This time the coverage formula was not modified, as in previous extensions, though a rejected amendment by Cochran (R-MS) sought to frame covered status as a fairness issue by extending section 5 preclearance to the entire nation. Testimony from the attorney general, the Commission on Civil Rights, and the Civil Rights Division of the Department of Justice uniformly stated that the 695 section 5 preclearance objections since 1965 demonstrated continued discriminatory intent by covered jurisdictions and thus merited continued coverage under the act (Hancock and Tredway 1985, 405–6). Congress agreed and passed an extension that retained the existing coverage formula, but did not modify it as it had done in previous extensions of the Voting Rights Act.

By 1982, Congress saw a need to reexamine the bailout procedures. Only nine jurisdictions successfully bailed out of coverage between 1965 and 1982, and these had been successful only when the U.S. attorney general declined to challenge the request. In seventeen instances when the U.S. attorney general challenged, the applying state rescinded the request or a court denied it. Some of these cases were perhaps meritoriously denied, such as the request by Gaston County, North Carolina, to reinstate its literacy test. In another case, City of Rome v. United States (446 U.S. 156), the Supreme Court ruled that jurisdictions within a covered state could not bail out independently from their state.

Representative Hyde (R-IL) proposed a new bailout mechanism based on elements of Butler’s impossible bailout amendment, which framed bailout in terms of meeting requirements rather than effectively extending coverage through a fixed reference date to the last use of a discriminatory electoral test (O’Rourke 1983, 781).
Hyde’s bailout mechanism called for a ten-year compliance period with section 5 by covered jurisdictions. The new bailout framework further recognized that a flaw of section 5 preclearance was that it only applied to changes in election procedures and did not address laws existing prior to 1965, which could remain in effect indefinitely unless successfully overturned in court or were changed through the political system. The new bailout mechanism would provide the incentive of successful bailout to encourage covered jurisdictions to amend their election administration rules to enfranchise minorities. The final form of Hyde’s bill was negotiated behind closed doors and added requirements to bail out, some of which Hyde reluctantly voted for (Williamson 1984, 19).

The new mechanism allowed jurisdictions to bail out if they could provide an account of good and behavior in the ten years previous to the bailout petition and evidence of the adoption of proactive steps to encourage minority representation. The new bailout mechanism consisted of six provisions. For the sake of brevity, they are shortened here (42 USC sec. 1973b(a)1(A)-(F)):

- No test or device had been used with the effect or purpose of denying the right to vote on the basis of race or color.
- No final judgment of a court determined that that denials of the right to vote on the basis of race or color or membership of a language minority had occurred.
- No federal examiners had been assigned to the jurisdiction.
- Compliance with section 5 by the jurisdiction.
- The attorney general had not interposed any objection that had not been overturned under section 5.

Jurisdictions have taken proactive steps to:

- Eliminate voting procedures and methods of election which inhibit or dilute equal access to the electoral process.
- Engage in constructive efforts to eliminate intimidation.
- Engage in other constructive efforts.

Additionally, the City of Rome decision was addressed by allowing jurisdictions to bail out if their state were covered, though the reverse was specifically rejected in a failed amendment offered by Stevens (R-AK) to allow states to bail out if jurisdictions within their territory were covered (CQ Almanac 1982, 377).

The Senate Judiciary Committee was optimistic that many jurisdictions would be eligible for bailout: “25 percent of the counties in the major covered states’ would be ‘eligible to file for bailout’ in 1984” (S Rep. No. 417, quoted in O’Rourke 1983, 786). Others, such as Hyde, believed that bailout under the new mechanism was practically impossible (Williamson 1984, 19) and Butler went further, calling the new bailout a “mockery of the idea of reasonable bailout” (quoted in O’Rourke 1983, 785). The House adopted the new bailout mechanism, but the Senate did so
only after a compromise orchestrated by Dole (R-KS), and the House later adopted the Senate version (Williamson 1984, 20). Most significantly, Dole’s compromise extended the new bailout mechanism for twenty-five years, whereas the House version would have contained no sunset provision (CQ Almanac 1982, 376). The special provisions of the Voting Rights Act that apply to covered jurisdictions would thus expire in 2007.

In the period between passage of the Voting Rights Act extension in 1982 and the effective start date of the new bailout mechanism on August 5, 1984, six bailout lawsuits were filed (Hancock and Tredway 1985, 412–15). Elmore County in Idaho, Campbell County in Wyoming, and jurisdictions in Connecticut were granted bailout after the Department of Justice determined that low participation in these counties was a consequence of calculating a turnout rate that included a large number of ineligible voters in these jurisdictions, such as military personnel, students, and transient laborers. El Paso County in Colorado and Honolulu County in Hawaii escaped coverage under the single language minority component when the Department of Justice determined that a sufficiently large percentage of the language minorities were fluent in English. The state of Alaska, however, was denied bailout after the Department of Justice argued there was not enough time to litigate the case before the new bailout mechanism took effect.

These bailout litigations shared a claim that the electoral test used by the jurisdiction was nondiscriminatory. Under the new bailout mechanism nondiscriminatory jurisdictions, along with those that had used an electoral test with discriminatory purpose or effect, were required to meet a ten-year compliance with section 5 and implement proactive steps to increase minority political participation. Foretelling the effectively high hurdle of the new bailout mechanism, amended bailout litigation submitted by Alaska in 1985 under the new bailout rules was unsuccessful (Hancock and Tredway 1985, 415).

The flood of bailout litigation following the August 5, 1984, effective date of the new mechanism never materialized. Only nine jurisdictions in Virginia covered by the original definition of a discriminatory electoral test subsequently bailed out. Currently, 880 counties or townships plus the state governments of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered. Partially covered states include California, Florida, New York, North Carolina, South Dakota, Michigan, and New Hampshire.

MODIFYING COVERAGE FORMULA AND BAILOUT MECHANISM

Section 4(a)(8) specifically sunsets section 4 on June 29, 2007, twenty-five years following the effective date of the Voting Rights Act Amendments of 1982. A common misperception is that section 5 preclearance of election administration changes for covered jurisdictions will expire in 2007, when it is the definition of covered jurisdictions found in section 4 that expire. When the coverage formula and bailout mechanism lapse, so too will the special provisions that apply to covered jurisdictions,
among these being section 5. Any debate about maintaining the proactive provisions of the Voting Rights Act will necessarily involve a debate over the section 4 coverage formula and bailout mechanism, as it has in past extensions of the act.

The legislative history of the Voting Rights Act demonstrates that there are two approaches by which supporters can attempt to broaden coverage of section 4 and three by which opponents may attempt to shrink it. Proponents and opponents alike can change the scope of coverage by modifying the coverage formula regarding the definition of a discriminatory electoral test or by modifying the elections considered in the participation component. Opponents can further seek to ease the bailout mechanism.

Modifying the Definition of “Test or Device”

The definition of “test or device” as articulated in the 1965 Voting Rights Act applies to those jurisdictions that used a device or test in the presidential election of 1964 with the effect of denying voting rights on the basis of race. The definition was expanded in 1975 to include English-only election material for jurisdictions with a single-language minority greater than 5 percent of the citizen voting age population. The coverage formula may be modified with regards to either component’s definition.

THE ORIGINAL 1965 DEFINITION

The 1975 Voting Rights Act outlawed the use of literacy tests or devices in the entire United States, and this specific component of the discriminatory electoral test definition was not modified subsequently. The anachronism of literacy tests provides those opposed to the proactive provisions of the act an argument to reexamine the first component of the test or device definition. It is instructive to note that members of Congress have previously tried to amend the definition to reduce coverage. For example, a rejected amendment offered by Ervin (D-NC) in 1970 sought to modify the coverage formula to apply only to the presence of a test or device in the most recent presidential election. Clearly, if this standard were adopted today no jurisdiction would be covered.

Proponents of continued or expanded coverage argued in 1982 the definition was designed originally as an objective standard to identify jurisdictions with a history of denying voting rights to persons based on race. Jurisdictions used practices difficult to quantify to impede minorities from fully participating in the electoral process, including violence (Kousser 1992). Those testifying during the 1982 reauthorization of the Voting Rights Act pointed to the denial of section 5 preclearance for election administration changes having nothing to do with the adoption of a discriminatory electoral test as evidence of continued intent to discriminate, such as city annexations, precinct changes, the adoption of at-large elections, and race-conscious redistricting schemes. Proponents of extension in 1982 pointed to the success of preventing these changes as a rational for keeping the current definition in place. Such an argument will have to be carefully crafted for renewal in 2007; the overwhelming majority of section 5 submissions now routinely receives
preclearance approval (see chapter 5 this volume). Only a handful of jurisdictions have been denied preclearance at least once since 1995 (table 13.3).

1975 DEFINITION RELATING TO LANGUAGE MINORITIES Two parts were added in 1975 to the language minority provisions of the test or device definition. Jurisdictions covered under this definition are those in the 1972 election with 5 percent single-language minority of the citizen voting age population and those that conducted it in English only. The number of immigrants admitted to the United States has doubled since the 1980 census (Office of Immigration Statistics 2004). Given this increase, it is almost a certainty that a greater number of jurisdictions would be covered by the first part of the single language provision if the 2000 census were used as a population base, though a special tabulation is necessary to reveal exactly how many jurisdictions would qualify. Furthermore, without an exhaustive survey of election administration practices, determining the number of these jurisdictions that qualify for the second part of the component, the conduct of English-only elections, is not possible.12

The minority language components of section 4 and the separate section 203 coverage formulas use the same population base: members of a single language minority constitute 5 percent or more of the citizen voting age population (CVAP). The single language component of section 203 was recalculated following the 1980 census and again following 1990 and 2000 censuses. The single language component of the section 4 coverage formula, on the other hand, specifically references the 1972 election and has not changed with the release of new census data.13 The two coverage formulas differ in that the section 203 coverage formula’s second component is a literacy rate of language minority citizens lower than the national literacy rate, whereas section 4 references both the use of English-only election material and participation levels below 50 percent in the 1972 presidential election.

All jurisdictions covered under section 4 are covered under section 203, and a significantly greater number are covered under the latter (see 28 CFR sec. 55.24). The incongruous reference of section 4 to the 1972 election, that of section 203 to the new population data available from the 2000 census provide compelling arguments to reexamine this component of the language minority definition. Given continuing migration into the United States, more jurisdictions should be covered under section 4 if the formula were updated to reference the 2000 census. Proponents of expanded coverage, however, should be wary of simply updating the section 4 component of test or device to reference the 2004 election without layering the formula over the existing coverage formula. Section 203 covered jurisdictions must provide election material in the language of the affected minority, though the number of jurisdictions in compliance is unknown. Thus, many jurisdictions would not be covered under the second part of section 4’s definition of test or device. Counterintuitively, opponents would perhaps reduce coverage by amending the definition of discriminatory electoral test to reference solely the 2004 election. There is a caveat: without hard data on the number of jurisdictions in compliance with section 203, it is unknown exactly how many jurisdictions would be covered by an amended section 4.
Proponents could likely expand the number of language minority jurisdictions covered by section 4 by layering the section 203 formula over the current section 4 coverage formula. Republicans may find amending the coverage formula in this direction appealing for political reasons. The Voting Rights Act is sometimes credited with forcing southern Democratic-controlled state legislatures to inefficiently distribute African American voters across state legislative and congressional districts during redistricting to benefit Republicans (Grofman and Handley 1998). However, Republicans now control many of these governments. Additionally, section 5 of the Voting Rights Act now acts as a constraint on optimal Republican gerrymanders. Substituting—rather than layering—the section 203 coverage formula for the section 4 coverage formula in its entirety would free many southern states from coverage and capture at least a few of the Democratic-leaning states such as California, New York, Oregon, and Washington. Perhaps Republicans could realize electoral gains in these states similar to those in the South.

Proponents could also expand coverage if the definition of language minority summed all language minorities into one category rather than being triggered if a “single” language minority constituted 5 percent of CVAP. Recognizing the growing diversity of many communities in the United States by broadening the definition may make sense. However, some thought would need to be given on how to implement the new definition. Forcing jurisdictions to translate election material to accommodate a small number of voters fluent in a given language would be a costly administrative burden. Furthermore, given the popularity of English-only ballot initiatives in some states, it is unlikely that the majority in Congress would strongly support amending the language minority definition simply as a good government policy.

Modifying the Participation Component

In 1965, 1970, and 1975, the registration and voting components of the coverage formula referenced the most recent presidential election at the time of passage, the 1964, 1968, and 1972 elections, respectively. The most recent election referenced, as of renewal in 2007, is thirty-five years in the past and much has changed. In 1972, the turnout rate among those eligible to vote was 56.2 percent and the differential in turnout rates between the southern states and the remaining states was 14.8 percentage points. In 2004, the national turnout rate was 60.3 percent, and the difference between the South and rest of the country was 4.6 percentage points (see McDonald and Popkin 2001).14 Given the length of time since the 1972 presidential election, and given that there is precedent for referencing the participation component of the coverage formula to the most recent presidential election, it is reasonable to consider the consequence of changing the participation component of the coverage formula to reference the 2004 presidential election.

The effect of updating the coverage formula’s participation component can be determined by analyzing the 2004 presidential election statistics. These statistics should be calculated for all jurisdictions with a discriminatory electoral
test. I assume that all jurisdictions within states currently covered by section 4, including partially covered states, are potentially covered. To these, I include jurisdictions that the attorney general determined used a test or device under the 1965 Voting Rights Act. The number of covered jurisdictions under the 1975 language minority amendments is unknown because no survey of multilingual elections exists. This formulation results in potential coverage of jurisdictions in twenty-five states. Within the scope of this analysis, 870 counties are covered either as a consequence of statewide or jurisdiction level coverage.

Although not perfect, this approach provides clues as to which jurisdictions might be covered if the participation component of the coverage formula were updated to reference the 2004 election.

I measure turnout rates within these jurisdictions, as a percent of the citizen voting age population (CVAP), consistent with the participation component adopted in the 1975 reauthorization of the Voting Rights Act. For the numerator, turnout rates have been traditionally calculated using the votes cast for president. In recent elections, nearly all states reported the total number of ballots cast, which includes ballots with no vote recorded for president. The increased coverage of reporting of the total number of ballots cast enables turnout rates to be calculated by either numerator to the turnout rate. The critical value adopted previously is registration and voting rates less than 50 percent. As a practical matter, I analyze turnout rather than voter registration since turnout rates should always be lower than registration rates, given that one must be generally registered in order to vote.

Table 13.1 reports the potential number of covered jurisdictions if the 2004 presidential election were considered solely as the participation component to the coverage formula. With presidential vote measured as a percentage of the CVAP, 300 jurisdictions are covered but only Hawaii entirely covered. Calculating turnout rates for the total number of ballots cast slightly reduces the number of covered jurisdictions to 278, but leaves Hawaii entirely covered. If the 2004 presidential election were the only one considered under the participation component of the formula, the number of covered jurisdictions is reduced. Particularly, if the turnout rate were calculated as the total number of ballots cast divided by the CVAP, only 31.6 percent of the currently covered 880 jurisdictions are covered.

The original coverage formula was in part arbitrary in that it covered some jurisdictions that had not discriminated and failed to cover some that had. The arbitrariness is apparent when considering Hawaii. Hawaii ironically has one of the highest turnout rates in nonpresidential elections, yet chronically low levels in the presidential election, which is more a result of it being a safe Democratic state that is difficult to travel to, giving little incentive for the presidential campaigns to expend resources in the state, than a consequence of purposeful race- or language-based discrimination. Furthermore, Hawaiian turnout is depressed because Hawaiians often know the presidential election outcome while the polls are still open. The presence of a significant number of ineligible persons, such as military personnel, also factor in the low turnout rate. It is noteworthy that jurisdictions have successfully bailed out by demonstrating low participation statistics were a consequence of a sizable population ineligible to vote (Hancock and Tredway
1985, 413–14). More generally, it is unclear if purposeful discrimination predominates or if some other factors are responsible for contemporary low turnout rates in some jurisdictions.

Table 13.2 reports the number of additional covered jurisdictions if the 2004 presidential election is layered over the existing coverage formula. Despite the increase in voter participation in the 2004 presidential election and the narrowing of participation across regions within the country, the number of covered jurisdictions would be expanded. Thirty-three additional jurisdictions, including the state of Hawaii, would be covered if the presidential turnout rate were calculated as a percent of the citizen voting age population. Calculation for the total ballots cast has a small effect on the number of additional covered jurisdictions, reducing the number to thirty, but again retaining the state of Hawaii under coverage.

The anachronism of the current section 4 formula referencing 1964, 1968, and 1972 elections provides compelling justification for a reexamination of the participation component. Clearly, proponents of reducing coverage will find appealing replacing the participation component in whole with the 2004 election participation statistics. Those favoring reduction in coverage will also favor calculating turnout rates for the total ballots cast, a measure that has been unavailable in previous deliberations over the act. Surprisingly, even proponents of increasing coverage will find updating the participation component appealing if past practices

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### TABLE 13.1 / Jurisdictions Covered if 2004 Participation Replaces Existing Participation Formula

<table>
<thead>
<tr>
<th>State</th>
<th>Vote for President/ Citizen-Voting Age Population</th>
<th>Total Ballots Cast/ Citizen-Voting Age Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>Arizona</td>
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<td>6</td>
</tr>
<tr>
<td>California</td>
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<td>14</td>
</tr>
<tr>
<td>Florida</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Georgia</td>
<td>88</td>
<td>82</td>
</tr>
<tr>
<td>Hawaii (entire state)</td>
<td>4</td>
<td>4 (entire state)</td>
</tr>
<tr>
<td>Idaho</td>
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<td>1</td>
</tr>
<tr>
<td>Louisiana</td>
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<td>4</td>
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<tr>
<td>Michigan</td>
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<td>1</td>
</tr>
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<td>Mississippi</td>
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<tr>
<td>Texas</td>
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<td>85</td>
</tr>
<tr>
<td>Virginia</td>
<td>28</td>
<td>21</td>
</tr>
<tr>
<td>Washington</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Total</td>
<td>300</td>
<td>278</td>
</tr>
</tbody>
</table>

*Source: Authors’ compilations.*
of layering new coverage over the old are followed because additional jurisdictions would be assigned covered status.

Regional and local interests will also come into play here. The history of section 4 reauthorization demonstrates that opposition to section 4 is strongest among representatives whose home jurisdictions are currently covered. Those jurisdictions that want out of covered status, but have not previously bailed out, might fashion an effective bailout through amending the coverage formula. But amending the formula might cover new jurisdictions, which will likely lobby to avoid covered status, finding allies among their senators and representatives. Layering of the 2004 election over the current section 4 coverage formula would affect nine states, including the largest states of California, New York, and Florida, which together could constitute an important blocking coalition in the House or Senate.

**Modifying the Bailout Mechanism**

Advocates for the 1982 Voting Rights Act extension argued that 25 percent of covered jurisdictions would be eligible to bailout in 1984 under the adopted revised bailout mechanism. The projection was based on analysis of covered jurisdictions in seven southern states conducted by the Joint Center for Political Studies (O’Rourke 1983, 791). In a separate analysis, O’Rourke (1983, 792–800) estimated about half of Virginia’s counties and a fifth of Virginia’s independent cities would be eligible for bailout in 1984. Leaders of the NAACP and MALDEF opposed the new bailout mechanism fearing that the scope of the special protections of the Voting Rights Act would be severely reduced as many jurisdictions bailed out (Hancock and Tredway 1985, 423). However, the rosy bailout projections were not
realized. Only nine jurisdictions in Virginia successfully have bailed out under the revised bailout mechanism since 1984.

Although few jurisdictions have bailed out successfully, a larger number should be eligible to do so. There are essentially two criteria for a jurisdiction to successfully bail out: compliance with section 5 for ten years and demonstration of constructive steps to encourage minority participation. To demonstrate compliance with section 5, a jurisdiction must not have received a section 5 objection by the Department of Justice or the District Court of the District of Columbia for ten years, among other criteria. Objections that are later withdrawn are not counted against a jurisdiction. Table 13.3 shows that as of July 1, 2005, only six state governments and forty-nine jurisdictions have at least one section 5 objection that has not been withdrawn within the last ten years.\textsuperscript{19} Because state governments are culpable for actions of their jurisdictions under current bailout procedures, the states of Alabama, Georgia, North Carolina, and Virginia are ineligible for bailout because a jurisdiction within their state received a section 5 objection.\textsuperscript{20} Although it is not known how many jurisdictions have taken constructive steps to encourage minority participation in the electoral system, at first blush, a large number of jurisdictions would appear to be eligible for bailout.

The hanging question is why more jurisdictions have not applied for bailout? Writing in 1985, Paul Hancock and Lora Tredway puzzled over this same problem, noting a “paucity of bailout efforts” following the amendment of the bailout mechanism in 1982 (422). The authors offer two plausible explanations: that covered jurisdictions may be unaware of the opportunity to bail out and that the marginal cost of continuing coverage is smaller than the marginal cost of taking the corrective action and submitting the legal documentation necessary to achieve

### TABLE 13.3 / Jurisdictions with Section 5 Objections Not Withdrawn since July 1, 1995

<table>
<thead>
<tr>
<th>State</th>
<th>Section 5 Objections</th>
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<tbody>
<tr>
<td></td>
<td>State</td>
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<tr>
<td>Alabama</td>
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<tr>
<td>Arizona</td>
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<tr>
<td>California</td>
<td></td>
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<td>Florida</td>
<td>Yes</td>
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<tr>
<td>Georgia</td>
<td></td>
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<tr>
<td>Louisiana</td>
<td>Yes</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Yes</td>
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<tr>
<td>New York</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>Yes</td>
</tr>
<tr>
<td>Texas</td>
<td>Yes</td>
</tr>
<tr>
<td>Virginia</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>6</td>
</tr>
</tbody>
</table>

*Source: Authors’ compilations.*
bailout. A third explanation, that jurisdictions delayed bailout as they made preparations to formally request it, has proven false. Although jurisdictions are now accustomed to section 5 preclearance submissions and generally know what changes will be granted clearance, the carrot of bailout has not proved to be enticing enough for jurisdictions to take some of the proactive steps to encourage minority participation simply for the sake of bailout.

The effective perpetuity of covered jurisdiction status will likely be an issue of debate in the coming reauthorization of the Voting Rights Act. Those favoring reducing the number of covered jurisdictions will want to examine the mechanics of bailout. If the lack of bailout litigation were caused by local jurisdictions’ lack of information and resources to initiate bailout litigation, a solution would be for the Department of Justice to proactively notify jurisdictions that they are potentially eligible for bailout, explain bailout procedures, and assist jurisdictions with initiating bailout litigation. Although this would result in a short-term increase in the workload of the Civil Rights Division, Voting Section of the Department of Justice as they reviewed bailout status, in the long-term their workload would be reduced, as they would be eventually required to review fewer section 5 submissions.

By loosening the bailout mechanism too much, those favoring continuing covered status at the current levels will be troubled that some discriminatory jurisdictions may slip out of coverage. For jurisdictions that returned to their discriminatory ways, the existing language in section 4 would place the jurisdiction under covered status through a finding by a court of discriminatory purpose or effect in their election administration, such as might be discovered during section 2 related litigation. If minority groups feared that they did not have the resources to litigate against every discriminating jurisdiction, perhaps an alternative complaint mechanism could be fashioned (see chapter 14 this volume). The new arrangement would need to strike the proper balance between a possible bailout mechanism and one that does not allow discriminatory jurisdictions to escape coverage.

If a new coverage formula is instituted that expands the number of covered jurisdictions, the arbitrariness of the coverage formula should be addressed through the bailout mechanism. In past extensions of the Voting Rights Act, jurisdictions that used a test or device without discriminatory intent were allowed to bail out of their covered status. The current bailout formula is designed to allow jurisdictions to escape coverage only after a period of good behavior and the institution of proactive measures to increase minority participation. As now fashioned, there is no escape for jurisdictions that used an electoral test without discriminatory intent (or in the case of language minorities, a sufficiently large segment of the language minority was fluent in English) who might be covered under a revised formula.

Suggested Technical Amendments to Section 4

Two further changes to section 4 should be considered when the Voting Rights Act is considered for renewal in 2007. These suggestions are not substantive, and would affect only the administration of the section 4 coverage formula.
The first is to move the calculation of the participation criteria of the coverage formula from the director of the Census Bureau to the Election Assistance Commission. The Census Bureau no longer collects jurisdiction level voting and registration data. Under the 2002 Help America Vote Act, section 241, the Election Assistance Commission is empowered to conduct studies of election administration, which the commission has interpreted to include a survey of election administration and participation within local jurisdictions. Thus, the Election Assistance Commission is best suited both to calculate the necessary statistics and to collect statistics on the use of English-only election material. Collecting the necessary data is imperative now, given that many jurisdictions fail to archive data.

The second technical recommendation is to revisit voter registration as an indicator of participation. Because persons who vote must be registered (except for North Dakota and small jurisdictions in Wisconsin, which have no voter registration), it is possible for a jurisdiction to have voter registration greater than 50 percent only if voter turnout is less than 50 percent. Furthermore, the validity of voter registration as a measure of participation is low because the variation in how jurisdictions report active and inactive registration does not allow for meaningful comparisons across jurisdictions. Thus the most relevant measure of participation for the coverage formula is voter turnout.

**CONCLUSION**

The effective expiration of the provisions of the Voting Rights Act that apply to covered jurisdictions, such as section 5 preclearance of changes to election administration rules and procedures, is found in section 4. Unless Congress takes action, section 4 will sunset on June 29, 2007. As we approach this date, twenty-five years since the last reauthorization of the Voting Rights Act, in 1982, little institutional memory remains regarding the issues and motivations that produced the current law. Speaking before the Congressional Black Caucus on January 26, 2005, President Bush said, as Clarence Page reported in the Baltimore Sun, that he was unfamiliar with the Voting Rights Act (“Clueless Like a Fox?” February 1, 2005, p. 11A), and many in Congress likely share his unfamiliarity. Few congressional members and staffers who participated in the debates over previous Voting Rights Act extensions remain.

The Voting Rights Act is rightfully credited with increasing participation and more effective representation for minority groups. Due to its past success, many proponents of the act simply assume that covered jurisdiction status should and will be extended for some, as of yet, undetermined period. However, the historical context reveals that such a viewpoint is naive, at best. Although proponents of continuing covered jurisdiction status have been successful at continuing and expanding the scope of the coverage formula, they have often done so in the face of strong opposition. Proponents for extending the Voting Rights Act will likely face strong challenges from those who oppose it, and will need to marshal strong arguments in favor.
If the Voting Rights Act is to be extended, proponents of extension will have to face tough questions as to the relevance of the current coverage formula. The definition of test or device now references election rules that were used in 1964, in the case of the original definition, or 1972, in the case of the language minority provisions. The most recent election referenced in the coverage formula is 1972. With some caveats, a change to the participation component would likely have profound consequences on the number of covered jurisdictions. If the coverage formula is amended to layer the 2004 presidential election over the current formula, a change similar to what was done in the 1970 and 1975 extensions of the act, a small number of currently uncovered jurisdictions will be covered. If the 2004 presidential election replaces the existing participation component of the coverage formula, the number of covered jurisdictions will likely be reduced, perhaps by two-thirds.

Proponents may argue that the coverage formula, though somewhat outdated and arbitrary, has allowed jurisdictions that have not discriminated on the account of race or language in elections to escape coverage. Jurisdictions that remain covered have a history of discrimination meriting vigilant attention. However, proponents will be hard-pressed to provide tangible evidence of continued discrimination of minorities within a sizable number of covered jurisdictions. The Voting Rights Act permanently bans many of the overt discriminatory mechanisms, such as literacy tests. Minority registration and voting rates have increased considerably since the 1960s and descriptive minority representation at all levels of government has increased (Davidson and Grofman 1994). During the 1982 extension of the Voting Rights Act, the high number of rejected section 5 preclearance submissions was accepted as evidence of continued discriminatory intent among covered jurisdictions. Today, the overwhelming majority of submissions by jurisdictions routinely receive preclearance approval (see chapter 5 this volume). The Voting Rights Act may be a victim of its own success.

If the Voting Rights Act is not extended to address practical concerns, perhaps it will be extended for political reasons. In previous extensions of section 4, southern Democratic members of Congress were among the most vocal in criticizing covered jurisdiction status of their constituencies. A coalition of nonsouthern Democrats and Republicans, particularly in the Senate, turned back challenges to the integrity of the Voting Rights Act and successfully expanded coverage. The coalition formed and maintained its integrity for seventeen years, from 1965 to 1982. Today, many Republican leaders of Congress represent covered jurisdictions and the coalition no longer exists. If the Voting Rights Act is to be extended, a new coalition must form.

Some assume, as Clarence Page put it in a Baltimore Sun article on February 1, 2005, that majority support for continuing the Voting Rights Act will come again from Republicans who will “gladly renew” (“Clueless Like a Fox?” 11A) covered jurisdiction status because drawing majority-minority districts ironically furthers Republican interests during redistricting by forcing Democrats to inefficiently concentrate minorities into highly Democratic districts (Grofman and Handley 1998).
However, when the act was last renewed in 1982, special provisions requiring covered jurisdictions to draw majority-minority districts constrained Democratic state governments in the South, and thus forced these jurisdictions to draw suboptimal partisan gerrymanders. Republicans have made enormous inroads in the South and control many southern state governments. The Voting Rights Act now constrains Republican state governments in the South, and the pure political motivations behind an “as is” extension of the Voting Rights Act no longer clearly favor Republicans (Shotts 2001). If Republicans seek to renew covered jurisdiction status for purely strategic political reasons, they might adopt a new coverage formula that disproportionately covers Democratic states, perhaps importing the section 203 coverage formula in some manner to section 4.

Perhaps a coalition will arise to maintain covered jurisdiction status in some form. If so, the bailout mechanism will likely be addressed. Despite rosy projections that the 1982 mechanism would allow many jurisdictions to escape covered status in a relatively short time following reauthorization, only a handful successfully bailed out since the mechanism took effect in 1984. A ten-year compliance with section 5 of the Voting Rights Act is one component of the current bailout mechanism and the overwhelming majority of jurisdictions have been in compliance. It is unknown why more covered jurisdictions have not litigated for their release. The reason may lie either with a too difficult bailout mechanism—particularly the proactive steps a jurisdiction must take to improve minority participation—or a lack of information and resources among covered jurisdictions. If the latter were the reason, more jurisdictions could bail out if they were provided with aid in preparing their bailout litigation.

The special provisions of the Voting Rights Act that apply to covered jurisdictions were never intended by Congress to be permanent. Indeed, the coverage formula has a specific sunset date, which means the reversionary point is not a continued section 4, it is no section 4. At the very least, if section 4 is to continue a new sunset date must be agreed upon. Every previous extension of the Voting Rights Act has included debates and amendments as to which jurisdictions should be covered and how they can escape coverage. To extend section 4 of the Voting Rights Act similar debate and compromise must occur.

APPENDIX: STATUTES AND REGULATIONS LIST

42 USC sec. 1973b(a)1(A)-(F).
28 CFR sec. 55.24
28 CFR 57 FR 43213.
41 FR 783.
40 FR 49422.
41 FR 34329.
Voting Rights Act of 1965, PL 89-110, sec. 4(a), 4(d).
NOTES

1. The attorney general determined that the following states had such a device or test: Alabama, Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, South Carolina, Virginia, Washington, and Wyoming (see 30 Federal Register 9897 [FR]).

2. A listing of covered jurisdictions can be found in 30 FR 9897, 31 FR 19, 31 FR 3317, 31 FR 5081, 36 FR 5809, 39 FR 16912, 40 FR 43746, 40 FR 49422, 41 FR 34329, and 41 FR 784. Often, partial lists of covered jurisdictions were released as the Census Bureau collected and analyzed data.

3. The attorney general determined that the following jurisdictions not currently covered by the 1965 coverage formula had such a device or test: Alaska, Arizona (except Yuma), California, Connecticut, Delaware, Hawaii (except Honolulu), Idaho, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington, and Wyoming (see 35 FR 12354).

4. Using a denominator using citizen-voting age population was a step toward calculating turnout rates for those eligible to vote. There was a degree of practicality to the earlier use of voting-age population as a denominator since a citizenship question was not asked on the 1960 census.

5. See Timothy O’Rourke (1983, 774) and Paul Hancock and Lora Tredway (1985) for a complete list of section 4(a) bailout cases during this period.

6. Hyde’s bill would have required jurisdictions to demonstrate:
   • The jurisdiction had not used a “test or device” in the previous ten years with the effect or purpose of denying or abridging the right to vote on the account of race or color.
   • The jurisdiction had submitted all required section 5 election administration changes in the previous ten years.
   • No such submission had been objected to.
   • The jurisdiction has engaged in constructive efforts to encourage minority election participation.

7. The new bailout represented a higher hurdle for jurisdictions covered under the 1975 language minority provisions to overcome, as they would have become eligible for bailout in 1985 or ten years since the last legal administration of English-only elections. This assumes that Congress would not have simply extended the language minority portion of the test or device coverage formula, as it had done with the original 1965 definition of test or device.

8. Dole’s compromise also included a review of the bailout mechanism in fifteen years, or in 1997 (see section 4(a)(7), Voting Rights Act Amendments of 1982, PL 97-205). In 1996, HR 351 was reported out of committee that would have struck the bilingual components from section 4 and 203. The bill was never voted on the floor of the House.

9. El Paso County, Colorado, initiated bailout litigation in El Paso County v United States, No. 77-0815, and withdrew its litigation when the Attorney General opposed the bailout application. The County resubmitted bailout litigation in Board of County
Commissioners v United States, No. 84-1626 and was granted bailout after the Department of Justice determined that the English-only elections had not been held with the purpose or effect of discriminating against a language minority group (Hancock and Tredway 1985, 414–15).

10. Alaska had successfully bailed out under the old mechanism in 1972 and had been covered anew under the 1975 language minority amendments to the coverage formula. The state would have needed to demonstrate the conduct of English-only elections was nondiscriminatory to bail out a second time under the old bailout mechanism.

11. The Virginia counties of Frederick, Greene, Roanoke, Rockingham, Shenandoah, and Warren Counties and the independent cities of Fairfax, Harrisonburg, and Winchester have successfully bailed out since 1982.

12. As of this writing, no government survey has been conducted of the use of English-only election materials in the 2004 election.

13. Although the section 203 coverage formula was not amended in 1982, a change in methodology by the Bureau of the Census defining members of a single language minority reduced the number of covered jurisdictions by fifty-six percent (Guerra 1998, 1423). Section 203(c) was last calculated for the 1990 census (see 28 CFR sec. 55.24, 57 FR 43213).

14. The 2004 turnout estimates are author compilations.


16. Although I calculate participation rates for counties, township statistics can be constructed for Connecticut, Massachusetts, Maine, Michigan, and New Hampshire. (There are twelve townships within Michigan and New Hampshire that are currently covered by section 4.) Due to Alaska’s method of reporting election information for state legislative districts, I analyze only the state as a whole.

17. The voting age population estimates are calculated by extrapolating the July 1, 2003, population estimates forward to November 1, 2004. The citizen-voting age population estimates are calculated by applying the April 1, 2000, census percentage of citizens among the voting age population to the 2004 projected population estimate. Turnout rates might be constructed to exclude other groups ineligible to vote, such as felons and mentally incompetent persons, and include persons living overseas (McDonald and Popkin 2001; McDonald 2002). However, these methods that remove ineligible voters—other than non-citizens—do so using state level statistics. There is no reliable method of apportioning ineligible persons to jurisdictions within states, such as counties and townships, but it is noteworthy that local jurisdictions have established such statistics to the satisfaction of a court that enabled them to escape coverage.

18. It is possible that a small number of townships and election districts in Alaska would also be covered, though this is perhaps unlikely given the high participation rates in Alaska.

19. Objections are listed on the Department of Justice website (http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm).
20. These objections predominantly concern redistricting plans, and given the conflicting rulings from the Supreme Court on redistricting in the past decade, it is perhaps understandable why some jurisdictions have had trouble preclearing their plans.

CASES CITED

Board of County Commissioners v United States, No. 84-1626 (D.C.C. July 30, 1984).
City of Rome v. United States, 446 U.S. 156 (1980).

REFERENCES

The Future of the Voting Rights Act


Section 5 of the Voting Rights Act (VRA), one of the most powerful weapons in the civil rights arsenal, is scheduled to sunset in 2007. Congress has begun to debate the fate of what may be the most creative and burdensome strategy for protecting racial minorities ever enacted, with supporters and opponents of the act gearing up for a fight.

Even experts on the act are deeply divided as to whether Congress should renew section 5. After a long period of relative unanimity, the academics who study the act and the lawyers who enforce it are at an impasse, and they are split for reasons that have little to do with whose ox is gored. What divides them is a single question: do racial and ethnic minorities finally wield enough power in the political process to protect themselves? Supporters of renewal say our politics is still infected with racism and insist that we keep the VRA in its current form. Critics of the act argue we have reached the world of “normal politics,” where black and Latino legislators can hold their own in the bargaining process. They thus decry the command-and-control approach that has been used for decades to regulate racial politics and even speculate that Congress should simply let the relevant sections of the act expire.

Rather than trying to resolve this intractable debate, Congress should adopt a regulatory strategy that can work in the territory between these two extremes. Our choice is not, as everyone seems to think, between maintaining the act’s decades-old regulatory structure or seeking a full-scale withdrawal. There is a more dynamic approach, a middle ground that avoids the problems identified by the act’s critics while maintaining a robust safety net for minority voters. There is, in short, a third way for the VRA.

This essay sets out to describe what a third-way approach would look like. Drawing upon a range of administrative law and constitutional scholarship, it proposes an opt-in approach that would privilege local control and community involvement in voting rights enforcement. An opt-in approach would provide the right types of incentive for those involved in policing racial politics and deploy civil rights enforcement resources more effectively than the current system. An opt-in strategy might even help address some of the constitutional concerns associated with section 5 renewal.
More intriguing, an opt-in approach would create a new set of institutional incentives for political elites—who all but unilaterally control how elections are run—to pay attention to the needs and concerns of those most affected by their decisions. An opt-in approach thus holds the potential, admittedly an elusive one, to transform our politics, as it offers a concrete strategy for tying the fate of political elites to average citizens and integrating debates about electoral structures into everyday politics. By reducing top-down regulation of election law, it may generate bottom-up support for voting rights enforcement.

THE QUESTION: CAN RACIAL MINORITIES NOW PROTECT THEMSELVES?

Section 5 of the Voting Rights Act is one of the most creative and burdensome laws protecting racial minorities. It requires select localities (covered jurisdictions)—mostly states in the Deep South—to ask the federal government’s permission before making any change, no matter how small, in the way they run elections (42 U.S.C. sec. 1973c). This preclearance requirement has achieved spectacular results. It solved the central problem in voting rights enforcement during the civil rights era: keeping up with the increasingly creative strategies recalcitrant state and local governments used to disenfranchise black voters. Before passage of the VRA, discrimination by states and localities was difficult to police. The moment a court deemed one exclusionary practice illegal, local officials would switch to another. Literacy tests, poll taxes, citizenship tests, at-large districting schemes—all were used seriatim to prevent blacks from voting. The preclearance requirement shifted the burden of inertia, allowing the Department of Justice to get one step ahead of local officials by forbidding them to make any changes without its approval.

Despite its successes, section 5 remains extremely controversial. Covered jurisdictions must preclear thousands upon thousands of changes with the Department of Justice every year. Many resent the fact that, some forty years after the VRA was passed, most southern states remain under the watchful eye of the Department of Justice even though the bulk of the flare-ups in recent elections have occurred in jurisdictions that are not covered by section 5, such as Ohio and the densely populated areas of Florida.

Section 5 also has an odd political valence. Some parts of the Democratic Party, traditionally the party most supportive of civil rights, fear that section 5 has led to the creation of too many so-called majority-minority districts—those where racial minorities can constitute a majority on election day. Given that African Americans and certain Hispanics vote heavily Democratic, these Democrats have long worried that majority-minority districts pack Democratic voters and let Republicans win more seats than they should. Some even blame the Democrats’ loss of the House on the aggressive creation of majority-minority districts during the 1990s, a trend spurred in part by section 5. Republicans, meanwhile, often oppose race-based government decisionmaking. But they may have benefited from the use of race in redistricting that section 5 demands, and the Department of Justice under
the first President Bush was widely known for its aggressive enforcement of section 5’s districting mandates.

It is not hard to see why partisans on both sides of the issue might not agree on whether and how to extend section 5’s life span. What’s more interesting is that the long-standing consensus among those most knowledgeable about the act—the lawyers who enforce it and the academics who study it—seems to have broken down.

The question that divides the experts is this: given the impressive gains racial minorities have made during the last forty years, do they now wield enough power in the political process to protect themselves? To understand why the views of the experts differ, consider a concrete example: Georgia’s redistricting process after the 2000 census. In 2001, a coalition of white and black Democrats passed a redistricting plan through the state legislature that reduced the number of districts where the population was more than 60 percent minority to increase the chances that Democrats would retain control of the state legislature (Georgia v. Ashcroft, 539 U.S. 461, 469–70). The political calculus behind that judgment was simple. Spreading out black voters increased the likelihood that the party of choice for most African Americans—the Democratic Party—would retain legislative control. Concentrating black voters in majority-minority districts was, in the view of supporters of the plan, simply a recipe for ensuring that candidates representing minority communities would lose legislative control, committee chairs, and the many others benefits associated with being part of the majority party (483–84).

Although the plan was supported by virtually all of the black state legislators as well as civil rights icon John Lewis (Georgia v. Ashcroft, 539 U.S. 489–90), the DOJ opposed the plan for the Georgia Senate and the district court from whom Georgia sought preclearance and rejected it on the ground that it unduly reduced black voting strength (Georgia v. Ashcroft, 195 F.Supp.2d 25). The lower court’s ruling was unsurprising. Until then, the Supreme Court and lower courts had almost universally favored majority-minority districts as the preferred solution to the problem of racially polarized voting.

The case eventually worked its way to the Supreme Court, which rejected the DOJ’s position, vacated the lower court’s decision, and remanded for a preclearance assessment under the new standard articulated by the Court. In doing so, the Court deferred to the judgment of state legislators that blacks were better served by a plan that increased Democratic strength even though it reduced the number of districts where they could control electoral outcomes.

Some experts argue that the Court got it right in Georgia (Issacharoff 2004; Pildes 2004). Why, they ask, should a court or the Department of Justice impose a particular vision of equality on minority voters in a case like Ashcroft, where black legislators not only favored the challenged plan but had enough votes to block it had they chosen to do so? In a world of intense partisan competition, where black and Latino legislators play important roles in the deal-making process (Issacharoff and Karlan 2003), academics like Richard Pildes and Sam Issacharoff ask whether we ought to allow any institution—let alone a potentially partisan one (Issacharoff 2004)—second-guess the judgments of duly elected legislators representing minority
THE SOLUTION: OPTING-IN TO THE VOTING RIGHTS ACT

The solution to this dilemma is not to try to resolve this intractable disagreement, but to develop a regulatory strategy flexible enough to work in the territory between the two extremes depicted by the act’s supporters and critics. We need, in short, a “third way” for approaching voting rights enforcement, one that can be adapted to what most would acknowledge is a changing regulatory environment.

An opt-in strategy provides such a middle-ground approach. Were the Voting Rights Act administered as an opt-in system, it would create space for community and legislative leaders to negotiate the best deal possible for racial minorities but place a bargaining chip in their pockets—a chance to demand that the act’s traditional constraints apply should bargaining break down. Political deals struck by racial minorities would be enforced, but the VRA would hang like the sword of Damocles over every negotiation.
This is concededly not “normal politics,” for a strong version of the opt-in approach would excuse racial minorities from the obligation to “pull, haul, and trade” (Johnson v. DeGrandy, 512 U.S. 997, 1020). But it should alleviate the fears of VRA critics by reducing the risk that a deal favored by racial minorities could be upset by a court or the DOJ applying a rigid understanding of the VRA’s requirements. At the same time, it would also avoid the dangers associated with a full-scale regulatory retreat by providing a safety net for racial minorities who find themselves negotiating in a hostile political environment.

Put differently, the renewal debate presents a difficult question: how should we allocate the risks associated with making the wrong empirical judgment about the current state of racial politics in this country? Those who think section 5 should lapse place the risk of mistake squarely with minority voters. If we are not yet nearing the realm of normal politics, minority voters may lose the many gains that the last two decades of voting rights enforcement have brought them. Those who believe that section 5 should be renewed in its current form, in contrast, insist that the risks of mistake must be shouldered by the states, perhaps subjecting the covered jurisdictions, and sometimes minority voters themselves, to needless and costly interference by the courts and the DOJ. An opt-in approach, by contrast, would require states and minority voters to share the risk of mistake, placing a formal obligation on racial minorities to participate in the enforcement process while still guaranteeing them the basic safety net section 5 currently provides. In the process, it would generate a new set of benefits for minority voters and perhaps the public at large.

What would an opt-in approach look like in practice? It should create space for community representatives, public interest groups, and other parts of civil society to strike a deal but preserve a chance for them to opt-in to VRA coverage under the appropriate circumstances. Rather than have the DOJ review every possible change made within covered jurisdictions, the goal would be to create a set of institutional incentives and decisionmaking proxies that induce cooperation between localities and community leaders and focus enforcement resources on bad actors.

The opt-in approach would thus start with a sunshine provision. Rather than preclearing the thousands of electoral changes localities make each year with the Department of Justice, covered jurisdictions would merely provide notice of the changes in a form easily accessible to the public sixty or ninety days in advance of making the change. Civil rights groups would then have a chance to negotiate with local officials over any change they found objectionable.

The incentives for compliance would stem from the threat of the opt-in. If the bargaining process is fair, a court or the DOJ would let the decision stand. That means that even a change that the DOJ or a court might have found to be retrogressive or dilutive under the current regime will stand if it emerged from a fair bargaining process or was properly “blessed” by representatives of the minority community. The key difference from the current regime is thus that the fate of any challenge would turn primarily on the fairness of the process that produced the change, not on its substantive merits.
If negotiations break down, however, the sword of Damocles falls. Civil rights groups would have the right to “opt in” to VRA enforcement by filing a formal civil rights complaint (perhaps one signed by a certain number of community group members to avoid the problem of the solitary crank). Such a complaint would be significantly less burdensome to file than a traditional voting rights lawsuit (a simple one-page sheet identifying the proposed change that is the subject of the complaint ought to suffice). After all, the point here is merely to trigger the DOJ’s investigation process, and it would unduly tax these groups’ resources if filing took a good deal more effort than conducting a phone call with the DOJ. Further, just as covered jurisdictions have the burden of proof in seeking preclearance (City of Pleasant Grove v. United States, 479 U.S. 462), so too they would retain the burden of proof in showing that the change challenged by a voting rights complaint was nondiscriminatory.

Opting in would bring into play the full range of remedies currently available under the statute. For instance, if a districting process excluded racial minorities, the default remedy might look like the types of remedies imposed prior to Ashcroft under section 2, which typically requires a number of majority-minority districts that is roughly proportional to the group’s share of the population, or under section 5, which typically requires a plan that DOJ would deem nonretrogressive. Similarly, as under the current system, the DOJ could refuse to allow any change in polling place location or registration practice that the jurisdiction failed to prove was nondiscriminatory.

In the long run, incentives for compliance increase. Localities known for running fair complaint-resolution processes would receive more deference from the DOJ if it is ever asked to intercede. And we would expect the DOJ to ramp up its scrutiny of any locality consistently found to violate the requirements of the act.

Finally, those representing minority voters should have a chance to police the policer by challenging the DOJ’s decisions to preclear a change in court. Under the current regime, preclearance grants cannot be appealed (Morris v. Gressette, 432 U.S. 491). Given that in recent years the Department of Justice has become increasingly politicized as it deals with difficult questions at the intersection of race and politics, it is time to take another lesson from the administrative law playbook and treat DOJ decisions as one would the decisions of any other federal agency by allowing third parties to challenge them in court.

Would an Opt-in Approach Work?

The most obvious question is whether an opt-in approach would work. Although later I explore why it would not only work, but work better than the options currently on the table, it is worth noting that similar efforts at what Ian Ayres and John Braithwaite (1992) have termed “responsive regulation”7 have succeeded in areas such as environmental law, welfare regulation, employment law, and consumer safety (for analyses of these areas, see Lobel 2004; Freeman 1997, 2000; but for a more skeptical view, see Seidenfeld 2000). Although the details of this
approach vary dramatically with context, responsive regulation involves a flexible regulatory strategy that responds to “how effectively industry is making private regulation work” and partially “delegate[s] government regulation of the marketplace to public interest groups, to unregulated competitors of the regulated firms, and even to the regulated firms themselves” (Ayres and Braithwaite 1992, 4). These real-world successes in such varied regulatory environments at least create the possibility that a new approach to voting rights enforcement—one modeled on an administrative law model rather than a traditional civil rights paradigm (Gerken 2006)—could succeed.

There are at least three key aspects of the responsive regulation paradigm that are relevant to this project. The first is sunshine (Ayres and Braithwaite 1992; Lobel 2004). If we move from top-down regulation to a process open to public participation, it is essential that all the parties involved have access to the information necessary to help make sensible regulatory choices and to compare the performance of covered jurisdictions across states.

The second salient thread has to do with regulatory escalation: using a mix of carrots and sticks to tailor the level of government intervention to whether the regulated party functions as a good actor or bad actor within the system, and, of course, to create incentives for more good actors to emerge (Ayres and Braithwaite 1992). Responsive regulation thus targets limited enforcement resources to police the worst offenders while encouraging other regulated actors to govern themselves in a manner consistent with the agency’s goals (1992).

The third relevant component is tripartism. (Ayres and Braithwaite 1992). Rather than using government resources alone to police the system, a tripartite approach relies on third parties—citizen groups, public interest watchdogs, whistle blowers—to assist in the regulatory process. It thus rests on the hope that collaborative negotiation may produce better regulatory outcomes than top-down regulation. Tripartism allows public interest groups to take part in regulation by granting them “access to all the information that is available to the regulator . . . a seat at the negotiating table . . . [and] the same standing to sue or prosecute under the regulatory statute as the regulator” (55–56). Such a strategy allows public interest groups not only to monitor the regulated entities, but to monitor the regulating agency itself.

Although the opt-in approach pulls several threads from the fabric of the responsive regulation paradigm, it does not fully reproduce that complex model, but instead cobbles together a variety of regulatory strategies that seem best suited to work in the voting rights context. Opt-in thus involves the costs and benefits associated with hybridization. There is, of course, a danger that the success of other models cannot be reproduced in the election law context without a good deal more mimicry than proposed here.

The strength of the opt-in proposal, however, may also be its modesty. It is a change in degree, but not in kind, for voting rights enforcement. It does not purport to turn the world of election law regulation upside down but instead adapts a variety of strategies used elsewhere to the unique regulatory environment of election law. In doing so, it brings to the fore existing, if underappreciated,
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regulatory practices in the election law arena—the Department of Justice’s reliance on minority groups in administering section 5 and the use of the “totality of the circumstances” test by the DOJ and the courts. It also plays up the procedural underpinnings of the Supreme Court’s most recent construction of section 5 in Georgia v. Ashcroft (539 U.S. 461). Opt-in thus offers an approach that fits easily within the existing regulatory paradigm and would not require extensive changes to section 5 to function effectively.9

For an opt-in approach to succeed in this context, it must also work politically—and it should. First, an opt-in strategy ought to appeal to a wide range of political camps, including those parties and interest groups most likely to play a key role in the renewal debates. Second, this is an odd moment in voting rights enforcement, in part due to the changing composition of the Court and in part due to the Court’s own waffling on issues that are at the core of voting rights enforcement.10 The looming uncertainty of future Supreme Court rulings casts a long shadow. The parties and interest groups involved in the renewal process are now working behind a veil of ignorance—it is hard to make the predictions that matter most to the renewal calculus. What constraints will the act impose on districting? How will the Court view the constitutionality of a renewed section 5? There is, as a result, room for political compromise, and a third-way approach allows each group to hedge its bets.

Consider how members of the party that will control the renewal process—the GOP—are likely thinking about renewal. At least one camp of the Republican party ought to find much to praise in the opt-in approach. It takes a deregulatory approach to voting rights enforcement, focuses on bad actors rather than forcing all covered jurisdictions to preclear every change they make, and reduces the level of enforcement if race ceases to infect the political process. What about the Republicans who have engaged in a much crasser calculus—those who favor renewal simply because they want to continue to pressure states to create majority-minority districts? Those Republicans will be playing some fairly steep odds, as Georgia v. Ashcroft strongly suggests that if members of Congress cannot provide more flexibility in the districting arena, the Court will do it for them. The benefit of an opt-in approach? It gives Republicans a chance to persuade minority voters that majority-minority districts best serve their needs—and of having such a deal stick without being second-guessed by the courts or the DOJ.

Democrats similarly should find an opt-in approach to provide a reasonable compromise. Those Democrats who—along with many civil rights groups—worry about preserving this important tool in the civil rights arsenal ought to appreciate the benefits offered by an opt-in approach. To be sure, opt-in abandons the command-and-control approach that has long been the hallmark of voting rights enforcement. But, in its place, opt-in offers a robust safety net for minority voters, one that ought to give civil rights groups and minority communities a greater voice in the districting process than they presently enjoy. A more targeted and dynamic regulatory strategy may also be a safer route for VRA supporters because, for the reasons outlined below, it is more likely to survive constitutional scrutiny than an effort to renew section 5 in its current form. As to Democrats solely worried about
their own political fates, opt-in gives them—as it gives Republicans—a chance to persuade minority voters that majority-minority districts are no longer a sensible strategy and to have the deal stick if they succeed in doing so. It gives them, in short, room to bargain with minority members of their own party over their shared political future.

Why Is Opt-in a Better Solution?

Even if an opt-in approach would work, the question is whether it would do a better job than the options currently on the table: maintaining the current regulatory structure, perhaps with some minor tweaks, or allowing section 5 to expire. I argue that there are at least four reasons to prefer the opt-in approach: it privileges local knowledge and community participation in protecting the right to vote; it offers the right set of incentives for everyone involved and thus deploys enforcement resources more effectively; it shifts the focus of the VRA from substance to process, perhaps opening up the political arena to a new array of voices and ideas; and it may relieve some of the constitutional concerns looming over the renewal process.

COMMUNITY INPUT ON ENFORCEMENT  The first reason to value an opt-in approach is that local public interest and civil rights group, not a distant bureaucrat in Washington, would decide which changes are worth investigating. Covered jurisdictions—those states and localities whose voting practices were deemed particularly egregious by Congress—must preclear every change they make to their voting system (42 U.S.C. 1973b(b) and 1973c). Small decisions (such as changing a polling place) and big ones (such as a decennial redistricting plan) must be approved by the Department of Justice or a court before they can be put into place. The DOJ therefore sorts through thousands of preclearance requests each year to figure out what changes violate section 5.

Under an opt-in approach, in contrast, localities would simply disclose what changes they planned to make in a publicly accessible format available to any public interest groups willing to take part in the enforcement process. Informal negotiations between community leaders and the locality would replace a DOJ investigation as the first step in the process.

Much could be done to ensure that the public disclosure mandate serves the same efficacious role as the preclearance requirement and that public interest groups function as effective private regulators. Not only would covered jurisdictions be required to publicize changes in advance of making them (in enough detail for monitoring purposes), but the information would be provided in a form that allows such organizations to compare data across jurisdictions so that potentially discriminatory patterns or outlier practices can be reasonably identified. We would also look to the DOJ to disseminate information about how it now identifies changes that are likely to be discriminatory. The DOJ has generated various sorting mechanisms for identifying practices likely to be the most troubling, and it would be helpful to provide information about such proxies to on-the-ground
civil rights groups. Indeed, the DOJ might even sponsor training sessions on a state-by-state basis to aid civil rights groups in monitoring localities and provide a clearing house for those groups to share information on their failures and successes going forward.14

One might worry that civil rights groups lack the resources to play such an important role in enforcing the right to vote. But they are already doing the type of legwork needed for an opt-in approach to work (see chapter 3, this volume).15 The Department of Justice receives so many preclearance requests that it cannot possibly evaluate all of them without help. Its “investigation” thus usually involves an informal call by a DOJ staffer to a civil rights group or an elected minority official to see if there is a problem,16 effectively allowing community leaders to opt in to a more rigorous variant of section 5 enforcement. According to DOJ staffers, “standard contacts” in a community would include local minority officials and the local chapters of the NAACP or LULAC.17 When calls are made to such individuals, “most know exactly what the score is,” as “they are used to hearing from the DOJ.”18

Far from burdening civil rights groups, the sunshine provisions of this proposal might even ease the burden already shouldered by these groups by providing them a readily accessible means for identifying violations and pooling information. It would also provide a more transparent process for public interest groups and minority officials taking part in enforcement, one that makes public the role that community leaders now play privately in the enforcement process.

The primary difference between the current system and an opt-in approach? Under the current approach, the DOJ must initiate the investigation. It makes the preliminary cut as to what matters and what does not, and it makes the first call to civil rights groups or local officials in order to begin the fact-gathering process. Under an opt-in approach, members of the relevant community decide for themselves what is worth investigating and what is not. The fact-gathering legwork—the crucial and most burdensome step in the process—remains in both instances with members of the local community. In essence, the phone calls travel in the opposite direction—from the community to Washington rather than vice versa—and the work necessary to file a complaint should take little more time than a conversation with a DOJ official.19

Asking civil rights groups to sort the wheat from the chaff would privilege local knowledge and encourage community involvement in civil rights enforcement. To the extent that resources are being prioritized, that decision takes place at the local level. Furthermore, local leaders, especially those who have benefited from the training and assistance of DOJ, ought to be better at making the “intensely local appraisals” of what constitutes discrimination (City of Mobile v. Bolden, 446 U.S. 55, 94) than an administrative agency in Washington. Not only do such groups possess the type of on-the-ground knowledge about local motives and electoral consequences that DOJ officials cannot possibly hope to possess, but they have a better sense of what matters to blacks and Latinos in their community.

Further, asking community leaders to take part in the enforcement process may give members of these communities a greater sense of efficacy and ownership over
the enforcement process (Freeman 1997). After all, one of the primary criticisms
directed at traditional administrative models is that “the agency alone is responsi-
ble for protecting the public interest” (15). At least as a formal matter, the current
regulatory scheme treats racial minorities as passive wards of the Department of
Justice. That formal allocation is, of course, belied by the active role that commu-
nity group members already play behind the scenes in helping DOJ. But under an
opt-in approach, the statutory scheme would formally acknowledge the important
work civil rights groups and private citizens already carry out informally. It would
also give them genuine decision-making authority over how to prioritize law
enforcement resources, a power these groups do not currently possess.

An iterative process involving decision makers at different levels of government
also seems likely to generate a better solution to the regulatory problem in ques-
tion. On-the-ground solutions negotiated by local stakeholders seem more likely
to generate creative alternatives than top-down regulation. To be sure, DOJ officials
engage in some informal negotiation with localities when a proposed change
seems problematic. In the end, however, DOJ officials are confined to a “yes” or
“no” decision on preclearance. Local community leaders, in contrast, have more
room to maneuver. They know what matters to the community, where they can
give a little, and what other possibilities lie open at the local level.

In addition, an opt-in approach gives civil rights groups two bites at the apple:
one chance to change the minds of local officials and another to persuade the DOJ
to take their side. No longer confined to informal lobbying with the DOJ or a costly
lawsuit under section 2 of the Voting Rights Act, civil rights groups would have a
process-based mechanism (negotiations with local officials) and a shaming mech-
anism (the filing of a formal complaint, which draws attention to the locality’s
recalcitrance) to add to their arsenals.

Finally, civil rights groups retain the tools necessary to regulate, or at least
bypass, the regulator. Under both the current regime and the opt-in approach, pri-
vate citizens can file a lawsuit under section 2 of the Voting Rights Act if the
Department of Justice fails to intervene when it ought to do so. They should also
be given a chance to police the policer by filing suit in federal court to challenge
DOJ decisions to preclear a change.

**APPROPRIATE INCENTIVES** A second reason to favor an opt-in approach is
that it provides the right kind of incentives for those involved in monitoring ele-
tions. Localities, of course, have every reason to work with civil rights groups to
avoid the initiation of formal proceedings against them. If civil rights group can
provide an alternative, nondiscriminatory option that satisfies a locality’s con-
cerns, local officials acting in good faith have every reason to settle the dispute.
Even those localities unsympathetic to minority concerns have some incentive to
comply, precisely because a civil rights complaint accusing the locality of malfe-
sance has a different normative significance than the run-of-the-mill preclearance
request that every covered jurisdiction files for every change it makes.

Moreover, local officials’ conduct would factor in to any subsequent review of
the proposed change. After all, were a locality to act in bad faith by engaging in pro
forma review or consistently ignoring sensible alternatives proposed by civil rights groups, that fact would presumably raise eyebrows within DOJ should an opt-in occur. In such instances, we would expect the DOJ to “escalate” its enforcement strategy, either by invoking formal VRA remedies without extensive investigation or by putting in place a more intensive monitoring system.26

Concomitantly, localities known for running fair complaint-resolution processes would likely receive more deference from the DOJ when it investigates a complaint. Indeed, one could even imagine the DOJ creating something akin to the safe harbor the Supreme Court has offered to employers with sound sexual harassment policies (Burlington Industries v. Ellerth, 524 U.S. 742; Faragher v. Boca Raton, 425 U.S. 775). This type of deference would create an incentive for local officials to set up sensible review procedures and work with community groups in setting election policies. It would serve as the rough, procedural equivalent to the act’s existing bailout provision (42 U.S.C. sec. 1973b(a)).

In the long run, this sort of iterated strategy may even create incentives for cooperation between localities and public interest groups. It may thus help shift the relationship between the two parties from a purely adversarial structure—with each group seeking a win from the courts or the Department of Justice—to a relationship that places greater emphasis on what Jody Freeman terms “problem-solving” (1997, 22).27

Civil rights groups and concerned citizens will also be guided by the right incentives under an opt-in approach. One might worry that such groups would challenge every change localities propose, thus needlessly duplicating the pre-clearance process at the local level while failing to conserve DOJ resources.28 One might also worry that civil rights groups will take unreasonable positions—that is, one might believe that it does not make sense to force local governments to negotiate with “self-appointed zealots.”29

Both concerns are misplaced. To begin, civil rights groups will want to present local officials and the DOJ with needles, not haystacks. After all, the group’s ability to effect change depends on a productive relationship with both. Flooding localities or the DOJ with weak claims means that the group’s complaints are likely to be ignored in the future. Similarly, if a group offers a cogent argument for every complaint it files, local officials and DOJ are likely to pay more attention to its concerns going forward.

As to the problem of overzealous advocacy, a locality need only strike bargains with reasonable partners. After all, the DOJ is as capable of ignoring the claims of recalcitrant interest groups as it is of scrutinizing the proposals of recalcitrant local governments.30

An opt-in approach also lets DOJ properly deploy its enforcement resources because it is flexible enough to adapt to the two main categories of problems covered by section 5: run-of-the mill pre-clearance requests and highly contested pre-clearance issues. Section 5 applies to all voting changes, from the arcane to the central, from the unimportant to the deeply contested. DOJ’s workload falls roughly into two categories. First are the run-of-the-mill pre-clearance issues, such as changes in the location of polling places, minor alterations to voting rules, and
the like. Second are election law decisions that are almost always hotly contested, with annexation and redistricting topping the list.\textsuperscript{31}

The problem for designing a sensible policing strategy is that the two categories offer different types of regulatory dilemmas. Routine preclearance changes are less likely to have a profound impact on minority voters, but their reduced salience means that it is easier for covered jurisdictions to sneak discriminatory changes past regulators. The challenge here is figuring out how to design a coverage mechanism that ensures that the right subset of changes comes to the attention of the Department of Justice.

Highly contested issues, by contrast, generate the opposite problem. Such issues almost always generate controversy, and someone will always want to request judicial or DOJ scrutiny.\textsuperscript{32} The problem here is not making sure that someone tries to opt in, but deciding when to let those that do so get the benefit of traditional VRA remedies. Hotly contested issues thus move us quickly into the area where the concerns of the act’s critics are most salient. When should the relevant decision maker second-guess the results of the bargaining process and when should it defer to the choices made by the minority representatives involved?

An opt-in approach works in both domains. For run-of-the-mill requests, an opt-in approach ensures that DOJ looks at the right set of changes. Rather than investigate thousands of requests, it can focus on problems that are both serious enough to concern community leaders and divisive enough to prevent local negotiations from working. Opt-in, in short, lets DOJ focus on needles rather than haystacks.\textsuperscript{33}

For highly contested issues, where someone will always want to invoke traditional VRA remedies, an opt-in approach is also effective in its role as the sword of Damocles. Because the DOJ’s job is not to second-guess the political deal struck but to decide whether the bargaining took place under fair conditions, an opt-in approach tells DOJ when to act and when to stay its hand. Under this approach, DOJ will not prevent racial minorities from judging what is in their own best interest or striking the same kind of bargains regularly reached by other minority groups (Pildes 2005).\textsuperscript{34} But if racial minorities are unable to bargain under fair terms—the moment when DOJ involvement is most needed—the opt-in approach allows DOJ to step in.

**SHIFTING FROM SUBSTANCE TO PROCESS** Third, there is much to be said for waging election law wars on the turf of process rather than substance. Under an opt-in approach, the job of the DOJ and the courts is to assess the bargaining conditions. The focus, then, is not on substantive outcomes, but process inputs. There are a number of reasons to think that process inquiries will better serve racial minorities—and our democracy—in the long run.

Process-based judgments will generate proxies useful to racial minorities. Although figuring out what makes for a fair districting process is obviously a difficult endeavor, it is also how and where we can see intriguing opportunities for ensuring that new voices—community groups, advocates for racial minorities, even citizens—are heard during the districting process. That is because the only
realistic way for courts or the DOJ to assess what processes are fair is to develop a set of heuristics for gauging whether the interests of racial minorities were fairly considered. Those proxies are likely to create a better set of incentives for political elites to engage with the communities most affected by their decisions than the current system supplies.

Take redistricting as an example. Whether courts are reviewing a process or a result—whether they are adjudicating the fairness of a districting process or the plan itself—they must develop a set of proxies for gauging what is fair. We have already seen what such proxies look like when courts police districting outcomes—the almost routine imposition of majority-minority districts upon localities, precisely the type of command-and-control regulation that the act’s critics have decried.

Were courts to develop a set of proxies in the process arena, political elites will finally have a reason to engage with the communities affected by the decisions they make. Why? Just think about how any decisionmaker would figure out whether a process was “fair.” Most would come up with a proxy that has already been deployed by the Supreme Court and the DOJ: the support of legislators who represent racial minorities. In Ashcroft, for instance, it obviously mattered a great deal to the Court that there was relative unanimity among African American representatives about the wisdom of the plan (539 U.S., 471). Similarly, post-Ashcroft, the Department of Justice declined to preclear a plan on the basis of “lack of support for the proposed change from minority-preferred elected officials” (Objection Letter 2004), and it has always relied on local minority officials for help in identifying changes worthy of an objection.

The consistent use of such a proxy might even encourage the development of cross-racial coalitions and buttress the negotiating power of minority officials. After all, legislators would be aware that the fate of a districting plan depended on engaging with legislators from minority communities and thus have a significant incentive to tailor their plans to the needs of that community. There is even some anecdotal evidence pointing to this possibility. Consider what occurred during the post-2000 redistricting cycle in New Jersey and Georgia. One story, of course, is that African Americans and Latinos had gained so much power before 2000 that they were able to play a major role in the districting process (Issacharoff 2004). One might tell a different—and, I think, more plausible—story about both states, one that involves a variant of the opt-in strategy I am describing. On this view, lawyers advising the Democrats were surely concerned that the Republicans would challenge the plan in court, and the Court’s prior jurisprudence endorsing majority-minority districts would prevent them from switching to a coalition-district strategy. Those lawyers might well have concluded that the best way to avoid such an outcome—the best way, in effect, to opt out of the VRA’s pre-2000 districting formula—would be to win the support of as many minority legislators as possible. Thus the political power minority legislators wielded by virtue of their votes was presumably buttressed by the incentives that threat of Voting Rights Act litigation created. The apparent result? Impressive evidence of coalitions among whites, blacks, and Latinos in both districting processes (Hirsch
2002). The opt-in strategy I am describing, then, would simply make explicit the incentives that, in my view, probably existed during the last districting cycle for those lawyers who wanted to pursue the coalition-district strategy.36

Representatives of minority communities, however, will not always be the best proxies for fairness in the long run (Karlan 2004). For instance, there will be instances where minority legislators negotiate from a position of weakness and support a plan merely because they had no choice. In such case, we might see that the costs of maintaining legislative control are not distributed evenly—for instance, a plan where districts that elected white Democrats were preserved and the only incumbents threatened were those elected in majority-minority districts.37

There will also be districting processes where we have reason to doubt the motives of the minority representatives themselves—for instance, when they support a plan that guarantees safe seats for all incumbents even though they might have drawn districts that increased the power of minority voters. Even the minority legislators in Ashcroft might have been suspect. Admittedly, self-interested legislators usually favor safe districts, and the legislators in Ashcroft chose more competitive districts for themselves (Pildes 2004). But they might have done so for self-interested reasons: it is usually better to be part of the majority party than the minority coalition, and the lure of committee chairs and legislative control might have led those legislators to make a different choice than their constituents would have preferred.

If we worry that legislators who represent racial minorities—like all legislators—are self-interested, courts might also take a chapter from the corporations’ rule book. In corporate law, when directors engage in a self-interested transaction, courts grant that transaction extremely deferential review if it is approved by a majority of disinterested shareholders (In re Wheelabratory Technologies, Inc. Shareholder Litigation, 663 A.2d 1194). Discerning who is “disinterested” in any political negotiation is, of course, a difficult task. But the Ashcroft majority certainly made such a judgment about civil rights icon John Lewis, explicitly deferring to his testimony in part because he “is not a member of the State Senate and thus has less at stake personally in the outcome of this litigation” (Georgia v. Ashcroft, 123 S.Ct., 2516).

One could imagine courts taking a more systematic approach for identifying disinterested parties and speculate as to the positive effect such an approach might have on redistricting. For example, courts might rely on the views of community leaders, civil rights groups, or good governance watchdogs, all of whom lack a direct stake in the outcome.38 Were courts and DOJ to use the “blessings” of such groups as a proxy for gauging a plan’s fairness, it would introduce a new set of voices into the districting process and create more channels for articulating the views of the affected community. Political elites would have every incentive to obtain these groups’ approval, thus giving civil rights groups a new and potentially more powerful role in regulating the electoral process.

Proxies need not be confined to community groups, of course. For instance, courts and the DOJ might measure a districting process against an idealized, “best practices” measure. They might grant safe harbors, for instance, to nonpartisan
districting commissions (Issacharoff 2002), citizen assemblies, or processes that featured significant community involvement and support.

Further, if the point of deploying a proxy is to discern who best represents the views of the citizens affected by the districting plan, political elites would have real incentives to show that their preferred plan enjoyed the direct support of blacks and Latinos voters. One could imagine, for example, a districting process that featured the introduction of focus groups, public education campaigns, deliberative citizen juries, or other strategies for demonstrating widespread minority support. Districting, then, would no longer be the province of the elites, as politicians of every stripe would have to build community support for any plan adopted.

All this is not to say that substance will not play any role in making process judgments. It would be perfectly appropriate for courts or the DOJ to use the deals brokered in other jurisdictions as a baseline for assessing whether minority group members were playing on a level playing field in the case at hand. The point here would not be to find a universal answer as to what outcomes are fair, but to have a sense of what other racial or ethnic minorities were able to negotiate for themselves in other contexts. A deal that fell well short of the baseline might signal a process failure during the negotiations in question. Substance, in short, would simply be one evidentiary factor in assessing whether the process was fair rather than vice versa.

Switching the focus of the courts and the DOJ from substance to process, then, creates the right sorts of incentives for a healthy politics. Fighting redistricting wars on this turf ensures that the battle will be about who speaks for the minority community, not which voting rights strategy to impose on it. It would also provide a healthy reminder that the Voting Rights Act is designed to benefit citizens, not political elites.

Moreover, such an approach seems much more likely to channel the energy of political elites—who represent a permanent feature of our political system—into more productive channels. To pass their preferred plan, political parties would have to figure out how to connect debates about electoral structures to everyday politics and work to insert these important issues into public debate. Legislators’ political fates would depend not just on the votes of their colleagues, but also the views of groups and individuals outside of the usual districting process. Politicians seeking to get their plans through would consult not with expert witnesses but with community groups to establish what was “best” for blacks and Latinos. At the very least, one would expect that the harder that political elites try to establish their bona fides as genuine representatives of black and Latino citizens, the more likely it is that the final plan will actually incorporate the views of the citizens most affected by these choices. An opt-in approach would thus help bring new voices in the districting process.

There are two, obvious objections to this proposal’s reliance on process inputs rather than substantive outcomes as a means of gauging what is “fair” under the Voting Rights Act. The first centers on whether process-based inquiries are so nebulous that they will be subject to partisan manipulation. The second centers on how we would determine what constitutes an appropriate default when the DOJ or a court finds that the process was unfair. I address each in turn.
First, are process-based inquiries better than substantive ones? It is certainly true that process-based inquiries, at least as an initial matter, are hardly likely to generate the sort of rigid, easily administered standards we find elsewhere in election law—for instance, the outright ban on poll taxes or the mathematical equality among district populations mandated by the principle of one person, one vote. But most of the preclearance inquiries DOJ and the courts now field under the current system do not involve such easily administered standards. For instance, I take it as a given in the wake of Ashcroft that in the all-important area of districting we cannot return to the days of mechanically applied standards for evaluating vote dilution but are stuck with a totality of the circumstances test that depends heavily upon on-the-ground political realities. Further, every DOJ official I interviewed said that context also matters for most of the other types of assessments the DOJ makes, a level of unanimity that suggests we should avoid conflating the fact that the DOJ lodges few objections with the claim that the evaluation process is something that could be conducted by a witless bureaucrat. Indeed, one former DOJ official suggests that there is more discretion exercised in deciding whether a polling place can be moved than in assessing a districting plan. DOJ’s own regulations state—presumably in an effort to deter localities trying to find safe harbors—that “mechanical” review is often impossible because most section 5 questions require “the appraisal of a complex set of facts that do not readily fit a precise formula.”

The question, then, is whether courts and the DOJ will be better at making mushy process-based judgments than they will be at rendering equally nebulous decisions about what mix of influence, coalition, and majority-minority districts constitute a “fair” districting plan or whether a change in the location of a polling place constitutes retrogression. And there is reason to think that the process-based route is the better one.

Although procedural and substantive judgments are equally contestable, both institutions are likely to be better at addressing questions of who represents a community than what is best for the community. As noted, the DOJ has already developed a set of heuristics as to what type of community leaders and localities are worthy of its trust, and it has explicitly relied on the absence of minority involvement in the decisionmaking process as a factor in its preclearance decisions. As one former senior DOJ official explained in an anonymous telephone interview, “one of the first things we want to find out” is what the minority community’s “position on [an issue] is”—something learned from both minority elected officials and community leaders. He added that there is ‘no doubt that this is a factor” in a preclearance decision” (August 14, 2005). Similarly, courts make such judgments routinely in cases involving standing challenges or class actions. Indeed, there is at least anecdotal evidence that judges are more comfortable with making judgments about process than about outcomes. Consider, for instance, how much of the opinion in Ashcroft was devoted to describing the level of support for the challenged plan among black legislators. It was plainly the terrain where the Court felt most comfortable; the Justices could tell themselves that they were not making a choice about what type of representation was “best” for racial minorities, but merely vindicating the views of the relevant community.
One might argue, as Sam Issacharoff does, that once the Department of Justice is given standards, not rules, to administer, it can engage in partisan manipulation of those standards. At this point, Issacharoff wonders, is the game still worth the candle? (2004). Here again, though, a process-based approach seems less vulnerable to Issacharoff’s challenge. That is because in the realm of process, the incentives for the major political parties do not point as consistently in a particular direction. Think about the question of districting. When the debate is about districting outcomes—majority-minority districts versus coalition districts versus influence districts—it is all too easy to figure out where each party’s interests lie. We thus are likely to distrust the judgment of a Republican department when it favors majority-minority districting over coalition districts, just as we would be suspicious if a Democratic department imposed coalition districts on legislators who had chosen a majority-minority districting strategy.

Judicial and administrative positions on what proxies to use for gauging a fair process, in contrast, seem less likely to have a consistent valence. If DOJ commits to the view that minority legislators must be trusted in one state, it presumably must do the same in others. If the Supreme Court finds that deliberative polling is a fair strategy for assessing citizen preferences in one case, it presumably must do so in another. If a community organization can get most of its members to show up at a meeting in one county, the same activities ought to be credited in another. Clear political incentives seem especially likely to be absent if the courts and DOJ begin to consider evidence about the preferences of local citizens, whose views will be shaped and framed during the districting process itself and thus extraordinarily difficult to predict ex ante.

In arguing in favor of a process-based inquiry over an outcome-based one, however, I am not putting forward a naive vision of process inquiries as neutral or free from any underlying substantive commitments.48 There is little reason to think that a judgment about whether a process is fair or whether some group is a genuine representative of an affected community is somehow more objective than a judgment about whether majority-minority districts are better than coalition districts. Both a process-based judgment and an assessment of substantive outcomes will be freighted with contestable normative assumptions.

It is equally true that the approach I am suggesting will not, at least in the short run, lead to less litigation. To the contrary, there will be instances where minority legislators and civil rights groups are deeply divided over what is best for the minority community,49 or where the community itself will be deeply divided.

Further, we should not be naive about the path politics is likely to take should an opt-in approach be adopted. The moment that elites learn that community support matters, they will presumably try to create shell organizations that claim community support but are little more than political shills. We should also expect political parties to try to capture existing community groups and to “fake” the appearance of a healthy decision-making process.

The claim I am making, then, is simply that when a fight is inevitable, we ought to think hard about what, precisely, we want to fight about. In my view, we ought to welcome battles over who genuinely represents minority communities.50
Rather than having scholars or politicians play the role of philosopher king, opining about what is best for the minority community, we should channel our political and litigation energies into discerning what members of the minority community actually think about the question.

Average citizens, of course, do not spend years thinking long and hard about the trade-off between substantive and descriptive representation or where polling places ought to be located. But they do know whom they trust and what kind of representation they want. I would thus expect black and Latino citizens to do precisely what other citizens do in making hard choices about other issues—rely on proxies, deploy heuristics, and look for guidance from community leaders.

One might object that there is no reason to think that community groups are any more representative of minority voters than legislators, especially given that there is no formal mechanism akin to an election for holding them accountable. There are at least three types of responses to this concern. First, as a practical matter, these groups are already speaking for minority voters through the informal and nontransparent process that the DOJ currently employs. If one is worried about accountability and representativeness, that concern holds equally true for the present regime. Indeed, if anything an opt-in approach helps increase accountability by making the negotiating process more transparent.

Second, and more important, if a group wants to claim authority to speak for the community, it must establish its standing to do so. We can fight out the issues related to representation and accountability in court just as we battle over the substantive voting rights issues that presently preoccupy judges and litigators. The difference between these two battlefields is that the terrain of process should generate a better set of incentives going forward—an incentive for groups to mobilize a broad membership, to create governance structures that create transparent decision-making processes and ensure the group’s accountability to its members, and to demonstrate deep community support for the positions the group is taking.

For those who doubt the likelihood such an approach could succeed, consider what has taken place in the community economic development movement (Simon 2001). Funding for community development corporations (CDCs) is generally tied to provisions “designed to make the organization accountable to its membership and through the membership to the larger community,” thus providing some ex ante incentives for community mobilization (169). Ex post incentives for community mobilization are created by the competition among CDCs for resources, as their ability to win new funds “depends in substantial part on their past records,” including the ability to muster significant community support for the programs they have initiated (178–82). In a roughly similar fashion, we would expect that litigation over who genuinely represents racial minorities will, in the long run, generate more accountability and representation for those communities than the current regime.

Third, the claim here is not that the views of community groups ought to displace those of elected legislators (even self-interested ones) on these matters. Instead, opt-in invites us to make a bet on polyphony. It begins with the assumption that political elites have too much influence over districting decisions and
tries to find the appropriate counterweight. The choice of an opt-in approach thus embodies the hope that competition among different types of representatives with different types of aims and interests will work better in representing the community than a narrow competition among legislative elites. Far from trying to identify the single, true representative of a community from either the private or public realm, the opt-in approach is premised on the assumption that communities can be represented in many different ways.

One might worry that an approach that “makes a bet on polyphony” risks dividing the community against itself. In some ways it is an odd claim; if the community is genuinely divided, the current regime merely papers over that disagreement. An opt-in approach, in sharp contrast, creates incentives for the potential stand-ins for minority voters—be they legislative elites or private associations—to find common ground. If community representatives are divided as to what is best for racial minorities, they will find it difficult to speak authoritatively on the group’s behalf. Community group leaders thus have every incentive to work out a consensus or compromise; their power, after all, comes from standing together.

What happens if the community remains genuinely divided? Judges should straightforwardly acknowledge that fact and choose a default—by deferring to one type of decisionmaker, following past practice, or even flipping a coin. But there is no reason to think that the existence of genuine and legitimate division ought to pose more of a problem for an opt-in approach than the current regime (unless one places great value on the (false) appearance of unanimity). There is no question that at some point someone must choose a course. But the need for a decision does not require us to pretend that the choice we are making is the only one that could be made. These are deeply political and highly contestable decisions, and we can acknowledge that fact at the same time we make a choice. Indeed, it seems better to recognize the existence of political difference on these issues than to pretend that there is a right answer—discernible only by expert witnesses and judges—for structuring our electoral system.

The second difficult question to address in designing an opt-in strategy, of course, is what ought to be the appropriate default to use if the process breaks down. Here again, take districting as an example. For simplicity’s sake, I have suggested that we begin with the types of remedies imposed prior to Ashcroft under section 2, which typically requires a number of majority-minority districts that is roughly proportional to the group’s share of the population, or under section 5, which typically requires a plan that the DOJ would deem nonretrogressive. Even here, however, a more flexible regulatory strategy might help us exit the current morass we now face in choosing which districting strategy is the better one for purposes of choosing a default.

One of the main benefits of a process-based approach over time is that it provides a dynamic feedback mechanism that ought to provide a great deal of useful information about the preferences of minority voters and the types of plans generated by a healthy negotiating process. The departure from a command-and-control approach to districting will allow new coalitions to develop and new approaches to flourish. For instance, it would be useful to know how often—and under what
circumstances—opt-ins occur and what kinds of plans are generated from processes deemed fair by the courts. Such information can—and ought to—inform our judgments about the default rule going forward.

Thus, even if we start with the default rule proposed above, one could imagine the courts, the DOJ, or Congress occasionally revisiting the substantive constraints imposed by the Voting Rights Act in light of the series of deals reached outside it. Such a benchmarking strategy would tell us a good deal about the needs and interests of racial minorities in the current political environment—whether they vary by region or level of government, whether legislators’ views differ systematically from their constituents, what kind of strategy is deployed in a given political situation, and the like.

Indeed, it is precisely this sort of dynamism that makes an opt-in approach an attractive regulatory strategy in the current political environment as we move from a system of entrenched racial divisions to the world of normal politics. In such circumstances, predictions are extremely difficult to make, and an adaptive regulatory strategy—one that acknowledges the possibility of moving forward while providing a safety net in case of retrenchment—seems like the most sensible option.

PASSING CONSTITUTIONAL MUSTER A final reason to favor an opt-in approach is that it may aid those defending the Voting Rights Act against the inevitable constitutional challenge that will follow renewal of section 5. Since the Supreme Court issued its decision in City of Boerne v. Flores (521 U.S. 507), there has been significant debate as to whether Congress has the power to extend the life section 5 in its current form and what sort of evidentiary record would be necessary to support such an extension (see, for example, Hasen 2005; Katz 2001, 2003; Karlan 1998; Pitts 2005a, 2003; Rodriguez 1998; Winke 2003). City of Boerne announced that the test for prophylactic congressional legislation enforcing constitutional rights was that the legislation be “congruen[t] and proportional” to the underlying constitutional harm Congress sought to remedy (City of Boerne). Board of Trustees v. Garrett (531 U.S. 356), added to that requirement by suggesting that Congress must also have a sufficient evidentiary record to justify congressional regulation. How rigorously Garrett’s mandate will be enforced is less than clear, as subsequent decisions have at least called the broadest readings of that requirement into question (Nevada v. Hibbs, 538 U.S. 721; Tennessee v. Lane, 124 S. Ct. 1978). Further, because section 5 involves both racial discrimination and protection of the right to vote, some have suggested that it may be subject to more lenient constitutional scrutiny than other statutory provisions that have fallen under Boerne’s axe (Tennessee v. Lane, 2012; Katz 2003; Hasen 2005).

Regardless whether the Supreme Court is likely to be more generous in scrutinizing the provisons of the VRA than it has been in reviewing other acts of Congress, at a minimum we would expect the Court to demand some effort from Congress to tailor section 5’s burdensome requirements and to build in an appropriate sunset. After all, the Court’s decisions in Shaw v. Reno (509 U.S. 630), Johnson v. DeGrandy (512 U.S. 997), and Georgia v. Ashcroft (539 U.S. 461), have
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sounded a consistent set of themes: a concern that the VRA not dissolve into a system of racial spoils, a worry that voting rights protections will entrench rather than undermine racial divisions, a search for the right strategy to bring us closer to the world of normal politics.

A more flexible, locally informed, and targeted enforcement strategy should help reassure the Court that the VRA continues to represent a valid exercise of Congress’s enforcement powers. First, it offers a set of functional limits to supplement the act’s formal coverage limits. By abandoning the act’s current command-and-control approach, opt-in ensures that federal intrusion into local politics is limited not only to select jurisdictions, but to those instances where there is evidence that the playing field is still tilted against racial minorities. After all, where racial minorities wield enough power in the political process to effect change, the DOJ and the courts will stay their hands. Similarly, even where blacks and Latinos lack significant bargaining power, a covered jurisdiction acting in good faith has every reason to try to accommodate the group’s concerns. Additionally, DOJ pre-clearance is requested only when the issue is one members of the community deem worthy of their attention. Thus the trigger for additional administrative or judicial scrutiny occurs only when an issue is both important to the local minority community and problematic enough for bargaining to break down.

Second, an opt-in approach contains a built-in sunset provision. After all, when we reach the stage of normal politics—when racial minorities can hold their own in every bargaining process—then any excuse for federal intervention evaporates. This functional sunset provision thus supplements the formal time limitations Congress has placed on section 5 during each renewal debate. Section 5’s functional sunset provision, in some sense, resembles section 2’s. Under section 2, vote dilution cannot be established unless voting is racially polarized (Thornburg v. Gingles, 478 U.S. 30). When people cease to vote along racial lines, section 2 will become a paper tiger. So, too, with an opt-in approach. When we reach the stage of normal politics, section 5 can no longer be invoked. This functional sunset provision ought to help reassure this Court, which has long been preoccupied with the danger that the Voting Rights Act might entrench rather than alleviate racial tensions, that Congress has fashioned an appropriate remedial scheme.

CONCLUSION

As Congress begins hearings on the Voting Rights Act, it is likely to find that experts in the field are at loggerheads. They can’t agree about the facts on the ground, nor can they agree upon the next step Congress should take.

The solution is not to abandon the all-important project of voting rights enforcement nor to maintain the status quo, but to choose an approach that seeks a middle ground between the warring parties. We should adopt an adaptive regulatory strategy that creates space for us to move forward in this highly fraught area where race and politics intersect but provides a safety net in case of retrenchment. The opt-in approach is right strategy for the situation in which we find ourselves—
where stakes are high and good predictions are hard to come by. It creates the right sorts of incentives for everyone in the system—public interest groups, local governments, courts, and the Department of Justice. And it might even create new channels for genuine community involvement in structuring our democracy, something that is woefully absent from our current system.

APPENDIX: STATUTES AND REGULATIONS LIST

42 U.S.C. sec. 1973b(a)
42 U.S.C. 1973b(b)
42 U.S.C. sec. 1973c
Ga. Code Ann. sec. 36-36-57
LSA-R.S. 18:535
Office of Assistant Attorney General, Civil Rights Division: Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act (Jan. 18, 2001), 66 FR 5412-01, 2001 WL 40061 (F.R.); 28 C.F.R. Sec. 51.59(e).

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anonymous (interview conducted August 14, 2005, by telephone) (Anonymous II). My thanks to all of them. Excellent research assistance was provided by Bryan Choi, Anton Metlitsky, Warren Postman, Amanda Teo, and Andrew Werbrock. Finally, I am indebted to the Russell Sage Foundation for its support in writing this paper.

NOTES

1. Samuel Issacharoff and Richard Pildes both place great emphasis on the role robust political competition may play in protecting the interests of minority voters (Issacharoff and Pildes 1988; Issacharoff 2004; Pildes 2004).

2. Neither Pildes nor Issacharoff has firmly committed to the view that section 5 ought to expire in 2007; thus far, their written work has only raised questions about the wisdom of renewal of section 5 in its current form. Moreover, their work has largely centered on the use of competition to police second-order voting rights issues rather than first-order questions like ballot access. Abigail Thernstrom, however, has repeatedly argued that section 5 should expire (“Emergency Exit,” New York Daily Sun, July 29, 2005; with Edward Blum, “Do the Right Thing,” The Wall Street Journal, July 15, 2005).

3. This claim is buttressed by Bruce Cain and Karin MacDonald’s empirical study of section 5, which suggests that “risk aversion drives much of the near universal compliance with the VRA” (chapter 7, this volume).

4. Even if section 5 expires, localities will continue to bargain in the shadow of section 2 of the Voting Rights Act. In its present form, however, section 2 does not seem to cast a long enough shadow to serve the same role section 5 now plays. First, it requires a lawsuit to be filed, placing the burden of proof on the plaintiffs and demanding a significant investment of resources from them. Second, section 2 has been used almost exclusively in the area of districting and has not consistently been deployed as a tool for policing the type of election procedures that section 5 regulates. Those procedures may be too small to justify the filing of a suit (it is not, after all, a coincidence that we see section 2 mostly in areas with very high stakes, like districting), and it would take a great deal of time to build up the necessary precedent to extend section 2’s reach to other, more routine voting practices.

5. I am indebted to Guy Charles for suggesting this formulation.

6. As with the current system, a change could not be made unless a certain amount of time had passed since the disclosure, and no civil-rights complaint had been filed. Filing of a civil-rights complaint would, in effect, “stay” the change until DOJ had completed its investigation. This proposal thus differs from the proposal made by the Reagan administration during the debate on the 1982 amendments. The Reagan administration proposed a mandatory notice provision, but it placed the burden of proof to challenge a change with the DOJ and demanded that the department establish its entitlement to injunctive relief for any change it wished to challenge (Days and Guinier 1984). Under that proposal, the burden of proof would have rested with the Department of Justice and the standard for obtaining relief would have been the high standard courts use to grant injunctions. Under an opt-in approach, the locality bears the burden of proof and the decision to preclear rests with the DOJ.
7. Although I focus on the seminal work of Ayres and Braithwaite, numerous academics have sought to respond to the criticisms of command-and-control regulation by proposing a variety of strategies that share some, but not all, of the features of the responsive regulation paradigm. These include David Dana (2000), Michael Dorf and Charles Sabel (1998), Cynthia Estlund (2005), Jody Freeman (1997, 2000), Robert Hamilton (1983), Douglas Michael (1996), Charles Sabel and William Simon (2004), and Richard Stewart (1986). For those considering how to adapt the responsive regulation paradigm to the field of election law field, Cynthia Estlund’s work on the role private rights of action can play in promoting self-regulation and Jody Freeman’s work on the role private actors play in public governance are particularly useful. For an in-depth effort to catalog and synthesize the vast literatures dealing with post-New Deal regulatory models, see Orly Lobel (2004).

8. Consider, for instance, a few examples of the differences between the voting rights arena and the world Ayres and Braithwaite described. On the one hand, it is harder to build an effective incentive scheme for regulated entities in election law than in other areas. The most obvious problem, of course, is that elected officials do not directly bear the costs of regulation in the same way that private firms do (Levinson 2000). Even if one assumes that elected officials are, indeed, motivated by the “shaming” mechanisms section 5 deploys, the agencies on which Ayres and Braithwaite focus have a wide array of regulatory tools, ranging from gentle prods (like minor fines) to something akin to the nuclear option (such as revoking a company’s license). The Department of Justice, at present and in the politically realistic future, does not possess this range of options. Voting rights enforcement has only modest and rarely used policing options that involve fines or imprisonment (42 U.S.C. sec. 1973j). It thus rests heavily on the injunctive model rather than the damages model. Even within the injunctive realm, the usual practice does not allow for anything that resembles the nuclear option in other regulatory fields. The type of strong incentives that may play a key role in other areas therefore cannot assist much here. Other aspects of the responsive regulation or “collaborative governance” model are hard to reproduce in voting rights regulation. For instance, administrative strategies to encourage self-regulation often depend on the disclosure of objective facts or objectively measurable goals, such as the number of accidents in a workplace or the amount of pollution emitted by a factory (see, for example, Freeman 2000). In the voting rights arena, it is more difficult to come up with uncontested measures of minority empowerment that could be used in a similarly productive way.

On the other hand, there may be more incentives for whistle-blowing in the voting rights arena than in the environment contemplated by Ayres and Braithwaite. Their tripartite scheme relies heavily on public interest groups as the third leg of the regulatory stool. In voting rights enforcement, there may be a broader range of players who can play that monitoring role—not just groups dedicated to the cause of minority empowerment, like the NAACP or MALDEF, but political parties and politicians of all stripes who may simply help enforce voting rights provisions for purposes of political gain or partisan payback. As one former DOJ official put it, “it is an old saw at the department that sometimes your best case can be made by white officials in the region” (telephone interview with Michael J. Pitts, August 1, 2005).
9. Because the goal of this paper is to offer a proposal that fits easily within the current regulatory space currently occupied by section 5, it retains many vestiges of the prior regime that one might alter or eliminate if one were writing on a tabula rasa.

10. Georgia v. Ashcroft, for instance, has eviscerated the long-standing practice of using majority-minority districts as the sole tool for empowering minority voters, and the Supreme Court’s rulings on Congress’s powers to enforce the Fourteenth and Fifteenth Amendments have hardly been a model of clarity.

11. This requirement is certainly no more burdensome than the current requirement for section 5 filings and, indeed, comports with the practice of some covered jurisdictions that require public notice of at least some types of electoral changes (see, for example, Ala. Code 1975 sec. 11-42-2 and Ga. Code Ann. sec. 36-36-57, mandating notice for annexation decisions; and LSA-R.S. 18:535, requiring notice for changes in polling places.

12. DOJ already posts such requests online, although in a form that makes them tricky to evaluate in full (see http://www.usdoj.gov/crt/voting/notices/noticepg.html).

13. Although there is no formal “triage” system at DOJ and “everything is looked at quite closely” (anonymous telephone interview, August 14, 2005), every DOJ official with whom I spoke described the various cuts that DOJ administrators make in sorting through preclearance requests. A number of preclearance requests generally get only a minimal or “quick” review: those made in places with a tiny minority population, those in places where racial minorities dominate politics, the routine scheduling of special elections such as bond elections, or practices that obviously help minority voters, such as increasing polling places or lengthening polling hours (anonymous telephone interview, August 2, 2005; telephone interview with Michael J. Pitts, August 1, 2005; telephone interview with David Becker, August 4, 2005, emphasizing that if the quick review turns up a problem, a full review is then conducted). Similarly, certain preclearance requests tend to get more rigorous review (one signal is that they are sent first to an attorney rather than an analyst)—for example, districting plans, annexation, certain changes in the method of election, majority-vote requirements, at-large districting, those changes that had generated controversy within the relevant community, or requests from a locality that has in the past received a large number of requests for information (a step that often signals a planned objection) or objection letters. Those practices—which were usually staffed up with extra lawyers (anonymous telephone interview, August 14, 2005)—were termed “red flags” (anonymous telephone interview, August 2, 2005), and got what one former DOJ official termed “heightened scrutiny” (telephone interview with Michael J. Pitts, August 1, 2005).

14. The Voting Section conducts a formal training session for its own analysts and attorneys. Run by a nonlawyer, it teaches new DOJ staffers the sorting strategies DOJ has used to ensure it focuses its energies on the right set of preclearance requests (telephone interviews, anonymous, August 1, 14, 15, 2005; with David Becker, August 4, 2005). A staff attorney agreed that it was possible to instruct people about what set of questions ought to be answered in evaluating various type of preclearance requests (anonymous telephone interview, August 14, 2005). The DOJ has also engaged in significant educational campaigns, appearing before various groups to promote compliance with section 5 (anonymous telephone interview, August 15, 2005; Posner 1998). For an example of an accessible guide to preclearance published in the 1980s, see Barbara Philips (1983).
15. Indeed, Guy Charles and Luis Fuentes-Rohwer argue that the DOJ’s objection letters reveal a long-standing DOJ practice in the DOJ to act “as advocates interceding on behalf of minorities or as mediators between minorities and government officials” (see chapter 3, this volume).

16. Telephone interviews: anonymous August 2, 2005; Michael J. Pitts August 1, 2005; David Becker August 4, 2005. As one senior DOJ official put it, “we’re in Washington; they’re there” (anonymous telephone interview, August 15, 2005). For another recent analysis of DOJ practices confirming the continued salience of minority representatives to the DOJ’s review process, see Meghann Donahue (2004).

17. Telephone interviews: anonymous August 2, 2005; see also David Becker August 4, 2005, noting that DOJ has a “whole slew of contacts” in “almost every covered county”; anonymous August 14, 2005, noting that experienced analysts have “over years built up files with minority leaders in communities”; compare Michael J. Pitts August 15, 2005, noting there is no formal list of contacts; who is called depends on the context).

18. Telephone interviews: anonymous August 2, 2005; see also David Becker August 4, 2005, contacts “usually” know the answer to DOJ official’s questions when contacted and indicating that he has “never had any trouble finding out” the necessary facts from local contacts.

19. It is, of course, critical that the filing required of civil rights groups be minimal so that the filing of a formal complaint does not drain the resources of these groups. The same holds true of the bargaining process. The risk associated with requiring civil rights groups to bargain with local officials before opting in is that the bargaining process might take up too many of these groups’ precious resources. In such a scenario, groups might well conclude that even if the opportunity to bargain gives them more power in the process, the game is still not worth the candle. It seems unlikely that civil rights groups will have this concern over big ticket issues, like districting. These groups already invest considerable resources in the districting process through negotiations and litigation, and the opt-in proposal ensures these groups have a seat at the table—something the current process cannot guarantee them. But the concern seems quite salient in the context of the small changes that are the bread and butter of the preclearance process. In order to avoid this problem, the courts and the DOJ should closely scrutinize any locality that drags its feet during negotiations. If small issues cannot be dispatched quickly through negotiations (onerous bargaining sessions, after all, are not in the interest of either civil rights groups or local government officials), that fact would signal the type of recalcitrance that would justify an opt-in by the civil rights group and close DOJ monitoring.

20. See also Cynthia Estlund (2005, 333), noting that post-New Deal shifts in employment regulation “renders employees the passive beneficiaries of the government’s protection.”

21. Consistent with the basic premise of the responsive regulation paradigm, Drew Days argues that the DOJ itself got better results from negotiation with covered jurisdictions than “coercive measures” (1992, 52).

22. This possibility animates much of the work on “collaborative governance” and “responsive regulation” (see, for example, Freeman 1997).

23. For an in-depth exploration of the role that private rights of action can play in encouraging self-regulation and regulatory compliance, see generally Cynthia Estlund (2005).
24. A central goal behind tripartism is to ensure there is someone to “guard the guardian,” to borrow Ayres and Braithwaite’s term, and reduce the chance of agency capture (1992, 54–57). Consistent with the switch to an administrative law approach proposed in this paper, Congress ought to give civil rights groups the right to appeal a DOJ determination that the bargaining process was fair (see Persily 2006; Tokaji 2005). Under current law, when the DOJ preclears a change, that decision cannot be appealed in federal court (Morris v. Gressette, 432 U.S. 491).

25. Indeed, even under the current scheme, the mere request for additional information—a discovery request that precedes the decision to file an objection—often leads a locality to “fold” (anonymous telephone interview, August 2, 2005).

26. There is some evidence that the DOJ already adheres to this practice informally. First, it tends to give a closer look to potentially troubling requests coming from localities against whom a large number of information requests (the large discovery request that is made prior to an objection being lodged) or objections were made (telephone interviews: Michael J. Pitts August 1, 2005; anonymous August 2, 2005; anonymous August 14, 2005, noting that while the practice was not formally required, it comports with “common sense”; but see anonymous August 15, 2005, stating that “places do change” so large number of prior objections does not predestine locality for higher scrutiny). Second, if a locality fails to provide all the information necessary for DOJ’s investigation, DOJ “can object on that basis alone” (anonymous telephone interview, August 2, 2005).

27. Given the differences between an opt-in approach and other models, one would not want to place undue emphasis on these sunny predictions, and we ought to expect the relationship between the parties to remain more adversarial in the election arena than in those contexts where the two are jointly tasked with a shared rulemaking assignment.

28. Ayres and Braithwaite term this “the problem of the zealous [public interest group]” (1992, 75).

29. I borrow this term from an anonymous reviewer of the draft.

30. Thus, although local governments cannot formally opt-in to traditional VRA scrutiny under this approach, the process-based analysis proposed here also affords localities protections from the unreasonable demands of the other side. As noted, as long as the locality maintains a fair and reasonable bargaining process, it is entitled to what amounts to a functional safe harbor protecting it from liability.

31. These categories obviously overlap in some instances, particularly where an election is hotly contested. Consider, for instance, the energy devoted to disputes over the location of polling place and changes in balloting rules during the 2004 election.

32. As Michael Pitts succinctly puts it, “when it comes to redistricting, both Democrats and Republicans seem quite willing to sue first and ask questions later” (2005b, 615).

33. For instance, imagine one is given two groups of preclearance requests to review. One pile contains a thousand requests, and the reviewer knows that about ten are likely to be grounds for denial; the other contains twenty requests, and the reviewer knows that they all fall into a “suspect” category of practices. It is clear which pile is likely to get a more perfunctory review. Indeed, one might suspect that there will be more false negatives—overlooked but valid claims—in the first pile simply because at every
moment the reviewer knows that the request before him is statistically unlikely to be one of the ten valid claims. Similarly, a reviewer who knows that the second pile has been presorted to weed out less serious claims might be more likely to find violations in the pile of twenty. Bill Stuntz makes this point with regard to the Supreme Court’s review of certiorari petitions (2005). Noting the reluctance of Supreme Court clerks ever to recommend that the Court grant certiorari, he suggests that the reason for this reluctance is the knowledge that the odds that one has found one of the rare needles in the cert. petition haystack are quite slim. He also hypothesizes that clerks are likely to pay more attention to—and recommend more grants for—“paid” certiorari petitions than in forma pauperis petitions not only because the quality of the former exceeds the latter, but also because the fact that someone has thought the question presented was serious enough to invest resources in pursuing it.

34. Richard Pildes asks why we should prevent racial minorities from striking the same types of deals that other electoral minorities can make.

35. For an analysis of why courts have adopted such a bright-line approach, see Heather Gerken (2001).

36. I should emphasize that, although I represented the Democratic party in districting litigation prior to becoming an academic and the firm where I worked continues to do so, I was not involved in anything that took place in either New Jersey or Georgia. The argument I offer here is merely an educated guess as to what the lawyers involved were thinking.

37. I am indebted to Pam Karlan for this example.

38. The DOJ routinely relies on members of these groups to assist in preclearance (see notes 16 through 19), and has sometimes rested objections at least in part on the failure of the locality to involve such groups in the decisionmaking process. See Hiroshi Motomura (1982, 241–43) for a review of early DOJ practices indicating that preclearance objections were sometimes based on the absence of minority participation in the decisionmaking process. For a more recent example of this practice, see also the objection letter to Union County, South Carolina, noting that proposed plan was developed without formal public hearings or opportunity for black members of the community to voice their concerns (http://www.usdoj.gov/crt/voting/sec_5/1_090302.htm).

39. Various Canadian provinces have begun to experiment with citizen assemblies in the electoral context, asking randomly selected citizens to deliberate as to which electoral system best served the needs of the province. The first such assembly took place in British Columbia last year. For information on the assembly, its proposal, and what took place during the subsequent referendum process, see the Citizens’ Assembly on Electoral Reform report (http://www.citizensassembly.bc.ca/public).

40. For an interesting example of a procedural solution designed to encourage agencies to rely on scientific studies that have been vetted by an appropriate peer review process, see Nicholas Bagley and Revesz (2005).

41. This type of baselining occurs in other areas of public law. As Charles Sabel and Bill Simon point out, courts often measure the performance of a school, prison, or public housing system not only against a standard chosen by the party but against “the performance of comparable institutions” (2004, 1019). Under the current regime, DOJ itself will compare the plan being precleared against plans proposed but not accepted during
the districting process in assessing whether retrogression has occurred (Office of Assistant Attorney General, Civil Rights Division: Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act (Jan. 18, 2001), 66 FR 5412-01, 2001 WL 40061 (F.R.); 28 C.F.R. Sec. 51.59(e)).

42. John Hart Ely famously quipped about the rigid demands of one person, one vote that “administrability is [the doctrine’s] long suit, and the more troublesome question is what else it has to recommend it” (1980, 121).

43. One author finds that DOJ was conducting nuanced, case-by-case review of preclearance requests even before Ashcroft (Donahue 2004).

44. Telephone interview with Michael J. Pitts, August 15, 2005, observing that “at least in redistricting you know what you are looking for,” whereas the courts have provided relatively little guidance about other types of challenges. See also anonymous telephone interview, August 2, 2005, noting that while the “vast majority” of section 5 requests were easily precleared, there are a number of “very hard calls” even outside of the redistricting context.


47. For a brief analysis on the tendency of judges to claim they are agnostic on questions of democratic theory, see Heather Gerken (2001).

48. A long-standing critique of process-based theories is, of course, that any determinate conception of process demands choices about one’s underlying substantive commitments (for seminal critiques along these lines, see Dworkin 1996, 76–81; Sandalow 1975; Tribe 1980; Tushnet 1980; for a recent defense of Ely—who, it is often said, perfected the process-based approach—see Dorf 2005).

49. For instance, we have already witnessed such divisions between minority legislators and civil-rights groups over post-2000 redistricting in places like Georgia and California.

50. Ayres and Braithwaite make a similar point, arguing that it is essential that what they term public interest group “guardianship” be “contestable”—that is, that a public interest group lose its standing to speak on behalf of citizens as its base declines (1992, 83).

51. The notion of benchmarking has been well developed by the democratic experimentalists, who in turn borrowed the idea from the practice of private firms. Democratic experimentalism empowers local governments to develop local solutions to shared national problems. In exchange for such grants of autonomy, localities pool information about the successes and failures of their programs at the state or federal level. This type of benchmarking allows others to compare solutions and eventually develop a set of best practices based on the information gained from local experimentation. The seminal accounts of the democratic experimentalist approach are Michael Dorf and Charles Sabel (1998), and Joshua Cohen and Charles Sabel (1997).

CASES CITED


REFERENCES

The Future of the Voting Rights Act


The renewal of section 5 of the Voting Rights Act (VRA) in 2007 will depend on both politics and the state of the law, and even more upon the peculiar interaction between the two.

Looking at the renewal issue in 2003, when the first draft of this chapter was written, it appeared that the two most important factors affecting renewal were who was going to be elected president in 2004 and the closely related question of who would be on the Supreme Court when the VRA came time for renewal. To these questions we now know the answers. Yet the general predilections of the next Supreme Court were always in little doubt, regardless of which particular bodies come to inhabit those robes. And there were reasons to think that the VRA is such an icon it was unlikely to be attacked even by a Republican president, especially one courting the Latino vote.

Moreover, whether renewal was to be decided by a Congress controlled by the Democrats or one controlled by the Republicans, mattered a lot less than one might think because there is no simple link between likelihood of renewal and Democratic strength. There are critical differences between the parties in their views about section 5 (and about voting rights—and civil rights, in general), but there are also big differences within the parties. Both parties will be divided about the renewal. But majorities in each will likely favor renewal of section 5 in some form. In the political realm, the devil will be in the details.

Most House members from the Republican Party see race conscious line-drawing as just another form of affirmative action quota, and thus something to which they are, in principle, unalterably opposed. And most states rights oriented Republicans see the preclearance denial authority of section 5 given to the Department of Justice (or to the federal bench in the District of Columbia) to be an undue imposition on
local responsibility for conducting elections, and are likely to view the pre-1965 history of racism in covered jurisdictions as having happened too long ago to be relevant today (the Bull Connor is Dead argument). However, for many Republicans, principle must bow to pragmatism. With respect to voting rights, the Republicans have long been divided between a pragmatic wing that sees section 5 and section 2 as having dramatically benefited Republicans by leading to the packing of Democrats of all races into the heavily minority districts, and a “principled” wing that continues to see color-conscious districting as anathema regardless.¹

The pragmatists relish the way in which the creation of majority-minority districts has “bleached” the remaining districts and thus bled them of loyal Democrats so as make it easier for Republican candidates to win in them. In addition to the direct benefits of reducing the number of districts that Democrats might win, the more Machiavellian elements of the pragmatist wing of the Republican Party also believe that section 5 as it has been implemented helped lead to white flight from the Democratic Party in the South by reinforcing the notion that the Democrats are the party of minorities. As white Democratic representation falls, and minority Democratic representation rises, the prominence of minority members as spokespersons for the Democratic Party in the South increases.² Whether Machiavellian or not, pragmatist Republicans believe it very likely that, for the immediate future, the Voting Rights Act could serve a major factor in keeping Republicans the majority party in the U.S. House. Moreover, Republican pragmatists are keenly attuned to the negative political consequences of being seen as antiminority, especially anti-Hispanic, at a time when the party is trying to make inroads at the margins among minority groups by emphasizing faith-based concerns.

Democrats are also somewhat divided about section 5, but the dramatic reduction in the number of white southern Democrats in Congress makes the preponderant view among Democrats easier to suss out. We can think of Democrats as being divided into roughly three groups. Minority Democrats (correctly) see the Voting Rights Act as the single most important factor in their ultimate electoral success. Without the majority-minority districts created by section 2 litigation (or to avoid section 2 litigation), the number of black elected officials (and elected Hispanic officials) would have remained minuscule. Section 5 is seen as a key to protecting those gains.³

Tables 15.1 and 15.2 chart the relationship between black population and black electoral success in the various rounds of congressional redistricting beginning in the 1960s, including the post-2000 round of redistricting.⁴ The basic patterns in 2002 are very similar to past results. The key difference is a few House districts in the South that are not majority-minority, but where minority voting strength is large enough to control the Democratic primary in the absence of a white Democratic incumbent, are now electing minorities to office due to low but relatively reliable levels of cross-racial voting support by the remaining white Democrats. But even such districts are, in character, very heavily minority.

That minority Democrats are likely to favor the renewal of section 5 will come as no surprise. White Democrats from areas with relatively few minorities can also be expected to support section 5 renewal, both on principle and because they have lit-
<table>
<thead>
<tr>
<th>Year</th>
<th>0 to 10%</th>
<th>11 to 20%</th>
<th>21 to 30%</th>
<th>31 to 40%</th>
<th>41 to 45%</th>
<th>46 to 50%</th>
<th>51 to 55%</th>
<th>56 to 60%</th>
<th>61 to 70%</th>
<th>More than 71%</th>
</tr>
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<td>1962 to 1964</td>
<td>0(35)</td>
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<td>1982 to 1990</td>
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<td>0(95)</td>
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<td>100(1)</td>
<td>100(1)</td>
<td>25(8)</td>
<td>40(5)</td>
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<td>1992 to 2000</td>
<td>0(235)</td>
<td>2.9(140)</td>
<td>0(105)</td>
<td>0(15)</td>
<td>0(5)</td>
<td>—</td>
<td>85.0(20)</td>
<td>76.0(25)</td>
<td>77.1(35)</td>
<td>—</td>
</tr>
<tr>
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<td>0(29)</td>
<td>0(21)</td>
<td>0(9)</td>
<td>40.0(5)</td>
<td>100(2)</td>
<td>100(3)</td>
<td>100(5)</td>
<td>100(3)</td>
<td>—</td>
</tr>
</tbody>
</table>

Source: Authors’ compilations.

Note: Entries are the percentage of districts won by a Black candidate with the total number of districts in that category in parentheses. Ten state south: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.
<table>
<thead>
<tr>
<th>Year</th>
<th>0 to 10%</th>
<th>11 to 20%</th>
<th>21 to 30%</th>
<th>31 to 40%</th>
<th>41 to 45%</th>
<th>46 to 50%</th>
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<th>61 to 70%</th>
<th>More than 71%</th>
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<tr>
<td>1962 to 1964</td>
<td>0.2(552)</td>
<td>0(65)</td>
<td>0(24)</td>
<td>0(12)</td>
<td>0(3)</td>
<td>12.5(8)</td>
<td>50.0(2)</td>
<td>100(2)</td>
<td>50.0(4)</td>
<td>100(2)</td>
</tr>
<tr>
<td>1966 to 1970</td>
<td>0.7(812)</td>
<td>1.0(102)</td>
<td>5.6(54)</td>
<td>0(18)</td>
<td>—</td>
<td>—</td>
<td>66.7(9)</td>
<td>0</td>
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<td>100(3)</td>
</tr>
<tr>
<td>1972 to 1980</td>
<td>1.0(1,301)</td>
<td>0.5(188)</td>
<td>6.8(59)</td>
<td>12.5(24)</td>
<td>0(5)</td>
<td>0(5)</td>
<td>52.9(17)</td>
<td>44.4(9)</td>
<td>75.0(20)</td>
<td>100(15)</td>
</tr>
<tr>
<td>1982 to 1990</td>
<td>1.5(1,285)</td>
<td>0(210)</td>
<td>27.5(40)</td>
<td>26.3(19)</td>
<td>0(6)</td>
<td>60.0(15)</td>
<td>72.7(11)</td>
<td>66.7(9)</td>
<td>100(10)</td>
<td>74.3(35)</td>
</tr>
<tr>
<td>1992 to 2000</td>
<td>0.6(1,247)</td>
<td>2.1(193)</td>
<td>13.3(30)</td>
<td>30.0(20)</td>
<td>50.0(20)</td>
<td>100(5)</td>
<td>50.0(10)</td>
<td>75.0(20)</td>
<td>100(35)</td>
<td>100(15)</td>
</tr>
<tr>
<td>2002</td>
<td>0.8(237)</td>
<td>2.6(99)</td>
<td>16.7(12)</td>
<td>22.2(9)</td>
<td>—</td>
<td>100(1)</td>
<td>100(1)</td>
<td>100(5)</td>
<td>88.9(9)</td>
<td>—</td>
</tr>
</tbody>
</table>

**Source:** Authors' compilations.

**Note:** Entries are the percentage of districts won by a Black candidate with the total number of districts in that category in parentheses. Some of these proportions may be misleading because the complement of black includes groups other than non-Hispanic whites, such as Hispanics and Asian-Americans, who may be present in some districts in substantial numbers.
tle to lose. On the other hand, white Democrats from the South commonly blame the VRA (and the majority-minority districts it helped create) for the fate of the Democratic Party in the South. Some still nourish hopes that, if it were possible to return to the old era of using blacks like sandbags to shore up the reelection chances of white Democrats, but not so many blacks that white incumbents’ reelection chances were imperiled, then the Democratic South could rise again. For these Democrats, though it might be political suicide to actually oppose section 5 renewal (because this might anger their black—or Hispanic—constituents), there’s no reason for them to be enthusiastic about it, or to do anything more than sit on their hands if there really were a prospect of its nonrenewal.

Georgia v. Ashcroft, (539 U. S. 461; 123 S. Ct. 2498) however, has thrown a joker in the deck by potentially radically redefining what section 5 means. Which politicians of which party will be in favor of renewing section 5 in 2006 (or 2007) may depend critically on what section 5 is taken to imply for redistricting—and that decision is at present entirely in the hands of the courts. The majority holding in Georgia v. Ashcroft allows jurisdictions to opt for satisfying the nonretrogression test either in the traditional way, by showing that they have maintained the same number of majority-minority districts (or at least maintained the same number of districts which can be expected to elect minority candidates of choice), or (now) by showing that the plan maintains or improves overall minority influence in the legislature. Here, the level of “minority influence” is to be judged via a vague and almost incoherent “totality of the circumstances” test.

If it is perceived that section 5 translates into the right to spread blacks and Hispanics across districts, with the aim of maximizing the number of Democrats elected as the best way to maximize minority influence—one possible interpretation of some of Justice O’Connor’s rather confusing language in Georgia v. Ashcroft—then Republican resistance to renewal of section 5 might be fierce. On the other hand, were that same interpretation to prevail, then white southern Democrats (however few might still be remaining in Congress), who view the Voting Rights Act as the straw that broke the party’s back, that is, ended its dominance in the South, may come to believe that section 5 ain’t so bad after all. Thus, the effective weakening of section 5 by the Georgia v. Ashcroft decision may make it much easier for all wings of the Democratic party to be enthusiastic about renewing the provision. Still, the party can expect to be somewhat divided about whether or not to push for statutory language that would reverse the Supreme Court’s Georgia v. Ashcroft interpretation of the present language of section 5 and return us to a Beer v. United States (425 U.S. 130) interpretation of section 5 in which reduction in the number of districts (potentially) controlled by minority voters would be the sole litmus test for retrogression. Indeed, one can imagine the Republicans being more enthusiastic about such a “glorious restoration” of the Beer standard than some Democrats. On the other hand, even the new version of the section 5 test is, in practice, likely to leave in place many heavily minority districts that are also very heavily Democratic, and thus continue to benefit Republicans. But the role of the Supreme Court may not be limited to interpreting the meaning of any new statutory language of section 5. Congress can vote for renewal, but, far more important is what will happen to the renewal when
its constitutionality is tested, as it surely will be, in the Supreme Court. Based on signs and portents so far, we are quite sanguine about the likelihood that some version of section 5 will be reenacted. But we are far less so about what will happen when we get to the Supreme Court. We see the struggle for renewal of section 5 of the Voting Rights Act as what in political science is called a two-level game (compare Tsebelis 1990). On the one hand, the renewal must pass the Congress. On the other, it must be held constitutional by the Supreme Court.

It is more than likely that some versions of section 5 that might pass in Congress might not pass constitutional muster. There is tension between the Court’s historic emphasis on the importance of the right to vote, and its past willingness to allow Congress to use its Civil War amendments’ authority to enforce voting rights and the newer states-rights federalism jurisprudence that has looked askance at federal intrusions into domains once reserved to the states (Hasen 2004). Indeed, one can imagine some Republicans in Congress pushing for positions that might seem to be desirable from the standpoint of minority voting rights protections, but that would lead to near certain rejection by the Supreme Court. Thus, voting rights advocates must walk a tightrope between advocating the strongest section 5 that might get through Congress without making it so strong that it would fail in the Supreme Court.

We share the view of many voting rights scholars that whether or not the Supreme Court will accept the need for continuing direct federal oversight of state election process as a constitutional exercise of Congress’s enforcement powers under the Civil War amendments will almost certainly critically depend upon the strength of the evidentiary record brought to Congress. That record must provide evidence that patterns of exclusion and discrimination are still present in any jurisdictions which section 5 would propose to cover. It must also buttress the claim that majority-minority districts, or at least districts in which minorities can be elected due to reliable white-Anglo cross-over support, are still needed to allow a full expression of minority preferences to be represented in the political system (see, for example, Pitts 2005b). In addition to the critical need for jurisdiction-specific and relatively contemporary evidence about continuing racism and discrimination, especially as it affects voting, we believe that four other essentially empirical issues must be addressed: evidence about continuing patterns of racially polarized voting, evidence about the extent to which white representatives from districts with substantial black or Hispanic populations are attentive to the concerns of their minority constituents, evidence about the extent to which black (or Hispanic) representatives from districts with substantial or majority black or Hispanic populations are attentive to the concerns of their minority constituents (that is, to Anglo whites), and evidence about the unique representative role vis-à-vis minority interests played by minority representatives.

These issues are not so much directly implicated in the renewal as they are issues that need to be addressed to make it less likely that the Supreme Court majority will continue to mischaracterize the racial structuring of political competition and representation in the United States when it comes time for the Court to decide on the constitutionality of section 5 renewal. With respect to the first issue, it is clear that
some members of the Court are under the belief that the levels of racially polarized voting have been substantially decreasing, even in the deep South, so that blacks and whites (or Hispanics and Anglos) can now form cross-racial (and cross-ethnic) political coalitions that vitiate the need for majority-minority districts, and thus render section 5 (at least in its traditional form) unnecessary. With respect to the second issue, the U.S. Supreme Court majority in Georgia v. Ashcroft seems to be asserting that minorities can be expected to achieve political influence (presumably influence roughly proportional to their numbers) in any districts in which they comprise a substantial proportion of the voters, regardless of who is elected from that district. With respect to the third issue, there is an asymmetry that needs to be addressed in how the Court has viewed majority-minority districts. If a district is drawn so as to be, say, 55 percent white by fragmenting black voters across multiple districts, why is that unproblematic, while drawing a district that is 55 percent black is a signal of racial apartheid? With respect to the fourth issue, as with the third, the Court needs to be better acquainted with recent social science scholarship on the role played by minority representatives with respect to issues of concern both to minorities and to other elements of their constituency.13

If the views of the Supreme Court majority about these four issues go empirically unchallenged, we believe that it is much less likely that section 5 would be seen by a majority of the members of the Court as still needed. But if the Court majority believes that section 5 is no longer needed, it is hard for us to imagine that it will continue to find constitutionally legitimate the extraordinarily broad application of Congress’s voting rights enforcement authority found in section 5. We believe strongly that the views on racial bloc voting levels, minority influence potential, and the behavior of representatives from majority-minority districts that we have attributed to the Court majority are far too simplistic, and indeed are more wrong than right.

With respect to racially polarized voting in the South, we need to understand prospects for minority victory as involving an interaction between levels of racially polarized voting and levels of minority voting strength. Yes, there is evidence of dramatic gains in minority representation, but these gains can be charged largely to compositional effects (how the districts are drawn) and in the South, quite counterintuitively, to changes in party identification (whites leaving the Democratic party), rather than to changes in the willingness of white voters to support minority candidates of their own party (Grofman, Handley, and Lublin 2001). Even in districts where voting patterns are racially polarized, minority candidates of choice can win—as long as the minority population proportion is high enough (Brace et al. 1988; Grofman, Handley, and Lublin 2001). Thus, evidence that minorities win does not necessarily refute the notion that voting is polarized.

In fact, in the South, there is little evidence that racial bloc voting is on the decline except in situations where minority incumbents are elected from heavily minority districts running for reelection. To the extent that there are real changes in the behavior of southern white voters with respect to support of minority candidates they are such as to make it harder, on balance, for black and Hispanic candidates to win general elections, because there are now more white Republicans—even though
a decreased white proportion of the southern Democratic electorate has made it easier, ceteris paribus, for minority candidates to win nomination in Democratic primaries in many parts of the South (Grofman, Handley, and Lublin 2001). Also, especially outside the South, unless we take into account the combined black and Latino populations in a district, we almost certainly will misstate the nature of white cross-over support for minority candidates of a given race-ethnicity, and we will mis-estimate the true nature of the relationship between, say, black population proportion and the likelihood of minority electoral success.\footnote{14}

With respect to the issue of minority influence, a key point to understand is that minority influence is not simply a matter of numbers, at least, absent districts in which minority voters are in the clear majority. The empirical evidence is clear that the factual claim espoused by Justice O’Connor that the greater the black, or other minority, voting strength in a district, the more will the representative of that district respond positively to the concerns of minority voters is fundamentally wrong. Party matters! Democrats and Republican elected officials respond quite differently to the percentages of blacks or other minorities in their district. In particular, in the South, for districts of any given level of black population, there is overwhelming evidence from both the behavior of representatives in the U.S. House from the South and from the behavior of legislators in various southern legislatures, that Republican representatives elected from such districts will behave quite differently from Democrats (see, for example, Overby and Cosgrove 1996; Whitby 1997; Canon 1999; Mendelberg 2001).\footnote{15} Here, Richard Fenno’s (1978) seminal distinction between geographic constituency (the set of voters in the district) and electoral constituency (the set of voters who voted for a given candidate) is critical. In particular, when Republicans win in districts where there are large numbers of minorities, but without much support from the minority community, they are not electorally beholden to the minority community and are thus much less likely to give weight to minority preferences than they are to those of the overwhelmingly white voters who elected them.

With respect to the third topic, the nature of white influence on black and Hispanic elected officials, we see good evidence that black or Hispanic elected officials are at least as likely to be sensitive to the views of their white constituents as white representatives are to be sensitive to the views of minorities within the district (see, for example, Fenno 2003).\footnote{16}

Finally, with respect to the last issue, we also find that minority officials are likely to serve coethnic constituents in a fashion that is distinctive from the representative role played by white representatives elected from districts with substantial minority populations. In particular, and in contrast to Carol Swain (1993), as perhaps the best study of this topic, Kerry Haynie reports that

there is, indeed, a connection between the presence of African Americans in [southern] legislatures and the substantive representation of black interests. The data and analyses here show that black legislators are the primary advocates for black interests. For example, African American representatives, all else being equal, are significantly more likely than nonblack legislators to introduce bills that prohibit racial discrimina-
tion in employment and housing, and laws that advance the educational and social welfare interests of black citizens. Moreover, these analyses indicate that for the substantive representation of African American interests, a legislator’s race matters above and beyond the effects of constituency characteristics and political party membership. In other words, black faces in legislatures do matter for black interest representation. (2001, 354–56; see also Fenno 2003)

There is one other empirical issue, about the political impact of section 5, that we would like to briefly discuss. Republicans and Democrats seem largely in agreement that redistrictings shaped by section 5 and section 2 are the principal cause of the dethronement of the Democrats in the South—at least at the congressional level. We view that as at best a half-truth, and, at worst, pretty close to nonsense. The shadow of the Civil War lasted a very long time, making the South a Democratic bastion and preventing meaningful political competition except in a handful of southern cities and former Republican strongholds. But no single event, not even a civil war, can shape politics forever.

Around four score and seven years or so later, speeded up by federal actions such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the racist politics and political institutions of the post-Reconstruction era South (for example, segregated schools and water fountains and back of the bus seating combined with overwhelming barriers to African American voting such as literacy tests, poll taxes, and ongoing voter intimidation) began to erode. Once that started to happen, the South’s conservatism began to manifest itself in support for Republicans—first at the presidential level, then for statewide election such as U.S. senator and governor, then within House districts, then increasingly for state legislative elections, and now even for local office. Redistricting plans in the 1990s and 2000 (for the U.S. House of Representatives and state legislature) drawn without majority-minority districts to “optimally” distribute blacks to shore up the reelection chances of white Democrats might indeed have slowed the pace of Republican growth (for a discussion of the 1990s, see Grofman and Handley 1998). It is our view, however, that they could not have prevented it.

In any case, what’s done is done. For example, as whites have fled the Democratic party in recent redistricting decades, the average proportion black within U.S. House districts in the South needed to push the probability of Democratic victory over 50 percent has gone up. Now levels of white support for Democratic congressional candidates in the South are so low that the only present southern House districts where the chances of Democratic victory are over 50 percent are those drawn with at least a 40 percent black population (see table 15.3). Barring new realignment trends, or the elimination of all or virtually all majority-minority seats in the South and the drawing of plans aimed largely to maximize Democratic strength—one of which we wouldn’t want and the other of which we couldn’t get, the Republicans will continue to control the majority of southern House districts for the immediately foreseeable future.

In the remainder of this chapter we consider various questions about the scope and content of a new section 5, such as the nature of the section 5 trigger to determine which jurisdictions are to be covered. We also look at the arguments for pressing for
TABLE 15.3 / Electing a Democrat: South Only, 1962 to 2002

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<tr>
<th>Year</th>
<th>0 to 10%</th>
<th>11 to 20%</th>
<th>21 to 30%</th>
<th>31 to 40%</th>
<th>41 to 45%</th>
<th>46 to 50%</th>
<th>51 to 55%</th>
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<th>61 to 70%</th>
<th>More than 71%</th>
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<td>82.5(40)</td>
<td>96.2(52)</td>
<td>89.1(46)</td>
<td>88.9(9)</td>
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<td>69.8(63)</td>
<td>66.7(57)</td>
<td>85.3(75)</td>
<td>75.0(60)</td>
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<td>100(3)</td>
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<td>—</td>
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<tr>
<td>1972 to 1980</td>
<td>65.4(104)</td>
<td>66.9(151)</td>
<td>79.0(99)</td>
<td>76.3(110)</td>
<td>76.7(30)</td>
<td>100(5)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1982 to 1990</td>
<td>56.2(130)</td>
<td>60.9(174)</td>
<td>78.2(101)</td>
<td>68.4(95)</td>
<td>100(20)</td>
<td>100(1)</td>
<td>100(1)</td>
<td>87.5(8)</td>
<td>100(5)</td>
<td>—</td>
</tr>
<tr>
<td>1992 to 2000</td>
<td>27.2(235)</td>
<td>57.1(140)</td>
<td>40.0(105)</td>
<td>80.0(15)</td>
<td>80.0(5)</td>
<td>—</td>
<td>100(20)</td>
<td>88.0(25)</td>
<td>91.4(35)</td>
<td>—</td>
</tr>
<tr>
<td>2002</td>
<td>24.4(45)</td>
<td>34.5(29)</td>
<td>38.1(21)</td>
<td>44.4(9)</td>
<td>80.0(5)</td>
<td>100(2)</td>
<td>100(3)</td>
<td>100(5)</td>
<td>100(3)</td>
<td>—</td>
</tr>
</tbody>
</table>

Source: Authors’ compilations.

Note: Entries are the percentage of districts won by the Democratic candidate with the total number of districts in that category in parentheses. Ten state south: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.
renewal of a section 5 whose scope and administration is essentially the same as at present, as opposed to agreeing to a scaled-back version. The key issue here is whether the section might usefully be confined to redistricting (and perhaps annexation), rather than including all possible electoral law changes. Another important question is whether the section 5 language should be rewritten so as to make it clear that Congress wants the courts to enforce the legal interpretation of section 5 that prevailed before Georgia v. Ashcroft. But before we turn to those questions, one further complexity needs to be addressed.

In thinking about the importance of renewing section 5 we believe that it is important to see section 5 as paired in an important way with section 2. The expected long run legal interpretation of the section 2 standard has ramifications for the importance of renewing section 5. Although Georgia v. Ashcroft’s immediate dramatic impact is on the interpretation of section 5, in the long run, it may prove even more important because of its spillover effects on the interpretation of section 2 of the VRA. Without too much overstatement, as section 2 goes, so goes the importance of section 5. As long as section 2 is in place as a fallback route for those concerned with protecting against minority vote dilution, it is possible to more readily contemplate a world without section 5—especially a world without section 5 as it has been constrained and reinterpreted by the U.S. Supreme Court (compare Pitts 2004) and enforced by a Department of Justice controlled by Bush 43. But if section 2 is rendered toothless by future Supreme Court cases—as it might well be—then there is much greater need to worry about whether we’ll have section 5 in any form as a safeguard against the very worst retrogressive outcomes. Additionally, in our view, the prospects for the continued health of section 2 are not good. Justice O’Connor’s opinion in Georgia v. Ashcroft has been taken by some lower courts as a wedge to justify weakening section 2, and that wedge may well turn into a battering ram over the course of the decade.

SCOPE AND APPLICABILITY OF THE “NEW” 5 AND 203

Although it might seem straightforward to renew section 5 essentially as is, by simply leaving all present language intact and adding 2004 as a year to be used to determine which additional jurisdictions not already covered are to be covered by either the “registration and turnout in presidential elections” clause or the use of a “voting test or device” clause, we believe that the political and constitutional reality is considerably more complicated. There are many important strategic and tactical issues to be faced by advocates of renewal.

Choosing Triggers for Coverage

In 1975, when the initial political participation trigger for section 5—less than 50 percent of person of voting age being registered or voting in the presidential elec-
tions of 1964 or 1968—was amended, the change was one directional. Specifically, it added jurisdictions that, in the 1972 presidential election, had less than 50 percent of eligible voters registered or voting to the list of jurisdictions already covered. In the 1975 renewal, if a jurisdiction no longer was a voting rights malefactor, it had to prove this by satisfying the “bailout” provisions of the act. The same has been true ever since.

Certainly that simple idea can be applied to renewal today as well, because all we would be doing is checking to see if any jurisdictions should be added to the present list. If, as we would expect, only a few or even no jurisdictions were added, it would not appear to pose any real problem. On the other hand, the fact that jurisdictions whose coverage was triggered in part by inadequate registration or turnout levels in 1964 or 1968 or 1972, might have current registration levels and turnout (at least in presidential elections) that would no longer make them eligible for coverage under either a registration or turnout as a ratio of CVAP test might also seem to be no real problem, either. As noted earlier, to show that they no longer require federal supervision, all a jurisdiction needs do is show itself eligible for bailout. Thus, bailout is the way out for any jurisdiction whose present (and durable) “clean hands” show that continued federal supervision of the jurisdiction’s electoral rule changes is no longer needed.

But, we find this renew as is approach problematic for two reasons. First, we are skeptical that the U.S. Supreme Court will find constitutionally acceptable the notion Congress may choose to make the triggering factors for section 5 that applied thirty to forty years ago to automatically continue to apply. Second, and equally important, we are skeptical of the relevance to vote dilution of the turnout and registration trigger factors as they have historically been applied. In our view they answer the wrong questions. In particular, if we are to use registration or turnout figures two elements seem clear to us. One is that the data should include both mid-term and presidential years, given the vast discrepancies in turnout between the two, and not just be restricted to the high turnout presidential years. The other is that the relevant registration and turnout data should specifically be for the covered minorities, not for all voters. Here it simply makes no sense that a jurisdiction can avoid coverage if Anglos and whites have registration and turnout levels high enough to compensate for below 50 percent electoral participation by the minority voters in the jurisdiction, no matter how low that minority participation rate might be.

Deciding on Changes to be Covered

We think that it would be helpful for the civil rights community to recognize that some aspects of section 5 may impose a higher administrative burden on the states than is now justified by their importance as a tool for protecting minorities—at least as long as a strong section 2 provision is in place as a back-up. Certainly it is worth considering the possibility of confining the scope of preclearance to redistricting and annexation, rather than including all possible electoral law changes (for example, changes in the location of ballot boxes,
changes in registration hours, and the like). It is not that the latter seemingly
minor changes in election practices cannot be used in a discriminatory fashion.
They can be and have been. It is rather that requiring preclearance submission
to DOJ of these numerous and recurrent changes in rules involves a very large
amount of jurisdiction and DOJ paperwork relative to the apparent payoff, and
discriminatory practices that arise as a result could be dealt with in other ways.
There is always the possibility of a section 2 challenge to such practices—albeit
sometimes after the fact—but it would seem to us to make sense to add the
strongly deterrent bite that any jurisdiction found violative of section 2 could
then be required for a defined time period to submit any and all of its electoral
changes for DOJ preclearance. Also, perhaps some type of expedited adminis-
trative hearing process could be set up to deal with challenges that must be
decided before (or on) election day. By generally limiting section 5 review to
practices that were challenged, except for changes that have such powerful
potential impact on the minority community that advance review seems
compelling, such as redistricting and annexation, the costs imposed on both
jurisdictions and DOJ by section 5 enforcement might be reduced. Moreover, for
topics related to registration, including changes with great discriminatory
potential such as voter purges, it might make sense to deal with these as part of
HAVA rather than the VRA, as part of making more uniform the treatment of
voting practices throughout the nation.

Evaluating whether new language ought to be added to, in effect, reverse some
(most?) of the Supreme Court reinterpretations of section 5 over the past decade
plus, we find ourselves torn as to what our recommendation should be about a
drive to restore the section 5 retrogression test to the pre-Ashcroft standard repre-
sented by Beer. 28 There are strong reasons of principle to argue that the pre-
Ashcroft interpretation of section 5 must be restored. The standard that was laid
down in that case, on the one hand, robs the provision of its central justification
and, on the other hand, is intellectually incoherent. Yet, having said that, we would
also note that pragmatic considerations point in the opposite direction, because the
need to agree on a draft of new language that is different from the present section
5 language may cause fractures in the coalition behind section 5 renewal, and an
insistence on that restoration to the Beer standard may doom any renewal of sec-
tion 5 in the Supreme Court in that any attempt to suggest that potential electabil-
ity of minority individuals rather than overall influence of minority voters as a
group is the heart of a nonretrogression test risks such a (restored) section 5 being
held by a majority of the present members of the Court to be an excessive and
improper use of congressional authority under the Civil War amendments.

Still, despite the fact that we have elsewhere (Grofman forthcoming) sought to
provide a coherent interpretation of the Georgia v. Ashcroft test by specifying the
nature of the relevant social science expert witness testimony, 29 and despite our
concern that any attempt to reverse Georgia v. Ashcroft may lead to a Supreme
Court backlash against the continuing constitutionality of the Voting Rights Act,
we would like to put on the record our reasons for considering Georgia v. Ashcroft
not to be a well-thought-out decision.
First, we believe that “minority influence” is an inherently murky concept, and that voting rights standards defined in ways that do not require the precise measurement of minority influence make the task of statutory interpretation for courts much harder. In contrast, the previously used operationalization of the section 5 test, specified in terms of changes in the number of districts in which minorities have a realistic opportunity to elect candidates of choice, offered a relatively straightforward and clearly manageable standard. In reinterpreting Beer, the Court has moved away from a singular focus, on comparing opportunity to elect under the proposed and the benchmark plan, to a much more complex and multifaceted approach about whose operationalization existing case law offers no real guidelines. This is particularly ironic given the Court’s decision in Vieth v. Jubilerer (539 U.S. 957), when justices who were in the majority in Georgia v. Ashcroft took the position that, without clear standards, partisan gerrymandering ought to be nonjusticiable.

Although the approach proposed in Grofman (forthcoming) and Grofman and Handley (2006) could go a long way toward resolving many of the ambiguities in operationalizing minority influence in the section 5 context, certain issues are still unresolved. For example, Karlan (2004, 22, 33) has called attention to the fact that the reasoning in Georgia v. Ashcroft seems inconsistent with that in cases such as Presley v. Etowah County Commission (502 U.S. 491), where the Supreme Court asserted that governance issues did not fall within the scope of section 5. Yet what is partisan control of the legislature about, or how many minorities hold committee chairmanships about, if it is not about governance?

Second, Justice O’Connor’s majority opinion in Georgia v. Ashcroft introduces a new and truly strange procedural element into the section 5 review process—what could be called the standard-switching option. The opinion holds that states are apparently free to elect one of two theories of representation. The descriptive theory entails districts in which minorities have the opportunity to elect candidates of choice (many of whom might be expected to be themselves, members of the minority community). The substantive theory involves districts that will elect candidates who are responsive to minority interests. It would appear that it is entirely up to the jurisdiction to decide which theory of representation it wishes to use in its preclearance submission documents to justify its plans.

Third, the standard switching option in Georgia v. Ashcroft is an open invitation to partisan gerrymandering in allowing Democrats and Republicans to seize whichever standard, descriptive or substantive, will best help them to achieve their partisan objectives when they defend plans subject to section 5 preclearance review. In legislatures controlled by Democrats, the Democrats will seek to subtract African Americans, or Democratic-leaning Hispanics, from heavily minority districts, in the name of increasing minority influence—with the real goal being the subjugation of Republican voting strength and the perpetuation of Democratic control. In legislatures controlled by Republicans, the Republicans will seek to add African Americans, or Democratic-leaning Hispanics, even to districts with substantial minority populations, in the name of increasing minority opportunity. Thus, in states controlled by a given party, members of that party
may be aided in pursuing their real goal of achieving dominance over the other party by being able to argue that they are seeking to satisfy section 5. 38

Fourth, by identifying as elements that need to be taken into account in a section 5 inquiry such matters as the whether the party to which most minority members are affiliated can be expected to retain control of the legislature under one plan but not under another, the majority opinion in Georgia v. Ashcroft forces the voting rights section of the Department of Justice to move away from strict concerns of racial representation to matters that are unavoidably and indubitably partisan. By and large, until quite recently, the staff attorneys of the voting rights section had been insulated from the political concerns that might be important to some of the department’s political appointees. 39 But, if electing Democrats may be expected, other things being equal, to increase minority influence—and the majority opinion in Georgia v. Ashcroft comes perilously close to saying just that—it should come as no surprise that, when Republicans control the White House and the Office of the Attorney General, they might want to make sure that section 5 is not interpreted in such a fashion as to prevent Republicans from drawing lines that would reduce the number of Democrats elected. One way to do this is to take control of critical section 5 reviews out of the hands of DOJ’s nonpolitical (and, in my experience, sometimes almost inhumanly apolitical) staff attorneys.

There is evidence that this dynamic may already be at work: namely the absence of the chief of the Voting Rights Section’s signature on the 2003 letter granting preclearance to the Texas congressional plan. 40 That preclearance rejected the views of staff attorneys as to the presence of a section 5 violation. The removal of DOJ staff attorneys from the preclearance process on a re-redistricting plan drawn by Texas Republicans as a superbly artful gerrymander aimed at adding at least five more Republican members to the U.S. House of Representatives certainly suggests a real politicization of the section 5 preclearance process—an internal power shift away from DOJ’s long-term voting rights attorneys toward the political appointees. 41 A spate of recent resignations in the voting rights section only reinforces these fears.

Fifth, the Court takes as given what needs to be proven. Yes, there may be a conflict between maintaining the number of districts where minorities have realistic opportunity to elect candidates of choice and increasing the number of districts where minorities have influence, but I would insist that it is necessary to empirically demonstrate such an incompatibility, not merely to assert it. 42 There may well be plans that improve both descriptive and substantive representation. We believe that many supposedly empirically grounded claims about the fundamental incompatibility of the two goals are exaggerated (see especially Grofman and Brunell 2005). 43 In Hannah Pitkin’s typological approach (1967), the categories of descriptive and substantive representation are distinct, but not mutually exclusive. 44 It is quite possible for a plan to advance both descriptive and substantive representation of minorities. For example, to the extent that minority candidates of choice have a “commonality of fate” with minority voters, they may naturally share interests (Mansbridge 1999, 2003; Tate 2003; see also Whitby 1997). Moreover, if minority representatives who are minority candidates of choice are elected from very
heavily minority districts, they almost certainly need to rely on minority votes for their (re)election, and thus need to be responsive to minority concerns, lest they face a successful primary challenge from another minority candidate who alleges that they have neglected this community.\textsuperscript{45}

Sixth, we see Georgia v. Ashcroft as offering a solution for an essentially nonexistent problem, because DOJ section 5 preclearance in the 2000 redistricting round was very modest in its ambitions, and consistent with the strictures restricting the scope of DOJ action imposed by the Supreme Court in the 1990s.\textsuperscript{46} Yet these differences between DOJ practices about 2001 and DOJ practices about 1991 seem to have escaped the notice of the Supreme Court in Georgia v. Ashcroft.\textsuperscript{47} Although our perusal of the evidence is only impressionistic, in comparing the 1990s round and the 2000 round of redistricting, we believe it hard for anyone to dispute that, in 2000, DOJ was exercising much greater caution in deciding on which district merited an objection under section 5 than in the 1990s, and was pursuing a functional rather than simply an arithmetic approach to operationalizing retrogression.\textsuperscript{48}

Seventh, and last but far from least, we believe that, fundamentally, the Voting Rights Act was passed to deal with minority exclusion from the ballot box, on the one hand, and from elective office, on the other—not with the lack of minority influence as such (compare Davidson 1992). Thus we find the Court majority stretching history to construe the section 5 language by giving potential primacy to minority political influence in the fashion that it has. In our view, once black enfranchisement had been achieved, the history of voting rights enforcement at the state legislative level and congressional level has largely involved successful lawsuits (and use of preclearance denials) to end the practice of the Democratic party using black (or Hispanic) voters as sandbags to shore up the reelection chances of white Democrats. Although this point can too easily be exaggerated, the Georgia v. Ashcroft opinion does at least raise the specter of a return to that practice.\textsuperscript{49}

**DECIDING ON THE SECTION 203 TRIGGER**

Although even many opponents of section 5 renewal are likely to agree that the section was once needed but to assert that it is no longer, views about section 203 are even more polarized. Opponents of this section reject the justification for requiring ballots in a language other than English. In their view, ought not U.S. citizens at least have the minimal literacy in English necessary to complete a ballot in that language? And, after all, how complex can it be to make the appropriate number of x’s by a set of names? Moreover, in a post 9/11 world, not developing competence in English may be seen as an indicator of an unwillingness to accept American values. Also, just as with section 5, opponents of section 203 would emphasize the high administrative costs involved, especially for large jurisdictions.\textsuperscript{50}

Just as evidence showing the continued need for section 5 will be critical, we think, if the constitutionality of DOJ preclearance powers is to sustained by the present U.S. Supreme Court, so we believe that compelling evidence showing the
continuing need for section 203 must be part of the evidentiary record in Congress if one is to expect the current Court to see section 203 as a legitimate extension of congressional Civil War powers. We are skeptical that one can count on the continuing vitality of Court precedents seeing access to instruction in one’s native language as constitutionally mandated, even as here when the context is the protection of the fundamental right to vote.

Moreover, even if the continuing need for section 203 is accepted, the question of the trigger still needs to be addressed. Is a 5 percent population threshold, along with certain numerical thresholds, a reasonable way to balance concerns about effective exercise of the franchise by those for whom English is not a native language against the costs and administrative burdens placed on local election officials in simultaneously preparing ballots and ballot materials in multiple languages?51 Here, in looking for justification for section 203, it seems to us that more empirical research is needed on the comprehensibility to nonnative English speakers of the texts of initiatives and referenda, whose dense, complex and esoteric phrasing can—as the present authors will readily attest—challenge the interpretive skills even of a native speaker of English with a Ph.D. in political science.

CONCLUSION

Section 5 renewal should be seen as a two-stage game—Congress and Supreme Court—requiring a number of critical decisions by renewal advocates to steer between Scylla and Charybdis, that is, between renewal language unduly weakened in Congress, and so strong that it will lead to the Supreme Court rejecting DOJ’s preclearance authority. In justifying renewal of section 5 and section 203, contemporary and compelling empirical evidence of the continuing need for these provisions will be critical (compare Issacharoff 2004 and Pitts 2005b).

A useful metaphor for Supreme Court review in terms of its fundamental test of “congruence and proportionality” is what we will call the “scales of constitutionality.” On one side of the scales, the more the civil rights community gets its way in making the provisions of the act highly inclusive—the more racial or ethnic or linguistic groups that are covered, the greater the range of the electoral activities that must be precleared, the greater the number of jurisdictions covered by section 5, the weaker the thresholds for section 203 coverage, the longer the period of renewal, and (perhaps most important of all) the greater the extent to which Supreme Court decisions about how to interpret section 5 get overturned—the more likely it is that the Supreme Court will just say no. On the other side of the scales—the greater the weight and recency of the evidence that particular groups need to be covered because they still are victims of ongoing discrimination, the greater the evidence that the particular electoral rules that are covered are ones that have been manipulated so as to minimize or cancel out minority voting strength, the more the evidence presented at congressional hearings is specific to the jurisdictions that the new trigger provisions of the act propose to cover, the greater the evidence that the language provisions of the act have been beneficial.
not just to recent immigrants but even to those born in the United States whose schooling has not prepared them well for coping with complex ballots and ballot explanations in English only (such as California’s often complicated referenda), the shorter the time period for renewal, thus assuring that the act could be reviewed in the light of changing circumstances rather than freezing into place assumptions about racial inequities, and the easier the requirements for allowing jurisdictions (including those within states) to “bail out” from coverage—the more likely it is that the Supreme Court will continue to see section 5 and section 203 as legitimate exercises of congressional powers to implement the Fourteenth and Fifteenth Amendments.

NOTES

1. Once upon a time, in a land far away, there was another principled wing of the Republican party, the Everett Dirksen wing, the one that thought of reconstructionist race politics as its link to the legacy of Lincoln, but that wing of the party is at present close to nonexistent. Nonetheless, its few remnants are likely to be absolutely crucial in negotiating the specific language to go into the renewal of the act.

2. For example, when George W. Bush was elected for the first time in 2000, the proportion of minority southern Democratic members of the House of Representatives was higher than the minority share of the state population in most Deep South states—sometimes much higher. (One example is Georgia, where in 2000 the entire Georgia House Democratic delegation was black. Another is Alabama, Louisiana, and South Carolina, where 50 percent was. Still another is North Carolina, where 40 percent was. Only in Mississippi and Virginia was black share of the state’s Democratic congressional delegation in 2000 roughly equal to its minority population share—and of course, even in these states the only black members of Congress are from the Democratic party.)

3. A. Wuffle (personal communication, April 1, 1999, quoted in Grofman 2000) has likened section 2 and section 5 in the 1990s to the two fists of a boxer: section 2, followed by section 5 being like the famous one-two knockout punch—the first to set up the districts, and the second to nail them in place.

4. Table 15.1 parallels earlier analyses that we (and our co-authors) have produced (see especially Davidson and Grofman 1994; Grofman and Handley 1991; Handley, Grofman, and Arden 1998).

5. We see this case as potentially more important for voting rights jurisprudence than Shaw v. Reno, the case widely thought to be the most important voting rights decision of the 1990s.

6. Mark Braden has observed (personal communication, 2003) that the specific group most affected by Georgia v. Ashcroft is likely to be Hispanics. In Congress, and in state legislatures, most of the black majority, or near majority, districts that could have been created are already in place, and blacks are a declining proportion of the total electorate, except in a handful of states. We should therefore not expect to see new black majority seats created because of population growth. For Hispanics, the fastest growing minority in the United States, in covered jurisdictions such as Texas, a nonretrogression test
based on the number of effective minority districts would help freeze into place addi-
tional majority Hispanic seats that are a product of the growth in the Hispanic popula-
tion over the previous decade. On the other hand, the likelihood of Democrats trying to
use Hispanics as sandbags to prop up the election or reelection chances of non-Hispanic
white Democrats increases under an interpretation of section 5 that includes the notion
of minority influence.

7. For proponents of the Voting Rights Act who see the act as a means of integrating the
halls of government in some substantial way, the Georgia case can only be seen as set-
ting a dangerous precedent. For partisan Democrats who see the election of more
Democrats as critical to representing minority interests, however, the decision is far
less troubling, and has even been welcomed. However, the Democratic party is not
necessarily the automatic beneficiary of the Georgia v. Ashcroft reinterpretation of sec-
tion 5. As Mark Braden, a leading Republican voting rights attorney, pointed out (per-
sonal communication, June 26, 2003), a good case can be made that Georgia v. Ashcroft
should be thought of as a victory for the haves. In covered jurisdictions, those who are
in charge of the redistricting process will be less constrained by section 5 than was
once the case, and will be better able to pursue a partisan agenda. For example,
Republicans are likely to advocate the continuation (or even an increase) in the num-
ber of effective minority districts when in control of the redistricting process. In the
hands of Democrats, however, redistricting is more likely to lead to the substitution of
influence districts for effective districts with the accompanying argument that this is
the path to greater overall minority electoral impact.

8. On balance, Republicans in Congress may decide it is the better part of valor to not
take on minority civil rights advocates directly, and to let the drafting of proposed lan-
guage be largely in the hands of the voting rights community, knowing that the ulti-
mate interpretation of any new section 5 language is something that will be fought
over in the Supreme Court.

9. Although there is always the potential for presidential veto, it is not something we
deem likely. President Bush and congressional Republicans are likely to be working
together to shape a common policy vis-à-vis the language used in the renewal.

10. If section 5 is renewed, it will, however, take a while for a court case involving the new
language to work its way through the system. For example, after the 1982 changes in
section 2 language, the first district court case involving its constitutionality was
heard in 1984, and that case was not decided by the Supreme Court until 1986
(Thornburg v. Gingles, 478 U.S. 30). Because we are so late in the decennial cycle, it
might seem that a constitutional test of any new section 5 language and triggering
mechanisms might be delayed until the next redistricting round, but we doubt that. If
nothing else, some re-redistricting in a covered state might serve as an appropriate
vehicle for such a test.

11. Having Republicans advocate a stronger version of section 5 than they think can pass
Supreme Court scrutiny would be a tactic analogous to what, in the Public Choice lit-
erature (Riker 1965) is known as offering a killer amendment—one that is proposed
by those who want a bill to fail. The amendment, in appearance, is one highly attrac-
tive to the bill’s most enthusiastic advocates, but also one that might not be expected
to pass. However, some legislators who oppose the bill support the amendment,
allowing it to pass with their support and those of the bill’s more extreme supporters. The legislators offering the killer amendment then reverse their position on the vote on final passage of the bill by voting their true preferences. Because the bill has been amended in a way that actually does not command majority support, the amended bill then fails. Here it would be the Supreme Court that is the ultimate “killer.”

12. The Court will need convincing that anything even remotely approximating the kinds of discrimination, including exclusion from the franchise, that were found in 1965 (and whose lingering effects persisted into the 1980s)—the historical realities seen as justifying the extraordinary intervention into and control over state electoral processes that the VRA imposed—can be found today.

13. This work shows flaws in the rather negative portrait of black representatives in earlier work such as Carol Swain (1993), and also casts doubt on the notion that white representatives and minority representatives are equally adept and equally motivated to serve minority interests.

14. In California, for example, there are U.S. House districts electing black candidates that do not have a majority of black voters, but do have a clear majority of black and Hispanic voters.

15. For useful reviews of recent literature on race and representation see Seth McKee (2004) and Bernard Grofman (2005).

16. But representatives, regardless of race or ethnicity, will, however, often, ceteris paribus, pay more attention to the voters who have voted for them than those who have not. But voters who are seen as implacable opponents, as well as voters who are seen as “having no where else to go” may well have less influence than their numbers might seem to suggest. This general “them” is explored in more depth in Bernard Grofman (2005).

17. The political science literature refers to this as a “top-down” realignment.

18. In fact, arguably, in many southern states it was the failure of Democrats to properly interpret the handwriting on the wall that led to Democratic losses in excess of what should have occurred as Democrats drew what Bernard Grofman and Thomas Brunell (2005) refer to as “dummymanders,” that is, redistricting plans drawn by one party that, at least with hindsight (and arguably with foresight, as well), look exactly like partisan gerrymanders drawn to favor the other party.

19. Indeed, more generally, unlike Ruy Teixeira and some other Democratic polyannas, we do not expect longer-run demographic and social trends to inevitably favor Democrats. In particular, we are skeptical about the feasibility of what A Wuffle (personal communication, April 1, 2004) has called the “waiting for Godez” cure for what ails the Democratic party. Not only would new Hispanic citizens have to have higher probabilities of being registered and voting than we would expect, but there is no good reason to believe that Hispanics will somehow remain invulnerable to the trends that have turned large numbers of other working class and middle class Catholics into Republicans. Thus, when we look beyond the South, we see a closely divided House of Representatives, probably with a Republican majority, as likely to be with us for a while.

20. The parallel would be congressional intent in 1982 to restore the pre Mobile v. Bolden (446 U.S. 55; 100 S. Ct. 1490) standard for determining vote dilution—namely, an
effects test viewed in the totality of the circumstances that did not require direct evidence of intentional discrimination.

21. If the reach of Georgia v. Ashcroft’s influence approach extends to section 2, then its impact would be nationwide, not confined to the states covered either in whole or in part by section 5.

22. Recall that we earlier cited a characterization of section 2 and section 5 as they operated in the 1990s as a one-two knockout punch.

23. Indeed, it might even seem highly desirable that the number of covered jurisdictions shrink (or at least not expand greatly), because the presumed justifications for section 5 are unlikely to be as compelling in 2005 as they were in 1965, when Jim Crow was still alive and reasonably well. However, there are countervailing considerations involving voting rights issues for other groups, most notably American Indians, occurring in jurisdictions in the west and southwest that are not presently covered under section 5.

24. Patterns or practices found in 1964 or 1968 or even 1972 seem sufficiently remote from 2007 that, if, say, registration or turnout is to continue be used as a trigger for section 5 coverage, it might seem to make sense to use only more recent data. But if we were to include only jurisdictions whose level of registration and CVAP turnout based on 2004 data fell below the 50 percent threshold, there would be no, or almost no, section 5 coverage at the state level. Using turnout as a proportion of voting age population as the trigger, my initial analysis of state-level turnout data from the 2004 presidential election compiled by Michael McDonald (George Mason University, http://elections.gmu.edu/Voter_Turnout_2004.htm) revealed the fact that only one of the nine states presently covered in whole by section 5 (Texas) would remain covered if low turnout in 2004 was the sole criterion, although two other states not presently covered in whole at present (Arizona and California) would be eligible for statewide coverage. There would be some additional states (for example, Hawaii and Nevada) that would fail a statewide turnout test based on VAP in 2004. But these states would probably not fail if CVAP and not VAP were in the denominator. Moreover, for these states, the applicability of the tests or devices component of the section 5 trigger would need to be demonstrated. However, if citizen voting age population data rather than voting age population data were used to define the trigger, as was the case in the 1975 renewal, then almost certainly none of the states presently covered state-wide would remain with statewide coverage.

25. The U.S. Census Bureau has been charged with the determination of which jurisdictions meet the various turnout and registration trigger provisions that have been used in the past. As Daniel Levitas (personal communication, June 2005) reminds us, when the Census Bureau determined which states fell under the trigger mechanism in the past, they used a complex mix of census micro-sample data and state-specific registration and turnout data produced by various secretaries of state (see for example, June 1976). Scholars who wish to anticipate the Census Bureau determination will need to familiarize themselves with its approach or determine whether—given problems both with the PUMS micro-sample data and state registration and turnout data bases—there are better ways to estimate minority participation rates that might be written into the trigger formulae.
26. Also, we might see the 2004 election as atypically high in voter participation because of media-fed voter perceptions that this election might be the political equivalent of a photo-finish.

27. Indeed, it seems clear to us that, in practice, with any reasonable trigger, the set of jurisdictions we can expect to be covered will be a subset of those now covered. In particular, some states now covered in whole may end up only covered in particular counties.

28. There are other recent cases other than Georgia v. Ashcroft in which the Court has dramatically reduced the scope of Justice’s section 5 enforcement powers under the act—most notably Presley v. Etowah County Commission (502 U.S. 491) and Reno v. Bossier Parish School Board (520 U.S. 471, and 528 U.S. 320). Here, too, the civil rights community might wish to ask Congress to clarify for the Supreme Court the correct interpretation of congressional intent vis-à-vis various specific language in the act. However, none of these cases is, in our view, anywhere as important for the future of voting rights enforcement as Georgia v. Ashcroft.

29. As a social science expert who often testifies in voting rights cases, one of the authors in this volume, Bernard Grofman, has recognized that it is now essential for the D.C. court and for the U.S. Department of Justice to flesh out the relatively sketchy framework for specifying overall minority influence offered in Georgia v. Ashcroft to delineate manageable legal standards for section 5 preclearance decision-making in the light of that Supreme Court decision. To that end he has written an essay offering social science perspectives on operationalizing Justice O’Connor’s approach (Grofman forthcoming), and co-authored with Lisa Handley an empirical sequel to that essay in which we apply its three-pronged test of retrogression to data on 2001 plan for the Georgia Senate involving comparison between that plan and the 1997 benchmark plan, on the one hand, and the 2002 consent plan on the other (Grofman and Handley 2006). The two essays described above take the statutory interpretation of section 5 offered by the Supreme Court majority as given. The contribution intended for those papers is to bring social science expertise to bear on ways to empirically operationalize opportunity to elect and influence-based standards in an appropriate fashion that is consistent with Georgia v. Ashcroft. The views expressed below are those of a concerned citizen.

30. Speaking as a citizen, I hope that the concept of influence will not become unduly influential in voting rights jurisprudence. For a similar view about the problematicity of an influence standard, see the discussion in Jason Bordoff’s (2003) note dealing with Georgia v. Ashcroft as a leading case of the 2002 Supreme Court term, and see Pamela Karlan (2004). We are particularly worried about “mission creep” between the role of an influence test in section 5 jurisprudence and the role of influence in section 2 jurisprudence.

31. Of course, applying even this standard requires careful empirical analysis (for extended discussion, see Grofman 2005).

32. It is worth remembering in this context that, the Beer court in effect, redefined the effects language of section 5 to restrict it to retrogressive effect (compare Pitts 2005a).

33. Moreover, the way in which the discussion of section 5 is couched in Georgia v. Ashcroft sometimes suggests as much of an interest in legislative intent as in what actually happened (see discussion of this point in Pitts 2005a).
34. Here the Court is borrowing from ideas of the noted political theorist, Hannah Pitkin (1967).

35. A. Wuffle (personal communication to the author, April 1, 2004) has suggested that this standard switching sounds an awful lot like leaving it to the criminal to decide with what crime she or he should be charged, and has imagined the following (tongue-in-cheek) dialogue:

Criminal. “I could plead not guilty to the rape charge, but, just in case you might convict me of rape, anyway—based on the evidence—I’ve decided, instead to plead instead not guilty to murder. I know I’ll be acquitted on that charge.”

Prosecuting Attorney. “OK, even though you’re clearly guilty of rape, since we can’t find you guilty of murder, I guess I have no choice under the crime-switching option the Supreme Court gave you but to let you off scot free.”

36. Pamela Karlan (2004) has argued there is a potential logical inconsistency here. As long as the number of districts where there is a realistic opportunity to elect is maintained, according to Georgia v. Ashcroft, it would apparently not violate section 5 if a plan eliminated all influence districts and made sure that the party supported by the minority community had no chance to control the legislature. So, in this descriptive representation defense to a retrogression claim is proffered, jurisdictions need not concern themselves with overall minority influence. But if evaluating overall minority influence (effective exercise of the electoral franchise) is the sine qua non of section 5, then it would seen that this litmus test needs to be applied to all plans, and thus we should look both at what happens to realistic opportunity to elect and at overall influence, not at one or the other.

37. Pamela Karlan, in her usual incisive prose, has made the point well by calling attention to the irony of the Supreme Court talking about a jurisdiction being allowed to choose between two different ways to “maximize the electoral success of a minority group” (2004, 31). As she notes, “Georgia hardly had a history of ‘choosing’ to ‘maximize’ black voting strength. The very real danger was that Georgia would pick a method of redistricting designed to minimize the electoral success of black voters—as it had undeniably done in the 1970s and 1980s” (31). At best, one might hope that the success would be a “byproduct” of other concerns on the part of the white Georgia Democrats.

38. The only exception will be the rare district that elects a Hispanic Republican. Because such a candidate is unlikely to be the candidate of choice of the Hispanic community (with southern Florida a major exception to this rule), the Republicans will seek to reduce minority population to guard that Hispanic Republican against a loss to a Democratic Hispanic candidate (as occurred in one district in the 2003 re-redistricting in Texas for seats to the U.S. House of Representatives).

39. Yes, there are exceptions, but, in my view, they are relatively few and far between.

40. I am indebted to J. Gerald Hebert, a former attorney with the Voting Rights Section of DOJ for calling this point to my and the media’s attention.

41. Of course, the political forces at DOJ taking over the review of the 2003 plan for the Texas delegation’s representation in the House of Representatives from the hands of
the line attorneys probably cannot be blamed on the new political content of the section 5 review standard vis-à-vis influence. Given the political importance of the Texas re-redistricting to Republican hopes of maintaining a lock on control of the U.S. House for the foreseeable future, and the apparent willingness of DOJ political appointees to place more weight on achieving with certainty desired outcomes than on the nature of the processes that lead to these outcomes, the same type of “special process” for the section 5 review of the redrawn Texas congressional plan may have been inevitable regardless of how Georgia v. Ashcroft had been decided.

42. I generally share Pamela Karlan’s point (2004, 36) that Georgia v. Ashcroft suggests that the Voting Rights Act is becoming a victim of its own success (see also Pildes 2002). Now that black and other minority representatives have been elected in reasonable numbers as a result of the creation of black majority seats, courts seem reluctant to recognize just how difficult this achievement was, and how bitterly resisted by incumbent politicians. They fail to give section 5 and section 2 the credit they in fact deserve, but instead attribute minority electoral gains to the supposed racial goodwill of white politicians and the supposed reduced racial animus of white voters. However, I would also agree with congressional specialist David Rohde (personal communication to the senior author, January 9, 2004) that, as long as African Americans and Hispanics are in leadership roles within the Democratic party, and as long as Republicans find it in their partisan interest to create highly minority districts that pack Democratic voters, descriptive representation of minorities is likely to be preserved at near its present levels almost regardless of the legal climate vis-à-vis voting rights enforcement. On the other hand, I would also concur with the assessment of Republican voting rights attorney, Mark Braden (personal communication, June 26, 2003) that the racial or ethnic group most affected by Georgia v. Ashcroft is likely to be Hispanics. In Congress, and in state legislatures, most of the black majority (or near majority) districts that could have been created are already in place, and blacks are a declining proportion of the total electorate, except in a handful of states, so we should not expect to see new black majority seats created. For Hispanics, the fastest growing minority in the United States, in covered jurisdictions such as Texas, that is not true. A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.


44. Hannah Pitkin (1967) also refers to a third element of representation, which she calls formal representation, which I prefer to call linkage representation—by which is meant the electoral mechanisms that permit voters to designate and control their elected representatives. Formal (or linkage) representation, though distinctive, is in no way incompatible with either descriptive or substantive representation—indeed, quite the contrary. Depending on the characteristics of the constituencies and the preferences of the voters, linkage representation may enhance descriptive representation, and it is likely to be linked to the incentives for substantive representation.

45. In addition to posing an improper dichotomy between descriptive representation and substantive representation, the Court majority to clearly enough distinguish minority
candidates who are also minority candidates of choice from minority candidates who
are not candidates of choice of the minority community. Descriptive representation,
per se, is certainly not required by the Voting Rights Act. Rather that act protects
(among other things) the rights of minority voters to an equal opportunity to elect
candidates of choice. However, as I have emphasized in Grofman (forthcoming), and
in many of my previous publications, if that right is to be meaningful, it must include
the right to elect candidates of choice in situations in which the candidate of choice of
the minority community is himself or herself a member of that community.

46. In contrast, even if, like the present authors, one does not believe that the creation of
tortuously and bizarrely constructed majority-minority districts in the 1990s redistri-
cting round could be blamed on DOJ enforcement practices (Grofman and Handley
1998; compare Posner 1998); and even if, like the present authors, one does not think
that the new constitutional test in Shaw v. Reno was the best way to address the prob-
lem of “ugly” districts drawn for race-conscious purposes (Grofman 1997), there can
be little dispute that, in the 1990s there clearly was a perceived problem in the way
race-conscious districting was being implemented. Moreover, in the early 1990s,
Republican attorneys and some civil rights advocates had made implausible asser-
tions about what was required of covered jurisdictions by the Voting Rights Act. Thus
federal courts needed to provide some clarification about the scope of section 5.
Indeed, though our review of the data is both limited and impressionistic, in looking
at congressional and state legislative section 5 preclearance reviews by DOJ in the 2000
round of redistricting, we do not see that DOJ could be accused of overreaching.
Hence, when the Court majority unveiled a new section 5 standard in Georgia v.
Ashcroft that replaced the Beer standard, they were, in effect, building a new barn
when none was needed—the old door had already been locked and all the horses
were safe within. In particular, when we look at how DOJ assessed retrogression in the
2001 Georgia senate plan, we see that DOJ raised a preclearance objection to only a
handful of the many districts in that plan that had been severely decreased in their
African American share of the electorate, and that it failed to object to some Senate dis-
tricts where the State of Georgia’s defense against a retrogression claim under Beer
was, in our view, rather weak. (These points are elaborated in the Grofman and
Handley review of empirical evidence about Georgia redistricting plans (2006), but
the key factual observation is simply that there were more than two dozen districts in
the 2001 Georgia senate or house plans where there had been substantial drops in
black population and black VAP from the 1997 benchmark, but DOJ objected only to
three senate districts.

47. These changes in DOJ review practices for congressional and legislative redistricting
across the decades also do not seem to have been much noticed by legal commentators.

48. See, in particular, the comparison in Bernard Grofman and Lisa Handley (forthcom-
ing), of how DOJ handled the Georgia 2001 plans with DOJ’s treatment of Georgia’s
congressional and legislative plans in the 1990s.

49. On the other hand, it would be almost equally ironic if the Voting Rights Act of 1965,
passed with proportionally greater Republican than Democratic support, should be
interpreted as prohibiting retrogression in the number of districts that elect
Democrats—an interpretation that a too-casual reading of Justice O’Connor’s opinion
in Georgia v. Ashcroft might also seem to support.
The Future of the Voting Rights Act

50. For example, Mauro E. Mujica, chairman and CEO of U.S. ENGLISH Inc., a group that describes itself as “dedicated to preserving the unifying role of the English language” claims on its Web site that “Los Angeles County spent $3.3 million, 15 percent of the entire election budget, to print election ballots in seven languages and hire multilingual poll workers for the March 2002 primary” (http://www.us-english.org).

51. In a March 7, 2005, press release “Justice Department to Monitor Elections in Arizona, California, and Washington,” the Civil Rights Division of the U.S. Department of Justice announced proudly that, in 2004, a record number of 1,463 federal observers and 533 department personnel had been sent to monitor 163 elections in 105 jurisdictions in twenty-nine states. This compares to 640 federal observers and 103 department personnel deployed in 2000. Most of these jurisdictions are likely to be ones where the monitored counties, thus their subordinate jurisdictions, were obligated under section 203 of the VRA to provide voting material in one or more languages other than English. Presumably, this expansion in DOJ monitoring efforts primarily reflects the continuing and expanding multicultural heterogeneity of the U.S. population, as opposed to an increase in attempts to subvert section 203 provisions by covered jurisdictions, or a politically motivated push by a Republican administration for greater visibility within the Hispanic community of actions seen as benefiting Hispanics.

CASE LIST


REFERENCES


The Future of the Voting Rights Act


Pitts, Michael J. 2005a. “Georgia v. Ashcroft: It’s the End of Section 5 as We Know It (and I Feel Fine).” Pepperdine Law Review 32: 265–314.


AN ACT To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Voting Rights Act of 1965."

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SEC. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: Provided, That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.
(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure 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: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court’s finding nor the Attorney General’s failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4.

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: Provided, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for
five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 percentum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase “test or device” shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)

(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the
Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that, in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure 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, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General’s failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3(a), or (b) unless a declaratory judgment has been rendered under section 4(a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4(b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that, in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white
persons registered to vote within such subdivision appears to him to be reason-
able attributable to violations of the fifteenth amendment or whether substantial
evidence exists that bona fide efforts are being made within such subdivision to
comply with the fifteenth amendment), the appointment of examiners is other-
wise necessary to enforce the guarantees of the fifteenth amendment, the Civil
Service Commission shall appoint as many examiners for such subdivision as it
may deem appropriate to prepare and maintain lists of persons eligible to vote in
Federal, State, and local elections. Such examiners, hearing officers provided for
in section 9(a), and other persons deemed necessary by the Commission to carry
out the provisions and purposes of this Act shall be appointed, compensated, and
separated without regard to the provisions of any statute administered by the
Civil Service Commission, and service under this Act shall not be considered
employment for the purposes of any statute administered by the Civil Service
Commission, except the provisions of section 9 of the Act of August 2, 1939, as
amended (5 U.S.C. 118i), prohibiting partisan political activity: Provided, That the
Commission is authorized, after consulting the head of the appropriate depart-
ment or agency, to designate suitable persons in the official service of the United
States, with their consent, to serve in these positions. Examiners and hearing offi-
cers shall have the power to administer oaths.

SEC. 7.

(a) The examiners for each political subdivision shall, at such places as the Civil
Service Commission shall by regulation designate, examine applicants
concerning their qualifications for voting. An application to an examiner
shall be in such form as the Commission may require and shall contain alle-
gations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions
received under section 9(b), to have the qualifications prescribed by State
law not inconsistent with the Constitution and laws of the United States
shall promptly be placed on a list of eligible voters. A challenge to such list-
ing may be made in accordance with section 9(a) and shall not be the basis
for a prosecution under section 12 of this Act. The examiner shall certify and
transmit such list, and any supplements as appropriate, at least once a
month, to the offices of the appropriate election officials, with copies to the
Attorney General and the attorney general of the State, and any such lists
and supplements thereto transmitted during the month shall be available
for public inspection on the last business day of the month and, in any
event, not later than the forty-fifth day prior to any election. The appropri-
ate State or local election official shall place such names on the official vot-
ing list. Any person whose name appears on the examiner’s list shall be
entitled and allowed to vote in the election district of his residence unless
and until the appropriate election officials shall have been notified that
such person has been removed from such list in accordance with subsection
(d): Provided, That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

SEC. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3(a), to the court. Sec. 9.

(a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.
(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commission shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpoena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10.

(a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be
necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4(b) and a declaratory judgment has not been entered under subsection 4(a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SEC. 11.

(a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person’s vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual
for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SEC. 12.

(a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3 4, 5, 7, 10, or 11(a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner
within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 percentum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3(a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney General’s refusal to request such survey or census to be arbitrary or unreasonable.

SEC. 14.

(a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C.1995).
(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c)  

(1) The terms “vote” or “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term “political subdivision” shall mean any county or parish, except that, where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SEC. 15. Section 2004 of the Revised Statutes (42 U.S.C.1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word “Federal” wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such
report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

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