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FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006 (PART I)

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

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FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006 (PART I)

THURSDAY, MAY 4, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:07 a.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. This is the Subcommittee on the Constitution.

Good morning. We want to thank everyone for being here today. This is the Subcommittee on the Constitution, as I mentioned. This morning marks an important step for this Committee as it continues its examination of the Voting Rights Act of 1965 and the temporary provisions that are set to expire on August 6, 2007.

Last fall, over the course of nine hearings, this Subcommittee examined in great detail each of the temporary provisions of the Voting Rights Act currently set to expire. With regard to sections 5 and 203, we held multiple hearings to ensure that all of the issues raised were addressed. This past March, we held an additional hearing to incorporate into the Committee's record a series of individual State and national reports documenting the continuing problem of racial discrimination in voting in the last 25 years and the necessity of the temporary provisions to protect minority voters in this Nation.

Today we have before us H.R. 9, the "Voting Rights Act Reauthorization and Amendments Act of 2006," the product of this Committee's work over the last 7 months.

I'd like to take a moment to thank my colleagues and those in the audience, who have been with us from the start, for their dedication and commitment to get us where we are today. In keeping with the bipartisan spirit of our hearings and previous reauthorizations, I'm proud to say that H.R. 9 is, again, the result of a bipartisan effort.

H.R. 9 extends the temporary provisions of the Voting Rights Act for an additional 25 years. In addition, H.R. 9 makes changes to certain provisions, including restoring the original purpose of section 5. In reauthorizing the temporary provisions, the Committee

heard from several witnesses who testified about voter discrimination that currently exists in covered jurisdictions.

It is on this evidence that the Committee considers it necessary to continue the temporary provisions for another 25 years. I believe it's important to note that in reauthorizing the temporary provisions the Supreme Court, in *South Carolina v. Katzenbach* and later in *City of Rome v. United States*, upheld Congress's broad authority under section 2 of the 15th amendment to use the temporary provisions to address the problem of racial discrimination in voting in certain jurisdictions. With H.R. 9, Congress again invokes its authority under section 2 in order to appropriately address the continued problem of discrimination in voting that is revealed in the record before it.

In addition to reauthorizing, the Committee finds it necessary to make certain changes to ensure that the provisions of the Voting Rights Act remain effective. For example, testimony received by the Committee indicates that Federal examiners have not been used in the last 20 years, but Federal observers continue to provide vital oversight. H.R. 9 strikes the Federal examiner provisions while retaining the authority of the Attorney General to assign Federal observers to covered jurisdictions over the next 25 years.

In addition, H.R. 9 provides for the recovery of expert costs as part of attorney fees. This change brings the Voting Rights Act in line with current civil rights laws, which already allow for the recovery of such costs.

H.R. 9 also makes technical changes to section 203, which will be discussed later this afternoon in a separate hearing. That hearing is at 2 o'clock this afternoon.

Most importantly, H.R. 9 seeks to restore the original purpose to section 5. Beginning in 2000, the Supreme Court, in *Reno v. Bossier Parish*, and later, in 2003, in the case of *Georgia v. Ashcroft*, issued decisions that significantly altered section 5. H.R. 9 clarifies Congress's original intent with regard to section 5.

This morning we will hear from our witnesses and discuss those provisions of the bill that address sections 4 through 8, the trigger, bailout, preclearance, and observer provisions, and section 14, which addresses the issue of attorney fees, of the Voting Rights Act. This afternoon we will devote our discussion to the provisions of the bill that reauthorizes and amends section 203.

I'd like to welcome and thank our witnesses here this morning, as well as our distinguished guests who are sitting with us on the dais this morning. None of the guests are here yet, so we won't recognize them at this time.

The gentleman from New York, Mr. Nadler, the Ranking Member, is not here. The very distinguished gentleman from Virginia, Mr. Scott, is here, and would he like to make an opening statement?

Mr. SCOTT. Thank you, Mr. Chairman. Representative Nadler wanted to be here but was unavoidably detained and asked me to sit in on his behalf. He's a strong supporter of the Voting Rights Act and regretted that he couldn't be here today.

But it's been 40 years since passage of the Voting Rights Act, and that act has guarantees millions of Americans equal opportunity to participate in the political process. The genius of the act

was not simply that it outlawed discrimination at the ballot box; it also gave voters new tools to ensure fundamental fairness in the voting process.

In past years, Congress has recognized the tenacious grip of discrimination in voting and we've continued to reauthorize the sections that will be discussed here today. These expiring provisions are essential to ensuring fairness in our political process and equal opportunity for minorities in America.

From the initial passage of the Voting Rights Act, Congress has relied on an extensive record of discrimination in voting to justify the continuing needs for the remedies imposed by the expiring provisions. In the original enactment of the Voting Rights Act and subsequent reauthorizations, Congress made sure that the Voting Rights Act remedies were proportionate to the problems Congress sought to cure.

In October of last year, we began the task of building a record to ascertain whether or not there was an ongoing need for these provisions. Through hearings in the Committee and field hearings conducted by many of the groups represented here on the panel, we have been able to build a clear and convincing record that there is a continuing need for the expiring provisions in the bill.

The temptation to manipulate the law in ways that will disadvantage minority voters is great, as great and irresistible today as it was in 1982. There are many specific issues that need to be addressed, including the clear need for section 5 in light of the inadequate remedies provided under section 2. Section 5 must be reauthorized to continue blocking the implementation of discriminatory voting changes, whether by deterring jurisdictions from enacting the discriminatory law in the first place or by routinely blocking those changes in the courts.

In the absence of section 5, a new State law can only be challenged in the time-consuming, vote-dilution litigation under section 2, where minority plaintiffs bear the burden of proof and, from a practical point of view and more significantly, they also suffer the burden of expenses in bringing the case.

The Supreme Court has ruled that winning parties in civil rights cases cannot recover expert witness fees as part of recoverable costs that they are entitled to receive, and this creates a chilling effect on voting rights litigation because it prevents lawyers and nonprofit organizations from recovering tens of thousands of dollars, sometimes hundreds of thousands of dollars, in expert witness fees.

During the reauthorization process, we were able to consider the impact of *Georgia v. Ashcroft* on section 5. According to the Court, the ability to elect is "important" and "integral," but a court must now consider the ability to "influence and elect sympathetic representatives." Although this consideration under the facts of *Georgia v. Ashcroft* may not have caused a problem because a majority found that the number of minority-majority districts was not reduced—dicta in the case clearly suggests that there may not be a violation of districts in which minority voters can elect candidates of choice—or dismantled, creating some ill-defined list of influenced districts.

The reauthorization and legislative history of section 5 must make it clear that this portion of the Voting Rights Act has been enacted to ensure that minority voters, where possible, ought to be able to elect candidates of choice. Influence in coalition districts will of course be a consideration in evaluation of the total plan, but the primary evaluation will be districts in which minority voters are able to elect candidates of choice.

Our record reflects a continuing need for these expiring provisions. At a time when America has staked so much of its international reputation on the need to spread democracy around the world, we must ensure its vitality here at home. H.R. 9 does just that.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much.

Mr. Franks, did you wish to make an opening statement?

Mr. FRANKS. No.

Mr. CHABOT. Do any other Members wish to make an opening statement? The gentleman from Michigan, the distinguished Ranking Member of the full Committee, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Mr. Chairman. I'll put my statement in the record, but I am impressed that this Committee has probably done the kind of a job that I think will stand the scrutiny of history and that will also be commended for the fair way that we examine the problems that are connected with the reauthorization of this Voting Rights Act.

We've broken our examination down before the introduction of H.R. 9 into a couple fundamental questions: Is there an adequate record of discrimination to justify reauthorizing the expiring provisions; and, Are the expiring provisions, as interpreted by the courts, still adequate to protect the rights of minority voters? And these are the questions that have guided us.

I think there is an ample record through at least nine hearings. And now as we go through the actual bill that has been introduced, on a bipartisan basis, I think that we should applaud you, Mr. Chairman, in the way that you have conducted a very thorough set of hearings that I think will stand the test of time.

Mr. CHABOT. Thank you very much.

Mr. CONYERS. The fact of the matter is that the questions that we are examining now will further help us. I welcome the witnesses back again who have participated and have helped us. We need to make sure that it is understood that circumstantial evidence in dealing with intentional discrimination is a very important part of the way we interpret the law.

We also need to realize that the changes that have been made to deal with court interpretation previously has been done before at other reauthorization hearings. And so this is nothing particularly new.

But I think that we might be well-advised that we've gone neither too far or left anything undone. I don't think that this was a pro-Voting Rights extension exercise and that everybody was cut out, because that's not the case. We've had balanced discussion, we've welcomed criticism from all quarters, we've examined every theory, plausible objection, and we continue to do it in the hearings that remain on the bill itself.

So to me, I think there's been an excellent job done. I feel confident that we will be in the best circumstances to face a Court which we are not sure of where they will be going. There are many on the Court whose exact position on some of these questions is not clear or is unknown to us as we put together, from everything that we've been able to see, hear, examine, interpret, and also take from circumstantial evidence, the very fact that there's a need for the Voting Rights Act to be improved and continued.

It's a huge job at a very difficult period of legislative time. I want to just let everyone know, each Member of the Committee. I single out Mel Watt, who has taken on an extraordinary role in this regard. The Chairman of the full Committee has worked with every recommendation, every improvement that we've sought in the process, Jim Sensenbrenner. And so I come here fully satisfied that these discussions, these witnesses, the evidence that has been produced for this very voluminous record will be able to withstand the exacting scrutiny of the courts that will be called upon to evaluate it in the future.

I thank you very much.

Mr. CHABOT. Thank you.

The gentleman from Virginia, Mr. Scott, is recognized out of order.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, I just wanted to follow up on the comments just made by the gentleman from Michigan.

As you indicated in your comments, this has been a work, a bipartisan work that you and Ranking Member Nadler worked very well together. The Chairman of the Black Caucus, Mr. Watt, did a yeoman's job in working with all of the different groups. Mr. Sensenbrenner, the Chairman of the full Committee, and Mr. Conyers. And working with the Senate. This has been a tremendous job. We've developed a record that I think is a model for bipartisan cooperation that I think, hopefully, we would see before.

But I would want to signal particularly focus on the job that Chairman of the Black Caucus Mel Watt from North Carolina has done in working with this. It has not been an easy job. He's been criticized by everybody. But I think the final product is a testimony of his good work and resolve and willingness to take arrows from both sides and put together a bill that I think everybody can be proud of.

Mr. CHABOT. Just let the record note that I haven't criticized him. [Laughter.]

The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

I could certainly take more than my 5 minutes that I have here to just thank people. I think I will refrain from doing that on this occasion, except to re-extend the thanks that I made to you and Ranking Member Nadler for sitting through all of these hearings and developing the record, which I think will be so important as we move forward; and to extend thanks again to Ranking Member Conyers for having the confidence in me to allow me to proceed as his representative in the negotiations about the bill.

I could certainly spend more than my 5 minutes summarizing the bill that we have arrived at. I think it is thorough and good, but Mr. Scott has done a magnificent job of doing that summary. Or I could spend more than my 5 minutes reading this eloquent statement that my staff has prepared for me. I think I will submit that for the record also.

What I thought might be helpful to us, though, to set the stage, is to let you know that I have been preparing to give a commencement speech at Fisk University, which is the school from which, after John Lewis, our colleague and moral leader in this fight, went to jail, and it took him a long time to get through to graduation. But he did graduate from Fisk University, and I'm doing the commencement address there. And it's given me the occasion to go back and reread some excerpts from the book that John Lewis has written called "Walking With the Wind."

And I can't think of really a better backdrop to this discussion or to our pending markup as we go forward than to just read this atmosphere that people were operating in leading up to the passage of the Voting Rights Act. This is from page 326 of John Lewis's book, "Walking With the Wind":

"When we reached the crest of the bridge, I stopped dead still. So did Josea. There, facing us at the bottom of the other side, stood a sea of blue-helmeted, blue-uniformed Alabama State Troopers, line after line of them, dozens of battle-ready lawmen stretching from one side of U.S. Highway 80 to the other. Behind them were several dozen more armed men, Sheriff Clark's posse—some on horseback, all wearing khaki clothing, many carrying clubs the size of baseball bats.

"On one side of the road I could see a crowd of about a hundred Whites laughing and hollering, waving Confederate flags. Beyond them, at a safe distance, stood a small, silent group of Black people. I could see a crowd of newsmen and reporters gathered in the parking lot of a Pontiac dealership. And I could see a line of Park Police and State Trooper vehicles. I didn't know it at the time, but Clark and Lingo were in one of those cars.

"It was a drop of 100 feet from the top of the bridge to the river below. Josea glanced down at the muddy water and said, 'Can you swim?' 'No,' I answered. 'Well,' he said with a tiny half-smile, 'neither can I.' 'But,' he added, lifting his head and looking straight ahead,' we might have to today.'

"Then we moved forward. The only sounds were our footsteps on the bridge and the snorting of a horse ahead of us."

Mr. Chairman, this is how we got here, this historical backdrop against which we were operating, in which President Johnson and those brave people, Members of Congress, enacted the original voting rights law. We've come a long way since then, but our record demonstrates amply, more than amply, that we still have a long way to go. And we have to keep on this mission at this basic democratic level—"democratic" with a small "d"—ensuring that every single citizen has the right to participate and have their voices heard in the political process. That's what this has been about.

I want to thank everybody who has been involved in this. I hope we can move forward to finish this job with this bill.

Thank you so much.

Mr. CHABOT. Thank you very much for that particularly gripping opening statement. We appreciate you sharing Congressman Lewis's book with us.

The gentleman from Maryland, Mr. Van Hollen, is recognized, if he'd like to make an opening statement.

Mr. VAN HOLLEN. Well, thank you, Mr. Chairman. I will be brief. I want to thank you and the Chairman of the full Committee, Mr. Sensenbrenner, and Mr. Watt, Mr. Conyers, Mr. Scott, and others who have worked for so long in making sure that this right that people lost their lives over and people fought so long to secure will be extended in the future if this Congress moves forward as I hope it will. I'm proud to be a cosponsor of this piece of legislation.

I just want to thank everybody for working together, and hope we can see it through the process to the President's desk. Thank you.

Mr. CHABOT. Thank you.

And Ms. Sánchez, who's not a Member of this Committee but is a Member of the full Committee, would you like to make an opening statement? The gentlelady is recognized.

Ms. SÁNCHEZ. Thank you, Chairman Chabot. And I also want to extend my thanks to Ranking Member Nadler for allowing me to join the Constitution Subcommittee for another important hearing on reauthorization of the Voting Rights Act.

Today's hearing is particularly special for me and in fact for everybody who has worked on the reauthorization effort. We have a bipartisan bill that honors the sacrifices and intentions of our great champions of the civil rights movement. And more importantly, this bill protects the fundamental right of all citizens in our country to vote.

I was particularly proud to stand on the Capitol steps on Tuesday for the press conference announcing the introduction of the bill. There were a lot of Members of Congress there who were thanked for their efforts in the reauthorization. But I want to personally thank Congressmen Chabot and Nadler for being the first to start the process of building the congressional record and now conducting legislative hearings on this landmark bill.

H.R. 9 is a shining example of the kind of quality bipartisan legislation that respects American ideals and puts partisanship aside. As a member of the Congressional Hispanic Caucus and a former civil rights attorney, this bill has every provision that I hoped it would contain when the reauthorization process began last fall.

H.R. 9 extends the preclearance requirements in section 5 for another 25 years and strengthens section 5 by repairing the damage done by the Supreme Court in *Reno v. Bossier Parish* and *Georgia v. Ashcroft*, those two cases. These are, I feel, very productive improvements in the VRA that will protect citizens' voting rights nationwide.

I'm also extremely pleased that the language assistance provisions in section 203 are reauthorized in this bill. My congressional district lies in Los Angeles County, which has been covered by section 203 since the year 2000. And I have seen first-hand how Hispanic, Chinese, Filipino, Japanese, Korean, and Vietnamese constituents have benefitted from those language assistance provisions when they go to the polls. That's why I believe that reauthorizing

section 203 is an essential provision of H.R. 9. Voting is a fundamental right that should be protected for all citizens, and that includes language minorities.

Voting is the one way that every American citizen can participate, influence, and collectively shape our democratic Government. The ability to fully participate in an informed way should not be denied to those citizens—and I emphasize "citizens"—who are more fluent in other languages other than English.

Today I think the icons of the civil rights movement after whom this bill is named—Fannie Lou Hamer, Ms. Rosa Parks, and Coretta Scott King—would be proud to have a bill that protects all citizens' right to vote regardless of their race, ethnicity, education level, or language proficiency. And I can't think of a better bill to have worked on.

We have Members backing this bill that come from all political stripes. They come from diverse ethnic and racial backgrounds and from Wisconsin to Florida, New York to California. This bill and those in support of it are a reflection of the best that America can do.

I sincerely hope that as this bill makes its way through the legislative process in both the House and the Senate, partisan concerns are put aside. Every Member of this body should join in support for this bill as it is currently drafted and resist urges to weaken this landmark bill or strip any of its provisions for short-term political points.

And again, I just want to thank the Ranking Member and the Chairman of both the Subcommittee and full Committee for their leadership on this issue. I yield back.

Mr. CHABOT. Thank you very much.

We'll now get into the introduction of the panel here.

Let me begin by saying that, without objection, all Members will have 5 legislative days to submit additional materials for the hearing record.

Our first witness will be Mr. J. Gerald Hebert. Mr. Hebert is a sole practitioner in Alexandria, Virginia, focusing on election law and redistricting. Mr. Hebert has had an extensive career in voting litigation, representing a number of States in redistricting and election issues, including the States of Texas, California, New York, South Carolina, and Virginia. Prior to his practitioner work, Mr. Hebert worked at the Department of Justice from 1973 to 1994, where he served as acting chief, deputy chief, and special litigation counsel in the Voting Section of the Civil Rights Division. Mr. Hebert served as lead attorney in numerous voting rights and redistricting suits and as chief trial counsel in over 100 voting rights lawsuits, many of which were ultimately decided by the United States Supreme Court. Mr. Hebert testified before this Subcommittee during last year's oversight hearings on the Voting Rights Act. We welcome you back here this morning, Mr. Hebert.

Our second witness will be Mr. Roger Clegg. Mr. Clegg also testified before us last fall. He is the President and CEO for the Center for Equal Opportunity, where he specializes in civil rights, immigration, and bilingual education issues. Mr. Clegg is also a contributing editor at National Review Online and writes frequently for USA Today, The Weekly Standard, the Legal Times, and other

periodicals and law journals. Prior to his work at CEO, Mr. Clegg held a number of positions at the U.S. Department of Justice between years 1982 and 1993, including that of assistant to the Solicitor General. Welcome back here this morning, Mr. Clegg.

And our third and final witness this morning will be Debo Adegbile. Mr. Adegbile is the Associate Director of Litigation at the NAACP Legal Defense and Educational Fund Incorporated, where he works with the director of litigation to oversee the organization's legal program while remaining actively engaged in voting rights litigation and advocacy. Previously, Mr. Adegbile was an assistant counsel at LDF, where he litigated voter rights cases on behalf of African-Americans and other underserved communities. Between 1994 and 2001, he was an associate at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, where he litigated several commercial and civil rights cases. More recently, Mr. Adegbile served as a coordinator of the National Nonpartisan Election Protection Program during the 2004 elections. We welcome you here this morning, Mr. Adegbile.

For those who haven't testified, and that's only, I think, one, before this Committee, so the other two are quite familiar with this, we have what's called a 5-minute rule. There's a clock right there in front of you, a light system, actually. The green light will be on for 4 minutes, the yellow light will come on letting you know you have 1 minute to kind of wrap up, and the red light will come on and that means your time is up. We won't gavel you down immediately, but we'd like you to try to end as close to the red light as possible.

And it's the practice of this Committee to swear in all witnesses appearing before it. So if you wouldn't mind standing and raising your right hands.

[Witnesses sworn.]

Mr. CHABOT. All witnesses have indicated in the affirmative.

We'll now begin with our first witness. Mr. Hebert, you're recognized for 5 minutes.

TESTIMONY OF J. GERALD HEBERT, FORMER ACTING CHIEF, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. HEBERT. Thank you, Mr. Chairman. And thank you, Members of the Committee, for the opportunity to speak to you today about what is considered to be the strongest and most effective piece of civil rights legislation ever enacted in the history of our country, the Voting Rights Act, which many consider to be the crown jewel of civil rights.

I previously appeared before the Subcommittee, as you said, last October, Mr. Chairman, and at that time focused my comments on the bailout provisions. I would simply add that I'm pleased to see that the bill, H.R. 9, makes no substantive changes in the bailout provisions. I think they're a good fit. I think they're easy to prove for jurisdictions that are not engaged in voting discrimination. I'm pleased to see that was left intact.

Before getting to some comments about the bill itself, I want to take just a few minutes to make some preliminary comments about the coverage formula that's been a part of the Voting Rights Act since its inception. The coverage formula is important, of course,

because it dictates which jurisdictions are going to be subject to the special provisions of the act.

H.R. 9 makes no changes in the coverage formula. To be sure, the constitutionality of all the act's special remedial provisions hinges on the coverage formula, so it's clearly an important issue. Because the *City of Boerne* case from the Supreme Court is now 10 years old and the composition of the Court has changed since that time, no one can safely predict, of course, how the Court will consider an attack on the constitutionality of the act, which is surely to come based on the coverage formula that some have claimed is outdated. I think it will help those of us who intend to defend the act's constitutionality in the future against attacks from groups, including Mr. Clegg's, to be able to point to the reasons Congress decided that the continuing problems of voting discrimination warrants the extension of the acts special provisions.

The record assembled by this Committee—and I'm pained to admit that I've read nearly all of it I believe is an impressive one. But what it really shows and what should be troubling to all of us is that the engine of voting discrimination runs on. And this Committee has done an excellent job at developing a record to show that the special provisions still remain a good fit to the discrimination in voting that is taking place.

And I think that's consistent with the Supreme Court's admonition in the *City of Boerne* case that there must be congruence and proportionality—and that's the quote from the Supreme Court—between the injury that you're trying to prevent or remedy and the means that you're adopting to that end. The fact that—the preclearance provisions in particular have blocked acts of intentional discrimination.

Now, I had occasion to read Mr. Clegg's testimony before today and I note that one thing that he has said is that a lot of the discrimination is anecdotal and not necessarily proof of intentional discrimination. I would submit to you that he is either unaware of a lot of what is in the record or that he doesn't understand what constitutes intentional discrimination.

I recall, for example, the numerous instances in the lengthy reports submitted by the Lawyers Committee for Civil Rights detailing intentional discrimination against minority voters. One of those examples, actually out of Alabama, involved the City of Foley. I represented a group of Black voters who wanted to become annexed into the city. Their children were drinking—the drinking water in their homes was contaminated because the septic tanks that they had outside their homes were leaking into the drinking water. They wanted to be annexed so they could be part of the city's services and get clean water and sewer services and streetlights and fire hydrants and all the rest. The city refused to annex them. And the Justice Department actually blocked some annexations on the grounds that they were allowing White people into the City of Foley to be annexed but were not extending the equal rights to Blacks.

I represented that group of people after I left the Justice Department, and we sued the City of Foley. And make no mistake, the decision to try to keep those people out was intentionally based on racial discrimination. They didn't want that group of people voting

in their elections. It had more to do with their opportunity to participate in the political process and bring about things that really affected their daily lives more than it did anything else.

And so I think that, you know, that example is in the record. But the Voting Rights Act ended up bringing about a solution to that problem. I'm happy to say that those people are a part of that town today and are getting the city's services that they deserve.

I know that my time is running out, so lastly, let me just make a couple of observations about some of the other provisions.

The one provision that I am opposed to in the bill is to adding a provision that precludes judicial review of the Attorney General's decision to certify Federal observers in a covered jurisdiction. I think that there ought to be occasions when we not only could review the decision about whether the Attorney General has placed observers in a certain area, but also to review the Attorney General's decisions to preclear certain things. That's a case, *Morris v. Gressette*, which presently precludes judicial review of the Attorney General's decision to preclear, and I think that's a provision that many of us in the voting rights bar would also like to see included in the bill. I understand that one horse can only carry so much baggage, but it is something that has been a growing concern to us, especially as we review the decisions by this Administration under the Voting Rights Act.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Hebert follows:]

PREPARED STATEMENT OF J. GERALD HEBERT

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of this Committee. Thank you for inviting me to testify before you today on a piece of legislation that has proven to be the strongest and most effective piece of civil rights legislation in our Nation's history: the Voting Rights Act.

I previously appeared before the Subcommittee last October and at that time focused my comments on the bailout provisions of the Act. Today, I will focus my comments this morning on a few key provisions of the proposed bill that has been circulated for discussion and has been shared with me by the Subcommittee staff. I also will briefly touch on a few other issues as they relate to reauthorization of the Act.

Before getting to the bill itself, however, I want to take a few moments to talk about the coverage formula that has been a part of the Voting Rights Act since its inception. The coverage formula is important because it dictates which jurisdictions are subject to the Act's special provisions.

As I read the proposed bill, the coverage formula determinations remain as they were. Even though the Supreme Court has upheld the Act against constitutional challenge on two occasions (1966 and 1980), much time has passed not only since the original Act was passed but also since the constitutionality of the Act has been revisited. On several occasions since 1980, the Court has decided voting rights cases assuming its constitutionality.

In 1997, the Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act, finding that Congress had exceeded its enforcement power under the Fourteenth Amendment. *City of Boerne v. Flores,* 521 U.S. 507 (1997). The Court's opinion in *Boerne* cited and quoted with approval passages from its earlier 1966 decision upholding the constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966). The Court in *Boerne* actually seemed to reiterate its earlier reasons for upholding the Voting Rights Act in the *Katzenbach* case and distinguishing the Voting Rights Act from the unconstitutional Religious Freedom Restoration Act. Thus, many have assumed since that time that the Court's Boerne decision points toward why the Court continues to view the Voting Rights Act as constitutional today. I think the record that this Committee has assembled shows quite convincingly that the engine of racial discrimination runs on and the need for the special provisions continues.

The coverage formula issue is straightforward. According to the Supreme Court, Congress's enforcement power under the Civil War Amendments extends only to enacting legislation that *enforces* those Amendments. *City of Boerne v. Flores, supra.* The Court has described this power as "remedial". *South Carolina v. Katzenbach, supra,* at 326. The Court has cautioned that Congress lacks the power to decree the substance of those Amendments. In other words, Congress has the power to enforce, not the power to determine what constitutes a constitutional violation. *City of Boerne, supra,* at 519.

The proposed legislation that I have reviewed makes no changes in the coverage formula. To be sure, the constitutionality of all of the Act's special remedial provisions hinges on the coverage formula, so it is clearly an important issue. And because *City of Boerne* is now nearly ten years old and the composition of the Court has changed, no one can safely predict how the Court will view the constitutionality of an Act based on a coverage formula that many consider outdated.

Congress has developed a detailed factual record that supports the reauthorization of the special provisions. This Committee has been doing a terrific job of gathering this information over the past year and I commend this Committee for doing so. I think it will help those of us who intend to defend the Act's constitutionality in the future against attacks from Mr. Clegg and his group to be able to point to the reasons Congress decided that the continuing problems of discriminatory voting practices warrants an extension of the Act. Congress's approach to studying the current conditions in the covered jurisdictions to insure that the Act still continues to be a good fit to voter discrimination is consistent with the admonition in *City of Boerne* that "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne, supra,* at 520.

Mr. Clegg (p.7) complains that the record developed by congress is anecdotal and doesn't involve much intentional discrimination. He is apparently unaware of a lot of the information that has been developed or he doesn't understand what constitutes intentional discrimination.

I recall for example that there were numerous instances cited in the lengthy report of the Lawyers' Committee for Civil Rights Under Law (which is already a part of the official record before this committee) detailing discrimination against minority voters. For example, former Justice Department official Robert Kengle reported that in Georgia, the Justice Department interposed several method-of-election objections where local governments "attempted to add at-large seats to single-member district plans under circumstances that strongly suggested a discriminatory purpose." Mr. Kengle's analysis noted by way of example the July 1992 objection to the Effingham County Commission's attempt to change the county's then-existing five-member single-member district plan (which had been adopted in response to a vote dilution lawsuit) to a mixed plan with five single-member districts and an at-large chair to be elected with a majority vote requirement. The Justice Department objected to the change stating:

> Under the proposed election system, the chairperson would be elected as a designated position by countywide election with a majority vote requirement. In the context of the racial bloc voting which pertains in Effingham County, the opportunity that currently exists for black voters to elect the commissioner who will serve as chairperson would be negated. **Moreover, it appears that these results were anticipated by those responsible for enactment of the proposed legislation. The proposed change to an at-large chairperson followed the elimination of the position of vice-chairperson, which had been held by a black commissioner since 1987. Although we have been advised that the proposed system was adopted in order to avoid the possibility of tie votes in the selection of the chairperson and for other proposals before the board, this rationale appears tenuous since the change to an even number of commissioners would invite tie votes to a greater extent than the existing system.**[1]

Mr. Chairman and members of the Committee, this was not ancient history. It was a little more than a decade ago, and well after the Supreme Court and Congress had observed the potential for diluting minority voting strength in racially polarized elections that such changes could produce. The various devices proposed in combination in Effingham County (numbered posts, majority vote requirement and at-large elections) have each been cited by the Supreme Court and the Congress as devices that enhance the opportunity for racial discrimination to occur in the elec-

[1] John R. Dunne, Objection Letter, July 20, 1992.

toral process. So when Mr. Clegg says there is little evidence of intentional discrimination and that the discrimination detailed in the congressional record is largely anecdotal, I respectfully disagree.

It is also important Mr. Chairman, that a number of objections interposed under Section 5 have been interposed to changes that had been illegally implemented (i.e., without Section 5 preclearance) for years, or even decades. Some changes finally were submitted only as the result of litigation; in other cases, it appears that the unprecleared changes were detected by DOJ during the Section 5 review of other changes (such as annexations) that were later submitted by the jurisdiction. The utter failure to make a Section 5 submission of an objectionable change, when such changes have been known for years to increase the potential for racial discrimination in the political process, strongly suggests that deliberate racially discriminatory conduct is at work.

It is critical to recognize that in this day and age, evidence of intentional discrimination must often be gleaned from circumstantial evidence. That is because state and local officials largely avoid making overt public statements of racial animus. The point here is that Congress is entitled to look at the record it has developed and draw reasonable inferences that intentional discrimination continues to occur, and I think the record developed to date proves that it does. Drawing inferences of intentional discrimination from objective facts is hardly new. Indeed, the Supreme Court itself draws such inferences of intentional discrimination, largely utilizing the factors laid out in the Arlington Heights case to decide whether intentional discrimination may be inferred from certain actions of government officials.

Lastly, a couple of observations about some other provisions of the bill. I believe Congress was correct in not changing the bailout provisions. I am opposed to the adding of a provision that precludes any judicial review of the Attorney General's decision to certify federal observers in a covered jurisdiction. I believe that in some instances in 2004, decisions were made at the Department of Justice to send federal officials and observers to jurisdictions based more on political considerations than racial considerations. For this same reason, I would also like to go on record as supporting legislation that overrules the Supreme Court's decision in *Morris v. Gressette* and would permit judicial review in extreme cases of decisions made by the Attorney General to grant preclearance to a voting change. I offer these observations because I have seen the Department of Justice's enforcement of the Voting Rights Act subject to increased manipulation by political appointees for partisan purposes. The recent revelations about the Texas re-redistricting and how the preclearance process got corrupted within the Department of Justice—and there are other examples—illustrate the need for this judicial review. I would, however, reserve it for extreme cases.

Mr. CHABOT. Thank you very much.

Mr. Clegg, you are recognized for 5 minutes.

TESTIMONY OF ROGER CLEGG, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY

Mr. CLEGG. Thank you, Mr. Chairman, for the opportunity to testify this morning before the Subcommittee. My name is Roger Clegg and I am president and general counsel of the Center for Equal Opportunity. I should also note, as you did, that I was a deputy in the Department of Justice's Civil Rights Division for 4 years, from 1987 to 1991.

The draft bill about which I've been asked to testify this morning is bad policy, basically from beginning to end, and unconstitutional in many different ways, to boot.

Let me begin, though, by quoting something to you:

"And today, in the American South, in—in 1965, there was less than a hundred elected Black officials. Today, there are several thousand. The Voting Rights Act of 1965 has literally transformed not just southern politics, but American politics.

"Well, I think during the past 25 years, you have seen a maturity on the part of the electorate and on the part of many candidates. . . . So there has been a transformation. It's a different

state, it's a different political climate, it's a different political environment. It's a different world that we live in, really. . . .

"The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. . . . [I]t's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race."

That's not me speaking, that's John Lewis, in a sworn deposition in the *Georgia v. Ashcroft* litigation.

Justice O'Connor found that testimony credible. Let me read how she concluded her opinion for the Supreme Court in that case:

"The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. . . . As Congressman Lewis stated: 'I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens.'" Justice O'Connor concluded: "While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."

But the bill that you are considering today will ignore what John Lewis said about the changes in the South and will continue indefinitely the preclearance provisions of section 5.

And it would explicitly overturn Justice O'Connor's decision in *Georgia v. Ashcroft.*

And it would also ignore the warning that Justice Scalia gave in *Bossier Parish II* about the limits of Congress's authority, and overturn that decision.

And, at a time when we are struggling with the issue of immigration, and when the one thing that everybody ought to be able to agree on is that we need to focus more attention on how to make sure that those coming to our country can become integrated into our society, that we strengthen the social glue holding that society together, and that all of us be able at least to communicate with one another, this bill would tell immigrants, hey, if you can't speak English, no problem, Congress will even force local governments to print ballots in foreign languages.

This bill is bad for those immigrants because it says that you can be a full participant in American democracy without knowing English—which is a lie. This bill is bad for all Americans because it perpetuates the racial gerrymandering and racial segregation that is now an inextricable byproduct of the section 5 preclearance process. In fact, the bill makes that process worse by overturning *Bossier Parish* and *Georgia v. Ashcroft.*

All of this is bad policy and it is also unconstitutional. Sometimes the bill exceeds Congress's authority because it has no plausible

record basis in enforcing the Constitution's ban on intentional racial discrimination in voting.

And sometimes it violates principles of federalism.

And sometimes it actually turns the Constitution on its head and tries to guarantee racial gerrymandering and racial segregation.

I'm not happy to say this, Mr. Chairman, but I believe I must. What I'm afraid has happened is that Democratic Representatives—that's capital "D" Democratic Representatives—are afraid in this area to do anything that might offend some minority incumbents and some of their minority constituents. Their Republican counterparts are afraid to be called racist by various demagogues and interest groups. And both parties, especially Republicans, are politically happy with segregated districts and uncompetitive contests.

I hope that there will be enough Representatives and Senators, or a President, out there who take seriously their oaths to the Constitution, who are willing to stand up to those who will call anyone a racist who stands in the way of their liberal agenda, and who will not let short-sighted political calculations tempt them from constitutional principle and the principle of nondiscrimination and nonsegregation.

Thank you.

[The prepared statement of Mr. Clegg follows:]

PREPARED STATEMENT OF ROGER CLEGG

TESTIMONY OF

ROGER CLEGG,

PRESIDENT AND GENERAL COUNSEL,

CENTER FOR EQUAL OPPORTUNITY

BEFORE THE

HOUSE JUDICIARY COMMITTEE'S

SUBCOMMITTEE ON THE CONSTITUTION

REGARDING THE

REAUTHORIZATION OF THE VOTING RIGHTS ACT

May 4, 2006

Introduction

Thank you, Mr. Chairman, for the opportunity to testify this morning before the Subcommittee.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Sterling, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

The draft bill about which I have been asked to testify this morning--which, among other things, reauthorizes the Section 5 and Section 203 provisions of the Voting Rights Act-- is bad policy from beginning to end, and unconstitutional in many different ways to boot. The provisions on which I will focus are: (1) the reauthorization of Section 5; (2) the overruling of the Supreme Court's *Bossier Parish* decisions; (3) the overruling of the Supreme Court's *Georgia v. Ashcroft* decision; and (4) the reauthorization of Section 203. (I would note that, in the bill's section 3, there is a racial classification--page 8, line 24--that will have to withstand strict scrutiny if it is to be upheld as constitutional.)

Let me begin by quoting something to you:

> And today, in the American South, in--in 1965, there was less than a hundred elected black officials. Today, there are several thousand. The Voting Rights Act of 1965 has literally transformed not just southern politics, but American politics. ...
>
> Well, I think during the past 25 years, you have seen a maturity on the part of the electorate and on the part of many candidates. I think many voters, white and black voters, in metro Atlanta and elsewhere in Georgia, have been able to see black candidates get out and campaign and work hard for all voters. ...
>
> So there has been a transformation. It's a different state, it's a different political climate, it's a different political environment. It's a different world that we live in, really. ...
>
> The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. ... [I]t's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.

That's not me. That's John Lewis, in a sworn deposition in the *Georgia v. Ashcroft* litigation.

Justice O'Connor found that testimony credible. Let me read you how she concluded her opinion for the Supreme Court in that case:

> The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. … As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." … While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.

But the bill that you are considering today will ignore what John Lewis said about the changes in the South, and it would explicitly overturn Justice O'Connor's decision in *Georgia v. Ashcroft*.

It would also ignore the warning that Justice Scalia gave in *Bossier Parish*, about the limits of Congress's authority.

And, at a time when we are struggling with the issue of immigration, and where the one thing that everyone ought to be able to agree on is that we need to focus more attention on how to make sure that those coming to our country can become integrated into our society, that we strengthen the social glue holding that society together, and that all of us be able at least to communicate with one another, this bill would tell immigrants

--hey, if you can't speak English, no problem, Congress will even force local governments to print ballots in foreign languages.

This bill is bad for those immigrants, because it says that you can be a full participant in American democracy without knowing English, which is a lie. This bill is bad for everyone, because it perpetuates the racial gerrymandering and racial segregation that is now an inextricable by-product of the Section 5 preclearance process. In fact, it makes that process worse by overturning the *Bossier Parish* and *Georgia v. Ashcroft* decisions.

All of this is bad policy, and it is also unconstitutional. Sometimes the bill exceeds Congress's authority because it has no plausible record basis in enforcing the law against racial discrimination in

voting, and sometimes it violates principles of federalism, and sometimes it actually turns the Constitution on its head and tries to guarantee racial gerrymandering and racial segregation.

I am not happy to say this, Mr. Chairman, but I believe I must: What I am afraid has happened is that Democratic Representatives are afraid in this area to do anything that might offend some minority incumbents and some of their minority constituents; their Republican counterparts are afraid to be called racist by various demagogues and interest groups; and both parties, especially Republicans, are politically happy with segregated districts and uncompetitive contests.

I hope that there will be enough Representatives and Senators, or a President, out there who take seriously enough their oaths to the Constitution; who are willing to stand up to those who will call anyone a racist who stands in the way of their liberal agenda; and who will not let short-sighted political calculations tempt them from constitutional principle and the principle of nondiscrimination and nonsegregation.

The Reauthorization of Section 5

The Two Basic Issues Raised by Section 5

Section 5 requires certain jurisdictions--called "covered jurisdictions"--to "preclear" changes in, to quote the statute itself, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the U.S. Department of Justice or the U.S. District Court for the District of Columbia. This includes anything from a relatively minor change (like moving a voting booth from an elementary school to the high school across the street) to an undoubtedly major change (like redrawing a state's congressional districts). The change cannot be precleared unless it is determined that it--to quote the new bill's language--"neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."

Section 5 raises constitutional issues for two reasons, and I think that these two reasons together are likely to create judicial concerns greater than their sum alone. First, there are federalism concerns

insofar as it requires states (and state instrumentalities, like cities and counties) to get advance federal approval in areas traditionally--and, often, textually, by the language of the Constitution itself--committed to state discretion. These federalism concerns are potentially heightened by the fact that some states are covered and others are not, especially if there is no compelling factual justification for the distinction. Second, since the federal government can bar a proposed change that has a racially disproportionate "effect" but not a racially discriminatory "purpose," Congress potentially exceeds its enforcement authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, since those two amendments ban state disparate *treatment* on the basis of race but not mere disparate *impact* on that basis.

Congress may have been confident that it was acting within its authority when it first passed the Voting Rights Act in 1965, but both the facts and the law have changed over the past 40 years.

The Shifting Factual and Legal Landscapes

As to the facts, few would dispute that a great deal of progress has been made over the last 40 years in eliminating the scourge of state-sponsored racial discrimination, particularly in the South (which is where most of the covered jurisdictions are). No one would deny that there is still additional progress to be made against racial discrimination generally, and in voting, too, but the facts are not there to justify singling out the jurisdictions delineated under Section 5 for the extraordinarily intrusive requirements of that section. (Worse, as I read the bill, you have made Section 5 permanent--there is no longer even a 25-year expiration date.)

You have already heard testimony from Professor Ronald Keith Gaddie and from my colleague Edward Blum. And you have before you the exhaustive, and unrebutted, studies published by the American Enterprise Institute (most of which already were put into the record by Mr. Blum, and the remaining few of which I am submitting to the subcommittee today). All this makes quite clear that (a) there is no crisis in voting rights in 2006 compared to what there was in 1965, and (b) there is no appreciable difference in the voting rights enjoyed in covered jurisdictions versus noncovered

jurisdictions. Why are Texas and Arizona covered, and not New Mexico, Oklahoma, and Arkansas? Why some counties in Florida and North Carolina, and not others? Why some boroughs in New York City, and not others?

I have gone through the record that you have before you. Regarding it, I would make four points.

First, I am struck by how one-sided it is. For instance, in the 170 pages of hearings on *Georgia v. Ashcroft*, I don't think that there is a single submission that defends Justice O'Connor's opinion. I don't think there was a single panel where more than one of the witnesses opposed reauthorization. I don't recall a single government official who testified or submitted a statement against reauthorization.

Second, it seems to me that the evidence that you do have is almost all scattered and anecdotal rather than systematic and statistical. What's more, much of it is not even about purposeful discrimination, which is what you need to be able to cite. A Justice Department preclearance denial based on effect--even of a proposed at-large system, which seems almost as reviled now as literacy tests--does not help the bill, nor does a study of post-1982 Section 2 litigation (since such litigation typically asserts only a disproportionate "result").

Third, very little if any of the evidence compares covered jurisdictions to noncovered jurisdictions, and what comparisons there are undermine the bill. For example, one of the few discussions that compares, even implicitly, covered and noncovered jurisdictions--the statement by Charles D. Walton of the National Commission on the Voting Rights Act--concludes that "discrimination in voting and in election processes in the northeastern states is a significant problem" and that there would be "a great benefit to having more of the country covered by the pre-clearance provisions of Section 5"; likewise, a law review article by Laughlin McDonald of the ACLU's Voting Rights Project is entitled "The Need to Expand the Coverage of Section 5 of the Voting Rights Act in Indian Country," and would do so "throughout the West"; the July 20, 2005, letter that Rep. William Lacy Clay submitted to the National Commission on the Voting Rights Act complained mostly about

Florida and Missouri (as did Jonah Goldman); the statement of attorney Stephen Laudig complained about Indiana; Rep. Gwen Moore complained about Milwaukee; Alice Tregay complained about Chicago; Ihsan Ali Alkhatib complained about Detroit; Marlon Primes complained about Ohio; in general, the National Commission on the Voting Rights Act held hearings all over the country, and all over the country it found problems--sometimes in covered jurisdictions, but often not.

Fourth, there is very little if any discussion of why the extraordinary preclearance mechanism--and the use of an effects test--is the only, let alone the best, means to address the intentional discrimination that does arise.

In sum, the record reads like an attempt--and not a particularly skillful one--to justify after the fact a decision that had already been made.

Let's just go through each of the nine "Findings" of the new bill: "(1)" admits the "[s]ignificant progress" that has been made; "(2)" asserts that "vestiges of discrimination … demonstrated by second generation barriers" still exist, but if these undefined "vestiges" and "barriers" are not purposeful, then they do not help the bill; "(3)" cites "racially polarized voting," but this alone is no evidence of a denial of voting rights, and certainly not unless the reason for the polarization is race rather than simply legitimate differences of political opinion, and is belied by the AEI studies anyway; "(4)" cites enforcement activities of the Department of Justice, but fails to mention that--based on your own record (see June 14, 2005, Statement of Joseph D. Rich before the National Commission on the Voting Rights Act)--more than 99 percent of proposed changes are precleared (the percentage of objections since 1995 is less than 0.2 percent, according to the Justice Department, see Serial No. 109-79, p. 2596); and, of course, this finding tells us nothing about the critical questions of whether the actions at issue were purposefully discriminatory and whether covered jurisdictions have more voting rights violations than noncovered ones; "(5)" cites evidence on the continued need for observer coverage in covered jurisdictions (but, again, no comparison is made with noncovered jurisdictions, and this observer provision in uncontroversial anyway); "(6)" criticizes the Supreme Court's *Bossier Parish II* and

Georgia v. Ashcroft decisions, but without giving any legal or factual specifics (indeed, the Court's decisions were consistent with the intent of Section 5, and overturning them, in any event, would raise constitutional problems; I've also noted the failure of the record to include any pro-*Georgia v. Ashcroft* views); "(7)" again asserts, but again without defining, the existence of "vestiges of discrimination"; "(8)" is essentially the same as Finding (4); and "(9)" is a broad and, as we have now seen, unsubstantiated conclusion.

As to the law, during the time since the Voting Rights Act was first enacted in 1965, the Supreme Court has made clear that the Fourteenth Amendment bans only disparate treatment, not state actions that have only a disparate impact and were undertaken without regard to race. ***See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977)** ("Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."). A plurality of the Court has drawn the same distinction for the Fifteenth Amendment. ***City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980)** (plurality opinion) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of freedom to vote 'on account of race, color, or previous condition of servitude.'") (quoting the Fifteenth Amendment).

The Supreme Court has also ruled even more recently that Congress can use its enforcement authority under the Fourteenth Amendment to ban actions with only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment. ***City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).** It is likely that this limitation applies also to the Fifteenth Amendment; there is no reason to think that Congress's enforcement authority would be different under the Fourteenth Amendment than under the Fifteenth, when the two were ratified within 19 months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens' voting rights.

Finally, the Supreme Court has, in any number of recent decisions, stressed its commitment to principles of federalism and to ensuring the division of powers between the federal government and state governments. ***See, e.g., Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).** It has also stressed what is obvious from the text of the Constitution: "The Constitution creates a Federal Government of enumerated powers." ***United States v. Lopez*, 514 U.S. 549, 552 (1995).**

The Unconstitutionality of Reauthorizing Section 5

Putting all this together, it is very likely that the courts will look hard at a law that requires states and state instrumentalities to ask permission of the federal government before taking action in areas that are traditionally, even textually, committed to state discretion under the Constitution, and to meet a much more difficult standard for legality than is found in the Constitution itself.

It is true that in the leading case *City of Boerne v. Flores*, the Court explicitly distinguished the actions Congress had taken under the Voting Rights Act. On the other hand, however, in doing so it stressed Congress's careful findings and rifle-shot provisions. **521 U.S. at 532-33.** If Congress were to reauthorize Section 5 without ensuring its congruence and proportionality to the end of banning disparate treatment on the basis of race in voting--which is exactly what the bill we are discussing today would do--the language in *Flores* could as easily be cited against the new statute's constitutionality as in its favor. Likewise, the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)--upholding Congress's abrogation of state immunity under the federal Family and Medical Leave Act--also stressed Congress's factual findings and the challenged statute's limited scope.

One frequently noted byproduct of the use of the effects test--under both Section 5 and Section 2--has been racial gerrymandering. It is ironic that the Voting Rights Act should be used to encourage the segregation of voting, but it has. In the closing pages of his opinion for the Court in *Miller v. Johnson*, 515 U.S. 900 (1995), Justice Kennedy noted the constitutional problems raised for the statute if it is interpreted to require such gerrymandering. (The Supreme Court has likewise, in the employment context, noted the danger of effects tests leading to more, rather than less, disparate treatment. ***See***

***Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 992-94 & n.2 (1988) (plurality opinion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring in judgment).)** This byproduct of racial gerrymandering obviously raises a policy problem of the Voting Rights Act, in additional to the constitutional one.

Congress does not have before it evidence on which it can base a conclusion that the preclearance approach and the "effects" test are necessary to ensure that the right to vote is not "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," to quote the Fifteenth Amendment. To the contrary, the evidence--especially the AEI studies, cited above--points in the opposite direction. Without these findings, a reauthorized Section 5 does not pass the tests of constitutionality the Supreme Court has set out.

The problems that remain are national in scope, and to focus on only particular jurisdictions makes no policy sense and aggravates federalism concerns. If the problems remain regional or remain only in even more widely scattered jurisdictions, then applying the statute's preclearance provisions where they are no longer justified also aggravates federalism concerns. The test in the statute that determines whether a statute is covered or not is, after all, based on data that are three decades old.

Section 5 has had other bad side effects. The segregated districts it has created have contributed to a lack of competitiveness in elections; more extreme and fewer swing districts; the insulation of Republican officeholders from minority voters and issues of particular interest to their communities (to the detriment of both the officeholders and the communities); and, conversely, the insulation of minority officeholders from white voters, making it harder for those officeholders to run for statewide or other larger-jurisdiction positions.

Section 5 of the Voting Rights Act is no longer fashioned to do the best job it can to guarantee the right to vote, and no longer does so in a way that consistent with the principle of federalism--which, after all, is also a bulwark against government abridgment of our rights as citizens.

Overturning the* Bossier Parish *Decisions

The Voting Rights Act's two most prominent provisions are Section 2, 42 U.S.C. 1973, and Section 5, 42 U.S.C. 1973c. Section 2 applies nationwide, and bans any racially discriminatory "voting qualification or prerequisite to voting or standard, practice, or procedure." Discrimination is defined in terms of a controversial "results" test. It is controversial because it defines discrimination differently than it is defined in the Constitution itself, and because it inevitably drives jurisdictions to do exactly what the Constitution itself proscribes, namely act with an eye on race and ethnicity.

Section 5, on the other hand--and as I've already discussed--is not nationwide in scope. Rather, it requires certain jurisdictions--called "covered jurisdictions"--to "preclear" voting changes.

In two decisions over the past decade, the Supreme Court explained how Section 2 and Section 5 fit together. In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (*Bossier Parish I*), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*), the Supreme Court held that, because Section 5 is aimed at changes in voting practices undertaken in order to evade the Fifteenth Amendment, it is violated only if the changes at issue are retrogressive in "purpose" or "effect." Thus, it is not permissible to refuse to preclear a changed practice or procedure simply because it may contain a violation of Section 2 (*Bossier Parish I*) or may reflect a discriminatory purpose (*Bossier Parish II*); the change must also be retrogressive.

The *Bossier Parish* decisions were rightly decided. As Justice O'Connor wrote for the Court in *Bossier Parish I*, "we have consistently understood these sections [i.e., Sections 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States." As I read it, however, Section 5 of the new bill would overturn both decisions; Section 5's new subsection (b) takes care of *Bossier Parish I*, and its new subsection (c) takes care of *Bossier Parish II*. (I see in Finding (6) that only *Bossier Parish II* is criticized, but even if you intend to overrule only it, in doing so you are also in effect overruling *Bossier Parish I*, because the bureaucrats at the Justice Department will be able to say

that the failure to correct a Section 2 problem--and to maximize the political advantage of a protected racial group--is evidence of discriminatory purpose.)

In my view, this is bad policy and unconstitutional. I'm sure that some will argue, for instance, What's wrong with the Justice Department holding up a change if it contains a potential Section 2 violation? But the problem is that, in truth, we don't know whether there is a Section 2 violation or not. Generally, we would have just one side's opinion about that, without a trial or a formal hearing or anything of the sort. As the Supreme Court recognized in *Bossier Parish II*, Section 5 contains "extraordinary burden-shifting procedures." And, while Section 5 is normally aimed at a simple determination of backsliding vel non, determining a Section 2 or purpose violation requires a difficult legal appraisal and, factually, weighing the "totality of the circumstances"--something much better left to conventional litigation. **See generally Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987).**

Indeed, as a practical matter, the government's opinion is likely to be that of a low-level bureaucrat. And it is one thing to give that person, whoever he or she is, the authority to hold up a change; it is something else to give that person the effective authority to order changes where none were being made. It can no longer be claimed that all the Department is trying to do is thwart changes designed to keep one step ahead of the enforcement of the law. Now, moreover, all that person at the Department will have to point to is some statement in a voluminous record that, taken out of context, shows bad purpose; indeed, not even that is necessary if the preclearance involves a practice (like voter ID) that someone at the Department believes has inherently a bad purpose.

This shift further jeopardizes the statute's constitutionality. In his opinion for the Court in *Bossier Parish II*, Justice Scalia wrote: "Such a reading would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), perhaps to the extent of raising concerns about Section 5's constitutionality, see *Miller* [*v. Johnson*, 515 U.S. 900,] 926-927 [(1995)]."

These problems are further exacerbated by the fact that, because Section 2 uses a constitutionally problematic "results" test, the Justice Department would be able to refuse to preclear, for instance, a redistricting plan that it felt had not been redrawn to contain "enough" minority-majority districts--even though the submitted plan contained no fewer such districts than it had in the past. The Department could likewise claim that the failure to "improve" voting lines demonstrates discriminatory "purpose"--and, once again, gerrymandered districts (of either the majority-minority or influence/coalition variety) would be ordered even though there had been no retrogression. This fear is hardly an unfounded one, since the Court itself has noted the Department's record in the past of coercing this sort of gerrymandering. ***Miller v. Johnson*, 515 U.S. 900 (1995).**

Finally, let me note another unhappy side-effect of overturning the *Bossier Parish* decisions. If the Justice Department refused to preclear a change that actually diminished discrimination but not by enough to make the Department happy--because it didn't diminish it *enough*--the result would be to leave in place the *more* discriminatory status quo. It would be better and fairer to everyone to approve the change (improving matters) and then also bring a separate lawsuit under Section 2 (which, if successful, might improve matters still further). **See *Bossier Parish II*, 528 U.S. at 335-336.**

***Overturning* Georgia v. Ashcroft**

The bill we are discussing today also adds a final subsection to Section 5, stating that the focus of the law now is just on whether a new provision protects citizens' ability "to elect their preferred candidates of choice." The purpose of this new subsection is to overturn Justice O'Connor's opinion in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Justice O'Connor wrote in that opinion that compliance with Section 5 had to be based on "the totality of the circumstances," not just on "the comparative ability of a minority group to elect a candidate of its choice." She relied in part on the testimony of Rep. John Lewis (D-Ga.).

The new bill rejects that broad approach, because it insufficiently guarantees the creation of majority-minority districts. The purpose of the provision is to demand the use of racial classifications that the Supreme Court has ruled will always trigger strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). Worse, the bill demands the segregation of voting districts *uber alles*, as the sine qua non for Section 5 preclearance of redistricting. In doing so, as I noted above, it also rejects the penultimate paragraph in Justice O'Connor's opinion for the Supreme Court in *Georgia v. Ashcroft*:

> The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. Cf. *Johnson* v. *De Grandy*, 512 U. S., at 1020; *Shaw* v. *Reno*, 509 U. S., at 657. As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." Pl. Exh. 21, at 14. While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life. See *Shaw* v. *Reno*, *supra*, at 657.

In addition, I would note that there is a good chance that the courts will interpret what the bill actually says as freezing into place not only majority-minority districts, but also influence or coalition districts. The latter will include districts, that is, in which a racial minority may make up a very small percentage of the voting population (for instance, Rep. Martin Frost's district at issue now in the Texas redistricting case before the Supreme Court). After all, an influence or coalition district can be said to ensure that the voters in question are able "to elect their preferred candidates of choice," and parts of Justice O'Connor's opinion in *Georgia v. Ashcroft* supports that interpretation (see, e.g., 539 U.S. at 480: "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.") (citations omitted); see also her quotation from *Johnson v. De Grandy*, two paragraphs later).

Reauthorizing Section 203

Finally, let me turn to the reauthorization for 25 years of the foreign-language ballot provisions of the Voting Rights Act, 42 U.S.C. 1973aa-1a, commonly referred to as Section 203, which is accomplished by Section 7 of the new bill. My discussion below is drawn from Linda Chavez's testimony before this subcommittee last fall; she is the chairman of the Center for Equal Opportunity. Similar points were also made for the subcommittee's record by K.C. McAlpin of ProEnglish and Jim Boulet, Jr., of English First.

Section 203 requires certain jurisdictions to provide all election-related materials, as well as the ballots themselves, in foreign languages. The jurisdictions are those where more than 5 percent of the voting-age citizens are members of a particular language minority, and where the illiteracy rate of such persons is higher than the national illiteracy rate. The language minority groups are limited to American Indians, Asian Americans, Alaskan Natives, and those "of Spanish heritage." Where the language of the minority group is oral or unwritten, then oral voting assistance is required in that language.

There are basically three policy problems with Section 203 that I would like to discuss today. First, it encourages the balkanization of our country. Second, it facilitates voter fraud. And, third, it wastes the taxpayers' money. In addition to these policy problems, in my view Section 203 is unconstitutional because, although Congress asserts it has enacted this law pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments, in fact this statute actually exceeds that authority.

Section 203 Balkanizes Our Country

America is a multiethnic, multiracial nation. It always has been, and this is a source of national pride and strength. But our motto is *E pluribus unum*--out of many, one--and this means that, while we come from all over the globe, we are also united as Americans.

This unity means that we hold certain things in common. We celebrate the same democratic values, for instance, share the American dream of success through hard work, cherish our many freedoms, and champion political equality. Our common bonds must also include an ability to communicate with one another. Our political order and our economic health demand it.

Accordingly, the government should be encouraging our citizens to be fluent in English, which, as a practical matter, is our national language. And, in any event, the government certainly should not discourage people from mastering English, and should not send any signals that mastering English is unimportant. Doing so does recent immigrants no favor, since true participation in American democracy requires knowing English. ***See* Jose Enrique Idler, *En Ingles, Por Favor*, National Review Online, March 8, 2006, available at http://www.nationalreview.com/comment/idler200603080757.asp.**

Inevitably, however, that is what the federal government does when it demands that ballots be printed in foreign languages. It also devalues citizenship for those who have mastered English as part of the naturalization process. As Boston University president John Silber noted in his 1996 congressional testimony, bilingual ballots "impose an unacceptable cost by degrading the very concept of the citizen to that of someone lost in a country whose public discourse is incomprehensible to him." **Quoted in John J. Miller, *The Unmaking of Americans: How Multiculturalism Has Undermined America's Assimilation Ethic* (1998), page 133.**

Section 203 Facilitates Voter Fraud

Most Americans are baffled by the foreign-language ballot law. They know that, with few exceptions, only citizens can vote. And they know that, again with only few exceptions, only those who speak English can become citizens. So why is it necessary to have ballots printed in foreign languages?

It's a good question, and there really is no persuasive answer to it. As a practical matter, there are very few citizens who need non-English ballots.

There are, however, a great many noncitizens who can use non-English ballots. And the problem of noncitizens voting is a real one. The Justice Department has brought numerous criminal prosecutions regarding noncitizen voting in Florida, as documented in a recent official report. **Criminal Division, Public Integrity Section, U.S. Department of Justice, *Election Fraud Prosecution and Convictions, Ballot Access & Voting Integrity Initiative, October 2002 - September 2005.*** This problem was mentioned years ago by Linda Chavez (***Out of the Barrio*, page 133**), and has been extensively reported on in the press. **See Ishikawa Scott, "Illegal Voters," *Honolulu Advertiser*, Sept. 9, 2000; Dayton Kevin, "City Steps Up Search for Illegal Voters," *Honolulu Advertiser*, Sept. 9, 2000; Audrey Hudson, "Ineligible Voters May Have Cast a Number of Florida Ballots," *Washington Times*, Nov. 29, 2000 ("A sizable number of Florida votes may have been cast by ineligible felons, illegal immigrants and noncitizens, according to election observers. ...This would not be the first time votes by illegal immigrants became an issue after Election Day. Former Republican Rep. Robert K. Dornan of California was defeated by Democrat Loretta Sanchez by 984 votes in the 1996 election. State officials found that at least 300 votes were cast illegally by noncitizens."); "14 Illegal Aliens Reportedly Voted," KSL NewsRadio 1160, Aug. 8, 2005; Associated Press, Untitled (first sentence: "Maricopa County Attorney Andrew Thomas has charged 10 legal residents who are not U.S. citizens with fraudulently registering to vote, and more residents are being investigated, he said."), Aug. 12, 2005; Joe Stinebaker, "Loophole Lets Foreigners Illegally Vote," *Houston Chronicle*, Jan. 17, 2005; Lisa Riley Roche & Deborah Bulkeley, "Senators Target License Abuses," *Desert Morning News*, Feb. 10, 2005; Teresa Borden, "Scheme To Get Noncitizens on Rolls Alleged," *Atlanta Journal-Constitution*, Oct. 28, 2004; Associated Press, "Harris County Cracking Down on Voting by Non-U.S. Citizens," *Houston Chronicle*, Jan. 16, 2005; John Fund's Political Diary, *Wall Street Journal*, Oct. 23, 2000 (voter fraud a growing**

problem since "47 states don't require any proof of U.S. residence for enrollment"); Doug Bandow, "Lopez Losing," ***American Spectator*****, Oct. 28, 2005 (Nativo Lopez's Hermandad Mexicana Nacional "registered 364 non-citizens to vote in the 1996 congressional race in which Democrat Loretta Sanchez defeated incumbent Republican Bob Dornan").**

Section 203 Wastes Government Resources

As I just noted, there are few citizens who need ballots and other election materials printed for them in languages other than English. The requirement that, nonetheless, such materials must be printed is therefore wasteful.

On the one hand, the cost of printing the additional materials is high. It is a classic, and substantial, unfunded mandate. For example, Los Angeles County had to spend over $1.1 million in 1996 to provide Spanish, Chinese, Vietnamese, Japanese, and Filipino assistance. **General Accounting Office,** ***Bilingual Voting Assistance: Assistance Provided and Costs*** **(May 1997), pages 20-21.** Six years later, in 2002, it had to spend $3.3 million. **Associated Press, "30 States Have Bilingual Ballots," Sept. 25, 2002.** There are 296 counties in 30 states now that are required to have such materials, and the number is growing rapidly. **See "English Is Broken Here,"** ***Policy Review*****, Sept-Oct. 1996.** Frequently the cost of multilingual voter assistance is more than half of a jurisdiction's total election costs. **GAO May 1997, pages 20-21.** If corners are cut, the likelihood of translation errors increases. (Indeed, the inevitability of some translation errors, no matter how much is spent, is another argument for why all voters need to master English. **See** ***The Unmaking of Americans*****, page 133; Amy Taxin, "O.C.'s Foreign-Language Ballots Might Be Lost in Translation: Phrasing Is Found To Differ by County, Leading to Multiple Interpretations and Possibly Confusion for Some Voters,"** ***Orange County Register*****, Nov. 3, 2005; "Sample S.J. Ballot Contains Error: Spanish Translation Doesn't Make Sense,"** ***Stockton Record*****, Feb. 27, 2003; Jim Boulet, "Bilingual Chaos,"** ***National Review Online*****, Dec. 19, 2000; English First Foundation Issue Brief,** ***Bilingual Ballots: Election Fairness or Fraud?*** **(1997), available at http://www.englishfirst.org/ballots/efbb.htm.)**

On the other hand, the use made of the additional materials is low. According to a 1986 General Accounting Office study, nearly half of the jurisdictions that provided estimates said *no one*--not a single person--used oral minority-language assistance, and more than half likewise said *no one* used their written minority-language assistance. Covered jurisdictions said that generally language assistance "was not needed" by a 10-1 margin, and an even larger majority said that providing assistance was either "very costly or a waste of money." **General Accounting Office, *Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election*, Sept. 1986, pages 25, 32, 39.** According to Yuba County, California's registrar of voters: "In my 16 years on this job, I have received only one request for Spanish literature from any of my constituents." Yet in 1996 the county had to spend $30,000 on such materials for primary and general elections. ***The Unmaking of Americans*, page 134.**

What's more, to quote again from John J. Miller's excellent book, *The Unmaking of Americans: How Multiculturalism Has Undermined America's Assimilation Ethic* **(1998), pages 242-243**: Getting rid of foreign-language ballots "does not mean that immigrant voters who still have difficulty communicating in English would not be without recourse. There is a long tradition in the United States of ethnic newspapers--often printed in languages other than English--providing political guidance to readers in the form of sample ballots and visual aids that explain how to vote. It would surely continue." I should add that Mr. Miller concluded that "Congress should amend the Voting Rights Act to stop the Department of Justice from coercing local communities to print election materials in foreign languages."

In sum, as a simple matter of dollars and sense, foreign-language ballots are just not worth it. The money would be much better spent on improving election equipment and combating voter fraud.

Section 203 Is Unconstitutional

Finally, Mr. Chairman, I would suggest that Section 203 raises serious constitutional problems, and, if it is reenacted, should be struck down as unconstitutional.

As I noted above, the Supreme Court has made clear that only purposeful discrimination--actually treating people differently on the basis of race or ethnicity--violates the Fourteenth and

Fifteenth Amendments. **See *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).** The Court has ruled even more recently that Congress can use its enforcement authority to ban actions that have only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment. ***City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *United States v. Lopez*, 514 U.S. 549 (1995).** This limitation is likely to be even stricter when the federal statute in question involves areas usually considered a matter of state authority. **See, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).**

Now, it seems to me very unlikely that the practice of printing ballots in English and not in foreign languages would be a violation of the Fourteenth or Fifteenth Amendments—that is, it is very unlikely that this practice could be shown to be rooted in a desire to deny people the right to vote because of race or ethnicity. **See *Out of the Barrio*, page 46; see also Abigail Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987), pages 40, 57.** Rather, it has perfectly legitimate roots: To avoid facilitating fraud, to discourage balkanization, and to conserve scarce state and local resources. Accordingly, Congress cannot assert that, in order to prevent discrimination in voting, it has authority to tell state and local officials that they must print ballots in foreign languages.

The rather garbled text of Section 203, however, apparently says that Congress was concerned not with discrimination in voting per se, but with educational disparities. That is, the poorer education that, say, Latinos receive is what makes foreign-language ballots necessary. Of course, if these disparities are not rooted in discrimination, then there remains a problem with Congress asserting its power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment to require bilingual ballots. But let us assume that Congress did have in mind unequal educational opportunities rooted in educational discrimination, presumably by the states.

Even here, I think there are insurmountable problems. There is, in short, a lack of congruence and proportionality between the asserted discrimination in education and the foreign-language ballot mandate in Section 203. Are all the language minorities covered by Section 203 subjected to government discrimination in education--and, if not, then why are all of them covered? Are there language minorities that are subject to government discrimination that are not covered by Section 203--and, if so, then why aren't they covered? How often does education discrimination result in an individual not becoming fluent enough in English to cast a ballot? Isn't it much more likely that this lack of fluency has some other cause (like recent immigration, most obviously, or growing up in an environment where English is not spoken enough)? Finally, is it a congruent and proportional response to education discrimination to force states to make ballots available in foreign languages? How likely is Section 203 to result in the elimination of education discrimination? Does this "remedy" justify Congress's overruling of the legitimate reasons that states have for printing ballots in English and not in foreign languages?

Congress has not and cannot answer these questions satisfactorily.

Does anyone really believe that the reason for Section 203 has anything to do with remedying state discrimination in education? Of course not. As Linda Chavez discussed in *Out of the Barrio*, the Voting Rights Act of 1965 was motivated by a desire to stop discrimination; the later expansion of the Voting Rights Act at the behest of Latino special interest groups was simply about identity politics. There was little factual record established even to show that Hispanics were being systematically denied the right to vote. This disenfranchisement would have been particularly difficult to demonstrate in light of the number of Hispanics who had previously been elected to office, which included Governors, U.S. Senators, Members of the House of Representatives, as well as numerous state legislators and local officials, many of these officials serving in jurisdictions that would soon be subject to the special provisions of the Voting Rights Act. **See also Thernstrom, chapter 3.** There is no credible way to equate the discrimination that African Americans in the South suffered to the situation of Latinos, who

had voted--and been elected to office--in great numbers for decades. That was true when Section 203 was first enacted, and it is even more true now, which is what matters for purposes of reauthorization. The reason for the bilingual ballot provision is not and never has been about discrimination--it is about identity politics.

Conclusion

As a matter of public policy and constitutional law, Section 5 and Section 203 should not be reauthorized, and the Supreme Court's *Bossier Parish* and *Georgia v. Ashcroft* decisions should not be overturned.

Mr. CHABOT. Thank you.

Mr. Adegbile, you're recognized for 5 minutes.

TESTIMONY OF DEBO ADEGBILE, ASSOCIATE DIRECTOR OF LITIGATION, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Mr. ADEGBILE. Good morning, Chairman Chabot, Ranking Member Conyers, Congressmen—or I should say Congresspeople Watt, Scott, Sánchez, Van Hollen, Franks. It's a great pleasure to be with you this morning to speak on the topic of H.R. 9.

Today I will speak very briefly to three topics: The proposed modification to section 5 to address the second of the Supreme Court's *Bossier* decisions; the proposed modification to section 5 to address aspects of the Supreme Court's ruling in *Georgia v. Ashcroft*; and the congressional power to renew the expiring provisions of the VRA under its enforcement powers under the 14th and 15th amendments.

With respect to the *Bossier II* modification, I think it's very important to note that in a very complex area of law the problem with *Bossier Parish II* is very understandable to everybody whether they be a lawyer or not, a representative or not. The problem is that the Voting Rights Act was clearly intended to stop discrimination in voting. It was most certainly intended to stop intentional discrimination in voting, and it was a long history of intentional discrimination that gave rise to the Voting Rights Act. Section 5 in particular was a special provision designed to stop entrenched discrimination and persistent efforts to circumvent court orders.

To the extent that *Bossier II* requires section 5 to allow evidence of intentional discrimination to go forward and not turn back voting changes, it is nonsensical, it is inconsistent with congressional intent, and it is appropriate for the Congress to move swiftly to address that case.

There's another point I would like to make about the *Bossier II* case, and that point is important as well. There is a tendency for those who oppose the very effective provisions of the Voting Rights Act to try and suggest that every single issue rises to constitutional importance. Congress has the power to enact the Voting Rights Act. We know that because the Supreme Court has told us on many occasions over the course of decades. The fix to *Bossier II* is statutory in nature. It does not rise to constitutional moment, and this body has the power to fix that statute, to stop intentional discrimination in the section 5 preclearance process so that the burden will not be foisted upon individuals in communities, often without resources and access to voting experts, to institute costly litigation to stop discrimination.

Turning to *Georgia v. Ashcroft*. That case was a break with longstanding precedent that had elevated the ability of minority voters to elect candidates of their choice. And when I say candidates of their choosing, I do not mean only African-American candidates or Latino candidates—candidates who the minority communities choose to serve them in this body and in State and local bodies. That ability-to-elect standard was very important in the context of section 5. It was important because there were many intentional ef-

forts to limit the ability of minority communities to participate equally in the political process.

In a winner-take-all game, which is the way our election system is structured, it's very important to be able to have your voices represented. The ability-to-elect standard has done that effectively. And if one reads *Georgia v. Ashcroft* carefully, the Supreme Court recognizes that the ability-to-elect standard is important, because they don't discard it altogether. However, they give legislatures too much leeway. They give legislatures the opportunity to choose a course of action, to pursue influence, which is an ill-defined concept. Everybody understands in common parlance that it's important to have influence in a political situation. But what we have found in light of racially polarized voting patterns, which persist in many of the covered jurisdictions, is that often influence alone is not enough, and influence is easy to hide behind. And this is one of the real harms that *Georgia v. Ashcroft* could bring to section 5.

It's easy to advance influence as a theory by which to cloak intentional vote dilution and discrimination. That is the danger. We haven't seen the full expression of that danger yet, because *Georgia v. Ashcroft*, as this distinguished panel knows, was decided late in the redistricting cycle. If *Georgia v. Ashcroft* is not corrected, as this bill intends to, it could lead to a very substantial undermining of the power of minority communities to have their voices heard in legislatures.

I want to touch just briefly in my remaining time on the congressional power to enact these renewal provisions. It's very important to note that both the 14th and 15th amendments are sources of power for Congress to act. The Supreme Court has repeatedly—and I said this already—but repeatedly, over many decades, upheld Congress's power to establish section 5, and the Voting Rights Act's provisions, and has done so after the case of *Boerne v. Flores*, which many throw up as a limit on congressional power in the context of voting.

To be sure, *Boerne* and its progeny tell us to look at the record carefully. It directs this body to be careful in its fact-finding. But this body continues to be the body that is best suited to make that fact-finding. I think that the record is very well-established. I don't have time to go into all of the examples.

But I look forward to addressing any questions that the panel may have. I appreciate this opportunity.

[The prepared statement of Mr. Adegbile follows:]

PREPARED STATEMENT OF DEBO P. ADEGBILE

Testimony of Debo P. Adegbile
Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc.

Before the House Judiciary Committee's Subcommittee on the Constitution

Legislative Hearing on H.R. 9, "A Bill to Reauthorize and Amend the Voting Rights Act of 1965" (Part I)

May 4, 2006
9 AM

2141 Rayburn House Office Building

Good morning Chairman Chabot, Ranking member Nadler, and Representatives Conyers, Watt and Scott, and other distinguished members of this Committee. I am the Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., and I welcome the opportunity to testify on the subject of "H.R. [9], A Bill to Reauthorize and Amend the Voting Rights Act of 1965: Part I." My testimony will address three topics that are central to the renewal bill. The topics are the proposed restorative statutory clarifications of two recent Supreme Court cases that narrowed the effectiveness of the Section 5 preclearance provision, (1) *Reno v. Bossier Parish School Bd. II,* 528 U.S. 320 (2000), and (2) *Georgia v. Ashcroft,* 539 U.S. 461 (2002); and (3) the broad reach of Congressional remedial and prophylactic powers under the enforcement provisions of the Fourteenth and Fifteenth Amendments.

Bossier Parish II

Although the standard for Section 5 review set forth in the Voting Rights Act ("VRA") in 1982 allows preclearance only if a proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group]," 42 U.S.C. 1973c, judicial interpretations of Section 5 have helped to shape its interpretation.

Prior to the Supreme Court's decision in *Reno v. Bossier Parish School Bd. II*, and consistent with the origin and statutory purpose of both the Voting Rights Act ("VRA') generally, and Section 5 in particular, a jurisdiction could not win preclearance for any Section 5 change that was intentionally racially discriminatory. The "discriminatory purpose" prong of Section 5 was grounded in the text of the statute itself, which barred voting changes with the "purpose" or "effect" of "abridging the right to vote on account of race or color." The statutory

language describing the scope of the purpose inquiry was straightforward; however, the VRA's unique history provided important context. After nearly one hundred years of blatant disregard of the constitutional commands of the Civil War amendments and earlier unsuccessful attempts to correct that situation with earlier enactments, Congress in the VRA employed its considerable power to the an extent necessary to begin the work of eradicating discrimination in voting. The Supreme Court so recognized in *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

Throughout the history of its Section 5 administration, the United States Department of Justice ("DOJ") has consistently applied well-settled legal principles in determining whether a submitting jurisdiction had established that a proposed change was not the product of discriminatory intent. *See, e.g. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977). In the 5-4 decision in *Bossier Parish Sch. Bd. II*, however, the Supreme Court reinterpreted the statutory language and re-conceptualized the nature of discriminatory purposes that are not entitled to preclearance under Section 5 – limiting them to retrogressive purposes only. Since that ruling, voting changes arising out of a prohibited but non-retrogressive racial *animus*, no matter how clearly demonstrated, and regardless of how strong the indications are of unconstitutional acts, are insulated from Section 5 objection under the purpose prong. The narrow decision elevates a strained interpretation of Section 5 over long-standing precedent, *see, e.g., City of Richmond v. U.S.*, 422 U.S. 358, 378 (1975)(recognizing the harm inherent in discrimination motivated by racial *animus*), and Congressional intent. *See* H. R. Rep. No. 89-439, at 10 (1962) (observing that "[b]arring one contrivance has too often caused no change in result, only methods"). By limiting the new inquiry to the more narrow category of retrogressive intent – a specific intent to worsen the

position of minority voters vis-a-vis existing circumstances – while excluding from the reach of the statute measures motivated by constitutionally prohibited intent to disadvantage and harm minority voters because of their race, the Court, in effect, judicially overrode Congress's intent rather than effectuating it .

In this situation, a statutory amendment to clarify and restore the original Congressional intent regarding the proper scope and interpretation of Section 5's purpose prong is desirable and appropriate for several reasons. Common sense and the plain purposes of the VRA strongly counsel against any interpretation of Section 5 that requires preclearance of intentionally discriminatory acts affecting the political process. The Fifteenth Amendment and the VRA each have, as one of their principal purposes, the eradication of historic and long-maintained voting discrimination. *See South Carolina v. Katzenbach,* 383 U.S. at 308 (noting that the VRA was "designed to banish the blight of discrimination in voting.") Even if the preclearance determination does not insulate voting changes from all judicial challenge , *see Bossier II* at 335, it is unnecessary and inefficient for the federal government to turn a blind eye to purposefully discriminatory acts while covered jurisdictions persist in, renew, or develop invidious voting schemes.

The *Bossier II* rule actually rewards the most intransigent perpetrators of discrimination, who after decades of exclusion of minority voters and candidates, may now be able to keep the political process closed on the ground that they have not abandoned their discriminatory ways. In these circumstances, under the reasoning of *Bossier II,* would-be violators are not diminishing political power or access but merely maintaining an exclusionary *status quo.* This scenario may aptly be characterized as perversely paying dividends for past discrimination. *See City of*

Pleasant Grove v. U.S., 479 U.S. 462 (1987) (sustaining objection under Section 5 to proposed annexation based upon discriminatory purpose because otherwise, the city's "extraordinary success in resisting integration thus far [would be made] a shield for further resistence."); *see also Bossier II*, at 342 (Souter, J., *dissenting*) (noting Bossier Parish School Board's decades of resistence to a desegregation order).

As originally enacted, Section 5 was intended to provide a mechanism to eradicate such purposeful voting discrimination and its continuing effects as quickly as practicable. Under the rule of *Bossier II*, however, for one category of voting rights violations, individual litigation brought either by an overburdened DOJ or at great expense by minority voters themselves is the only avenue for achieving that purpose.

For a quarter century, nothing in the text of Section 5 or the Constitution was understood to require the rule of *Bossier II*. *See City of Richmond*, 422 U.S. 358 (1975) ("An official action . . . taken for the purpose of discriminating against Negroes on account of race has no legitimacy at all under our constitution or under [Section 5]."); *Beer* v. *U.S.*, 425 U.S. 130, 141 (1976) ("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"); *Pleasant Grove v. U.S.*, 479 U.S. 462, 470, 472 (1987) (upholding denial of preclearance for a proposed annexation in an all-white city where the city had not dealt fairly with annexation requests from local African-American communities and specifically affirming district court's findings of discriminatory purpose and pretextual nature of justifications advanced by city for annexation).

As testimony and analysis presented to this Committee illustrates, the *Bossier II* rule has significantly narrowed Section 5's implementation by the DOJ. *See generally* Testimony of

Brenda Wright, November 1, 2005; *See also* Peyton McCrary *et al.*, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act* at 38 (Nov. 1, 2005) (unpublished manuscript submitted); H.R. Rep. No. 109-69 (2005), reprinted in *Voting Rights Act: Section5 – Preclearance and Standards.* (noting that 43% of the DOJ objections in the 1990s were based exclusively on the discriminatory purpose prong). Accordingly, the *Bossier II* decision was not simply a minor shift without consequences.

The proposed clarification to Section 5 in H.R. 9, in pertinent part, restores the pre-*Bossier II* discriminatory purpose standard. 42 U.S.C. 1973c(c) would be amended to read as follows: "(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose." This modification would allow the DOJ, or the reviewing three-judge panel, to interpose objections or deny declaratory judgments in situations where sufficient evidence of discriminatory intent exists such that the submitting jurisdiction cannot meet its Section 5 burden.

Significantly, *Bossier II* rests primarily on the Court's interpretation of the statutory language, *see Bossier II* at 336. In *Bossier I*, the Court had also given weight to the Congress's failure to clarify Section 5's statutory language in reaching its conclusion that Section 5's "effects" prong was limited to retrogressive effects. *See Bossier I*, 520 U.S. at 483 (noting Congress's failure to alter the language of Section 5 following *Beer v. U.S.*, 425 U.S. 130 (1976)). The proposed modification to Section 5 in H.R. 9 is intended to avoid any implication that Congress ratifies the *Bossier II* ruling by aligning the purpose prong with constitutional standards.

Restoring the original aim and scope of the "purpose" prong of Section 5 is fully within Congress's powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments, which themselves were part of "the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment . . . [establishing] the role of the Federal Government as a guarantor of basic federal rights against state power," *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). As the Supreme Court, through Justice O'Connor, recognized and reaffirmed in *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999), "Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions . . ." [citing *City of Rome v. U.S.*, 446 U.S. 156, 175, 178-80 (1980). The "effects" prong of Section 5 thus goes beyond the constitutional standard; the Fourteenth and Fifteenth Amendments are violated only by intentional discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Bolden v. City of Mobile*, 446 U.S. 55 (1980). Nevertheless, as Justice O'Connor noted, the Court in *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) recognized that "Congress' power to legislate under the Fourteenth Amendment [extends to '[l]egislation which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *Lopez v. Monterey County*, 525 U.S. at 282-83.

On the other hand, the "purpose" prong as it would be restored under H.R. 9 is congruent with the constitutional requirement and thus necessarily imposes lesser federalism costs, supporting the conclusion that there is no serious basis for doubting its constitutionality.[1]

Georgia v. Ashcroft

In 1976, in *Beer v. U.S.*, 425 U.S. 130 (1976), the Supreme Court interpreted "discriminatory effect" to mean retrogression — an analysis that calls for a determination of whether the minority community is worse off after the change, measured against the *status quo* or benchmark. *Beer* went further to require a denial of preclearance of voting changes if "the ability of minority groups . . . to elect their choices to office is . . . diminished." *Id.* at 141 (*quoting* the House Report on the extension of the Voting Rights Act in 1975). This ability-to-elect standard was ratified when Congress extended Section 5 in 1982, and has been consistently applied by courts and the DOJ for more than a quarter century.

However, in a recently decided Section 5 redistricting case, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a bare 5-4 majority of the Supreme Court suddenly abandoned the

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[1]In *Bossier II*, Justice Scalia's opinion for the Court suggests that interpreting Section 5 to extend to "discriminatory but non-retrogressive vote-dilutive purposes . . . [would] exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, [citation omitted], perhaps to the extent of raising concerns about § 5's constitutionality," 528 U.S. at 336, citing *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995). This is far from overruling *Katzenbach*, *City of Rome*, and *Lopez*. It is important to note, first, that *Miller* suggested only that if Congress had intended to incorporate a policy of maximizing majority-black districts into Section 5 (and the Court found "no indication Congress intended such a far-reaching application of § 5," 515 U.S. at 927), that might raise constitutional questions. *Id.* at 926-27; and second, that immediately after the "perhaps" phrase quoted above, Justice Scalia continued by saying that "Most importantly, [coverage of discriminatory but nonretrogressive vote-dilutive purposes under Section 5] finds no support in the language" of the statue, in the Court's view. In light of these observations, the "perhaps to the extent of raising concerns about § 5's constitutionality" phrase is simply an inadequate basis for predicting that restoration of the original intent of the "purpose" prong will be subject to serious constitutional attack.

straightforward approach adopted in *Beer* and replaced it with a new analysis that undermines the focus on voting changes that diminish the minority community's ability to elect candidates of choice, where it exists, in favor of far more nebulous considerations.

The Court held that plans that reduce the ability of minority voters to elect candidates of choice could still be approved under Section 5 as long as the Attorney General or a court believes that other factors somehow balance out the loss in tangible minority voting power. Although all nine Justices appeared to agree that, in the Section 5 context, a numerical majority of minority voters in a district was not a hard and fast requirement to establish ability to elect, one factor the Court points to is whether the new plan results in the election of representatives who, while not the candidates of choice of minority voters, "would be willing to take the minority's interests into account." The Court characterized these districts as "influence" districts.

The facts and circumstances of *Georgia v. Ashcroft* have been recounted in detail during previous hearings and through written testimony; thus, I will not revisit them here. Instead, I will only note briefly that there are some fairly obvious redistricting realities that often get lost in many discussions, even among those who are very knowledgeable about the subject. The preference for single-member districts, the decennial Census enumeration, and the constitutional requirements under the doctrine of "one-person, one-vote," place substantial temporal, geographic, and demographic limitations on line drawing. In addition, historical patterns of racial segregation continue to shape too many communities and, as Drs. Richard Engstrom and Theodore Arrington have testified before this Committee, racial bloc voting patterns persist in many covered jurisdictions. In many, but by no means all situations, minority voters do not have

the ability to elect candidates of their choosing if they are dispersed intentionally or in service of some other aim. And, the record of DOJ objections and letters requesting more information is replete with evidence of intentional efforts to dilute, and of dilutive effects, in a variety of contexts and jurisdictions at all levels of government.

Against the backdrop of gradually achieved and potentially fragile gains (documented in part in voluminous and thorough DOJ objection and "more information" letters, observer deployments and reports, as well as detailed and thorough reports prepared by the nation's leading voting rights organizations and voting rights experts), the Supreme Court announced its radical departure from the *Beer* standard that had for so long protected minority voters' equal voting rights in tangible ways.

To correct this unwarranted shift in statutory interpretation, the proposed modification to Section 5 in H.R. 9 is found in §§ 1973c(b) and (d) and reads as follows:

(b) Any voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting that has the purpose of or will have th effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(d) the purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

These provisions are intended to restore the primacy of the ability to elect standard that protects hard-won gains from disappearing, and in so doing avoids several of the dangers that *Georgia v. Ashcroft* has invited. I will describe a few.

- In the absence of a clear metric for influence[2], it is exceedingly difficult to evaluate the trade-offs that *Georgia v. Ashcroft* introduced into the Section 5 analysis;
- The pursuit of an influence theory will likely be used to cloak and protect intentionally discriminatory or retrogressive acts from meaningful Section 5 review;
- The influence theory eradicates any meaningful benchmark analysis because it invites wholly incongruous comparisons.

In contrast, the DOJ, and the Court are familiar with the ability-to-elect standard that has been applied effectively, both before and after the limitations on Section 5 established by *Shaw v. Reno* and its progeny. The "opportunity to elect" standard can provide flexibility by adjusting to changes in levels of polarized voting.

Prior to *Georgia v. Ashcroft*, DOJ's assessment of the minority community's ability to elect was conducted utilizing a functional approach that was intensely jurisdiction-specific. DOJ performed an intimately localized review of election results, demographic data, maps and other information in order to assess the relative ability to elect under the benchmark and proposed plans. The "Procedures for the Administration of Section 5 of the Voting Rights Act," 28 C.F.R. Part 51, provide detailed information about the pre-*Georgia v. Ashcroft* Section 5 review process. For example, 28 C.F.R. 51.28 identifies supplemental information that DOJ has utilized to assess the minority community's ability to elect including: (1) demographic information; (2)

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[2]Strict numerical cut-offs such as 20%, 25% or 30% ignore local conditions which are important.

maps; (3) election returns; (4) evidence that the change was adequately publicized and that there was sufficient opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place; and (5) a list of minority contacts in the covered jurisdiction.

The ability-to-elect standard is restorative and strictly statutory in dimension. The standard has withstood the test of time as an effective and workable judicial and administrative test, and continues to be vital in light of the ongoing efforts to weaken the position of minority of voters. A Section 5 declaratory judgment case from Louisiana in the post-2000 round redistricting that was settled before the Supreme Court decision in *Georgia v. Ashcroft* provides some indication of the dangers posed by the decision.

In *Louisiana House, et al. v. Aschroft,*[3] the DOJ, individual African-American Louisiana voters represented by the NAACP Legal Defense and Educational Fund, Inc., and the Louisiana Legislative Black Caucus (as intervenors) opposed the Louisiana House of Representatives's plan to eliminate an African-American ability-to-elect district in New Orleans, despite the fact that the district had experienced an increase in the African-American population during the preceding decade. After the disposition of preliminary motions, the Louisiana House did not mount a defense based upon any recognized theory under Section 5, but instead sought to uphold a plan intended to protect the seats of two powerful white politicians, one Republican and one Democrat — even though incumbency protection is not accepted as a defense in vote dilution

[3]This case and other evidence of the continuing need for the expiring provisions is of the VRA, is described more fully in the Leadership Conference for Civil Rights's Louisiana Report which has been submitted into the House record.

cases. The litigation was settled and the ability-to-elect district was restored after a strong ruling from the Court that criticized the Louisiana House for its litigation tactics. LDF spent over $33,000.00[4] on just one of its experts. Most significantly, had *Georgia v, Ashcroft* governed, the Louisiana House could have mounted a defense based upon a theory that the plan eliminated an "opportunity to elect" district but still provide "influence" for African-American voters. The ability-to-elect standard protected against elimination of minority voting strength, the core of Section 5's aims as they have always been understood, in New Orleans.

Congressional Power to Renew Section 5

Section 5 of the VRA has been constitutionally challenged in three major cases, over the course of four decades. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *City of Rome v. U.S.*, 446 U.S. 156 (1980); and *Lopez v. Monterey,* 525 U.S. 266 (1999). Over that forty-year span, Congress's power to enact, and renew, Section 5 preclearance has been upheld in each case in opinions that have consistently recognized the federalism costs that the provision imposes. There is no doubt that the Civil War Amendments, and Congress through its broad enforcement powers, have reordered the federal balance, because, as the Court has observed in a variety of contexts, that was the very purpose of those Amendments to the Constitution. *See*, *e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976) ("'[t]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment.),'" 427 U.S. 445, 455 (1976); *Mitchum v. Foster*, *supra*.

It is not new that some opponents, of the VRA, and others are raising questions about Congress's power to reauthorize the expiring provisions, because it initially was passed in

[4]These expenditures were not recoverable under then-existing law.

the face of similar questions, and those voices have persisted as have the problems that justify the remedy. *See, e.g., ACLU Report of Voting Rights Litigation Since 1982* (documenting judicial findings of voting discrimination from courts across the country, submitted into the House Record); *see also The Report of the National Commission on the Voting Rights Act* (summarizing testimony of about voting abuses and trends, and collecting data). Nor is it new that the record assembled by House of Representatives as of this point, with more hearings scheduled for the Senate, has documented numerous Section 5 violations, including examples of intentional voting discrimination, examples of retrogressive effects intercepted by the existing preclearance protections, and including both local and statewide voting violations. These sources document both violations that touch many citizens as well as those that have harmed (or would have harmed) only a few, but each may have remained in place for years or decades but for the VRA's Section 5 preclearance requirement.

The Louisiana State Report of the Leadership Conference on Civil Rights documents the fact that every statewide redistricting for the Louisiana House of Representatives since the VRA was passed has initially been met with an objection; this is but one illustration of level of entrenchment of voting discrimination in that State, where more than half of the parishes have received objection letters. However, objections are not the only measure of the effect of Section 5 in achieving its purposes. Whether classified as deterrence or part of the VRA's educative function in enhancing compliance with federal law, tracing the line of "more information" letters from DOJ reveals that many additional and very likely harmful changes were withdrawn in response to these letters. Intense and sustained discrimination against Native Americans has been documented, as has widespread non-compliance with Section 5 in certain

covered jurisdictions such as South Dakota. This is not a full summary but rather provides some general sense of what this Committee has assembled during the ten renewal hearings to date.

The present formulation of the threat of constitutional invalidation, however, is largely founded on the Supreme Court's decision in *Boerne v. Flores*, 521 U.S. 507 (1997) and its progeny, which have re-examined both the balance of power between the state and federal governments and also the relationship of the co-equal branches of Congress and the Supreme Court. In *Boerne*, the Court announced the new doctrine of "congruence and proportionality" to place some limit on Congressional power under broadly framed Constitutional grants of authority. There are few who doubt that the cases clearly call for Congress to be more deliberate in its exercise of its enforcement powers under the Civil War Amendments. Indeed, the Court in *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001), very carefully reviewed the Congressional record relied upon to justify its passage of Title I of the Americans with Disabilities Act pursuant to the enforcement powers. But even these cases fail to carve out clearly discernible limits on Congressional powers in the context of remedies and prophlylactic legislation in the area of race. *See Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

At best *Boerne* is an evolving doctrine and its ultimate contours are presently unknown, at worst too muscular a *Boerne* doctrine could trample Congressional power creating constitutional problems of a different variety. The *Boerne* cases do not provide clear rules for Congressional guidance. The best that can be said in light of those cases is that:

- (1) even as the Court announced the *Boerne* doctrine, it recognized that the VRA was the exemplar of the appropriate exercise of Congressional power;
- (2) two years after announcing its decision in *Boerne*, the Court reaffirmed Section 5's constitutionality in *Lopez v. Monterey*, 525 U.S. 266 (1999), a case that recognized federalism costs in strong terms: "In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens the Act imposes," *id.* at 285;
- (3) Congress has compiled a strong record, one that compares favorably with 1982, and it continues to do so;
- (4) Congress acts at the height of its enforcement powers when it renews the VRA, which is a remedy and prophylactic measure for discrimination against race and language minorities from which the entire nation has benefitted; and finally
- (5) it would implicate serious separation of powers, and *stare decisis* concerns for the Court to curtail a renewed Congressional vindication of the right "that is preservative of all other rights," in the face of the nation's ongoing efforts to vindicate the full promise of the Constitution that has yet to be achieved.

We urge renewal of all of the expiring provisions as set forth in H.R. 9, and specifically recognize the centrality of the Language Access provisions in Section 203 that have aided in extending a full measure of citizenship to all Americans.

Mr. CHABOT. Thank you very much.

The Members of the panel up here now each have 5 minutes to ask questions of the witnesses, and I'll begin with myself and I recognize myself for 5 minutes for that purpose.

Mr. Hebert, I'll begin with you, if I can. How administrable is the standard established by the Supreme Court in *Georgia v. Ashcroft* and how does it deviate from the standard set by the Supreme Court in 1976 in *Beer v. United States*, which was the standard followed by the Court for nearly 30 years?

Mr. HEBERT. Well, *Beer* was a case that said that the effects prong of section 5 was to be measured by whether or not the proposed change retrogresses minority voting strength. *Georgia v. Ashcroft* did take a different approach to looking at retrogression in the context of a proposed redistricting plan. In *Georgia v. Ashcroft* the Supreme Court, and I agree with Mr. Adegbile that they have attempted to give States more leeway, in a sense, by saying that no longer will you be bound to simply look at the number of minority controlled districts you had before and compare it to the number of minority controlled districts you have afterwards and if there are less in the afterwards, then that retrogresses minority voting strength. That seemed to be a fairly bright-line test before—you looked at the number of effective minority districts that minority were electing candidates of their choice, and then you compared the proposed plan and measured them up.

In *Georgia v. Ashcroft*, the Supreme Court said there are really three types of districts that should be in the calculus. There are majority-minority districts; there are so-called coalition districts, where minorities aren't a controlling majority by themselves but maybe operate in coalition with some other group, some other minority group or perhaps Anglos, to elect a candidate of their choice; and influence districts. And that you can really look at the totality of the plan before and see how many of those categories of districts you have and how many you see in the new plan in those categories. And if overall, in the totality of circumstances, there's been no retrogression, then the plan should be precleared.

There was an important fact in *Georgia v. Ashcroft*, which is that nearly all of the minority legislators in the Georgia legislature agreed with the plan to actually reduce down the percentages of some of the more heavily Black districts downward, where they still felt they could have effective control, and so the Supreme Court credited that testimony as well.

I think, you know, that's a long answer to a short question, but it's really—the fact is that it did change the playing field, as the dissent pointed out in *Georgia v. Ashcroft*, by really taking what was previously a bright-line test and really replacing it with something that would be more difficult to administer by the Justice Department or the D.C. court, which is looking at the totality of circumstances test.

Mr. CHABOT. Thank you. Let me follow up my next question with you as well, and then I'd invite any of the other panel members to answer as well.

H.R. 9 restores the discriminatory purpose standard to section 5 such that any voting change made with a discriminatory purpose cannot be precleared under section 5. What impact will this change

have on minority voters, and how difficult will it be for the Department of Justice or the United States District Court for the District of Columbia to administer? And does the change impose any additional burdens on covered jurisdictions? Is this intent more or less consistent with the way the standard was interpreted and applied prior to 2000?

Mr. HEBERT. Well, the answer to, certainly, the last part of the question is it definitely restores the law as it existed prior to *Bossier II*. *Bossier II* represents, I think, really, the low-water mark for Supreme Court activity in the civil rights area, in a sense, because what it said was that they would reinterpret the statute to allow a jurisdiction that engages in unconstitutional discrimination in voting and develop a plan around that unconstitutional discrimination, and they could still get preclearance under the Voting Rights Act, a statute that was enacted to further the purposes of the 14th and 15th amendments. Many of us were really stunned that the Court could really rewrite the statute, which is what it did, and limit it in that way.

The Supreme Court has since at least the mid-1970's laid out a road map, and the Justice Department followed this for years and years, and still does in many cases, about how to take the circumstantial evidence of intent and draw inferences of purposeful discrimination out of it. It's called the factors that come out of the Village of Arlington Heights case back in 1977, and there are factors that you can actually take into account and say, look, based on what happened here—the context, the events that led up to the decision, the effect of the decision, whether they followed normal procedures, and so on—you can look at all of that and then draw an inference about whether or not intentional discrimination played a role.

The Justice Department has, and the Supreme Court, too, those two branches of Government have for years been using that approach to prove discrimination. It would really not add much burden on the States to have to show that, in my view. They'd been able to work under that standard from 1965 to 2000. And, you know, for the most part, the Justice Department followed Supreme Court precedent in its interpretation.

Mr. CHABOT. Thank you. If other witnesses would like to answer, they can—or not.

Mr. CLEGG. Well, just briefly, Mr. Chairman. On the question you asked about whether the approach taken by Justice O'Connor in her opinion in *Georgia v. Ashcroft* would be more difficult to administer than what Mr. Hebert has called the bright-line approach that he favors, I suppose it's true that an approach that mechanically invokes quotas and racial gerrymandering is very easy to administer. It's very automatic. You don't have to consider all the other nuances and factors that Justice O'Connor thought ought to be included.

But ease of administration is not the only thing that we ought to be concerned about. And I think that that's what concerned Justice O'Connor, that the automatic approach of saying that, well, if you can draw a majority-minority district, you've got to do that, is easy to administer, but it's not consistent with the ideals of the Voting Rights Act.

With respect to the *Bossier Parish II* issue, I agree with Mr. Hebert that there are a lot of things that go into the inquiry about whether purposeful racial discrimination has occurred. I don't think that we disagree about that. The question is whether section 5 should be interpreted to allow the Justice Department to refuse to preclear a change that is not retrogressive. And I think that Justice Scalia was right when he said that that was not the purpose, has never been the purpose of section 5, and that—if you were to interpret this that way, and this is what he said, that it would create real constitutional problems.

Mr. CHABOT. Thank you very much.

Mr. Adegbile?

Mr. ADEGBILE. First, with respect to the question about *Georgia v. Ashcroft*, it's very clear that the Supreme Court's decision will make the administration of section 5 much more difficult. Justice Souter did an able job in the dissent in that case in pointing out that the Court had given no guidance as to how to compare the tradeoffs which it contemplates. Under section 5, DOJ or a reviewing court begins with the status quo. They don't take the standard from the air. They look to see what are the circumstances under which minority voters find themselves at present? And then they examine the voting change to see whether the voting change is worsening the position of minority voters.

When you have influence in the mix, it becomes very hard to understand what the benchmark is. How many opportunity-to-elect districts are equal to a so-called influence district? How many influence districts do you have to put in place if you take away a coalition district? The analysis gets very complicated and the statute will start to collapse of its own weight—which I hope was not the Court's intention, but I think that it's very important for this body to move to restore the clearer standard of the ability-to-elect that is reflected in H.R. 9.

With respect to *Bossier Parish II*, the language in the bill clearly goes back to the pre-*Bossier II* standard. And it just simply does not make sense for DOJ or a court to have to turn a blind eye in a section 5 context to evidence of intentional discrimination. I mean, it's particularly disturbing, because we hear under the *Boerne* case and its progeny that it's very important to look to incidents of intentional discrimination. Well, I'm here to tell you that without section 5's protections and without this restoration, there will be more of those incidents that go completely undetected because there are not the resources or wherewithal to turn them aside. Section 5 is very effective in doing that and it's entirely consistent with the purposes of the Voting Rights Act, and I believe Congress's intent, to fix that case.

Mr. CHABOT. Thank you very much. My time has expired.

The gentleman for Michigan, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

I wanted to ensure our friend Mr. Clegg that John Lewis is—we're trying to get him to the hearings so that he can help you be more comfortable in your bed at night to find out that John Lewis is a full supporter of this bill—as a matter of fact, he's a cosponsor—and has been working with us on it. He would be probably as

surprised as myself to find out that he is now being quoted as a reason not to be supportive of the bill. So I'm hoping he can get here from his other Committee assignment to join us here, because I've talked to him many times and I'm sure he'll be able to speak better to his quotation that you made than I can.

Mr. CLEGG. Well, actually, he would not be surprised because I've done the same thing in the past when we've appeared on a panel together. So——

Mr. CONYERS. He's used to you saying that?

Mr. HEBERT. He's used to—— [Laughter.]

Mr. CONYERS. Oh, okay. Well, then, I——

Mr. CLEGG. He's used to hearing those words quoted. And of course, in his own testimony before the Subcommittee, he was at great pains to——

Mr. CONYERS. Yeah. Did he help straighten you out? That didn't make any impression upon you, I presume.

Mr. CLEGG. Well, look——

Mr. CONYERS. Well, if he's already been——

Mr. CLEGG [continuing]. Mr. Conyers, he——

Mr. CONYERS. Look, if he's already——

Mr. CLEGG. That's what he said.

Mr. CONYERS [continuing]. Denied it and you still insist on quoting him, then there's no point in my going any further on it. I've only got 4 minutes left.

Mr. CLEGG. He doesn't deny the accuracy of the quotation.

Mr. CONYERS. Well, I'm sure.

Let me go somewhere else here now. Section 203. Now, the notion that we're encouraging people who are newly sworn-in citizens not to continue to improve in English is an important consideration. And for me, it's a sensitive one because we've already heard from a number of Members of Congress on this who have some reservations. And we know that immigration is a huge issue.

So I wanted to ask Mr. Adegbile whether or not we can get through this particular time situation and continue to have language assistance where needed, in view of the record that's been compiled that shows that it is not particularly expensive and doesn't seem to put out election workers at all.

Mr. ADEGBILE. Thank you for that question, Congressman Conyers. Section 203 is a critical aspect of the Voting Rights Act. It was part of the evolution of Congress's understanding about our democracy and the barriers to that democracy. It's a provision that applies only to citizens—only to citizens—and many people try to distort the record on that issue.

People who receive 203 assistance at the polls are people who pay taxes, they are people who serve in wars, they are people in our communities, and they deserve a say in the political process. It is simply nonsensical to suggest that somebody is going to make a decision about whether or not they are able to learn and speak English because of a rule that allows them to have translated materials in voting. I don't think that anybody seriously posits that argument. And if folks say it, I think it's a cynical argument.

The NAACP Legal Defense Fund supports 203 language assistance because we recognize that barriers to voting affect many different types of citizens and that we don't enrich the democracy by

saying some citizens can have access and others cannot. I am aware of some of the testimony that will be presented this afternoon. It will go in detail to these issues. And I think that the record on 203 that's before Congress now and continuing to be established will be at least as strong as the record that has been presented at previous renewals of the Voting Rights Act.

Mr. CONYERS. Thank you.

Mr. Hebert, have you any thoughts about that? Because to me, this is the one sensitive issue that I see standing in front of us. I think we're moving in a quite uniform way. We've kept in touch with our legislative counterparts in the other body. But in this era of immigration emotionalism, their marches and so forth, I want to get from both of you the best suggestions as to how we move to resolve this issue as expeditiously and effectively as we can.

Mr. CHABOT. The gentleman's time has expired, but the witness can answer the question. And I would just, again, note that we do have a hearing on this at 2 o'clock this afternoon, on section 203. But the question has been asked, so it can be answered.

Mr. HEBERT. Thank you, Mr. Conyers, and Mr. Chairman for allowing me to answer.

You know, I follow the Justice Department's enforcement of voting rights laws pretty closely. Since 1999, nearly all of the cases the Justice Department has brought in Federal court under the Voting Rights Act have been brought to enforce the minority language provisions under 203. Over 90 percent of their cases, and quite a number of them. And many of them get settled quickly because the jurisdictions find that the fix, that they are really not things that they are falling down on, are fairly easy to do and they recognize that they should be done.

We talk a lot of times about citizenship and people being naturalized and the process and, you know, learning to speak English to become a citizen. Well, you know, if a child is born in this country and their parents aren't citizens, but they're born here, even if they're undocumented people, the parents, the child is a citizen at birth. They may grow up in a household that doesn't speak English. When that boy or girl turns 18 years of age and is ready to vote, why shouldn't they be able to go to the vote and get meaningful information to make their vote as effective as mine? Why would we deny people that right? In the United States we open our hearts and open our minds to people in this country, and that's why we, many argue that we have an immigration problem today, because we've been too soft.

But the fact remains that in the area where we're protecting the most fundamental right and trying to ensure that we do exactly what Mr. Clegg read, that John Lewis's vision for America is and Justice O'Connor's vision for America is, to get people included in the process, why would we not extend those bilingual provisions as we've done?

Mr. CONYERS. Thank you very much.

Thank you, Mr. Chairman.

Mr. CHABOT. The gentleman's time has expired. Thank you.

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman. And thank you, members of the panel.

I know that when we discuss subjects like this, I think it's perhaps important for us just to back up for a moment and remind ourselves, you know, of the simple idea that America is first and foremost an ideal, an ideal that all human beings are created equal and endowed by their Creator with certain unalienable rights. And I think that that is indeed what America's best gift to the world is, to somehow not only maintain that but to see it exported throughout the planet.

Having said that, you know, I'm going to make an admission that legislation like this catches some of us without full understanding of its overall impact. You know, it's a fairly esoteric endeavor that we face here. But having that desire to see all human beings recognized for the miracles that they are and somehow that we would become that color-blind society that cares about people because they're human beings, if we can start there and pursue that with our hearts, you know, I think that there is somehow hope for all of it.

Now, what I'd like to do, Mr. Clegg, I'll start with you, if you don't mind, is the Voting Rights Act has been in place for some time and there are going to be some things that are addressing Supreme Court decisions here. And if you can, in practical terms for someone who is not an expert, can you help me understand how, in practical terms—you know, an election—not so much in an outcome-based circumstance but in the effect of some of the corrections or the ways that this bill addresses both the *Georgia v. Ashcroft* and the *Bossier* decisions? How does this affect those decisions and, in practical terms, how is it played out?

Mr. CLEGG. Putting aside questions of constitutionality, the fundamental policy problem that I have with this bill is the fact that section 5, unfortunately, has become a powerful engine for the segregation by race of voting districts. And I don't think that that was the original intent of the Voting Rights Act. I don't think that that's why people marched at Selma. I think that that turns the purpose of the Voting Rights Act on its head. And unfortunately, that is the single greatest effect now of section 5. And the overruling of *Bossier Parish* II and particularly the overruling of *Georgia v. Ashcroft* will exacerbate that problem.

That's in a nutshell the most fundamental problem that I have with this legislation.

Mr. FRANKS. Mr. Adegbile, your name has been said a number of different ways today and I'm not sure I said it right. So I hope you repeat it yourself for all of us. But would you take a crack at the same question?

Mr. ADEGBILE. Sure. And you did indeed pronounce it correctly. I apologize to the panel. I don't know of any translation for that particular name, and it always gives me difficulty as well. So I thank you for your efforts.

With respect to the two decisions, I think *Bossier II* is very simple and I think it's easy to sort of break it down. *Bossier II*, as the Congress intends to correct the statute, the fix will have the effect of making it easier to detect and block some forms of intentional

discrimination in voting. It's that simple. It's consistent with the intent of the statute, and that's what it does.

I can't really imagine the theory of a constitution or a nation that would want to make it harder for those forms of intentional discrimination to get detected and stopped. That's what *Bossier II* does.

With respect to *Georgia v. Ashcroft*, we've heard Mr. Clegg say a number of times that the *Georgia v. Ashcroft* modification will lead to the racial segregation of voters and other things to that effect. There are two important points. One is in my testimony, and that is there are many factors that map-makers consider when they draw districts. I need not tell these Members that because all of you are familiar with the process. But in the first instance, districts are drawn where voters are, where they live. There is residential segregation in the United States of America. It is not because we have the vote and because we have districts. It has its roots in the history of discrimination, and it persists to this day.

So in a system where we draw districts to give voices, local voices, an opportunity to participate in the political process, drawing some of those districts around segregated communities that are living under those circumstances because of our history of discrimination is not only appropriate, it's necessary. And the Voting Rights Act permits that because, even though minority people very often live together, there were people that would try to fragment these populations or over-concentrate them to minimize their voices in the political process.

Significantly, there's also a line of Supreme Court decisions that exercises a check on racial gerrymandering, which Mr. Clegg is very familiar with. *Shaw v. Reno* and its progeny limit the ways in which race can be used in the redistricting process. Nothing in H.R. 9 changes those cases—some may think that the Voting Rights Act couldn't change those cases, since they are constitutionality based. Those limits continue to exist, and that is why the modifications suggested don't lead to racial gerrymandering as Mr. Clegg has suggested.

Mr. FRANKS. I thank the gentleman. My time has expired, Mr. Chairman. Thank you.

Mr. CHABOT. Thank you.

The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Let me start by asking unanimous consent to submit for the record the statement of Congressman John Lewis. He anticipated that he might not be able to get here today, probably anticipated what Mr. Clegg was going to say.

Mr. CHABOT. Without objection, so ordered.

Mr. WATT. All right. And having submitted it for the record, let me just read specifically what he concludes so that—which is actually not entirely inconsistent. I mean, it reinforces in some respects what you said.

"The Voting Rights Act was necessary in 1965, and unfortunately it is still necessary today, as the extensive Committee record makes clear. We have come a great distance, but we still have a great distance to go before all Americans have free and equal access to the

ballot box. This legislation is among the most important that this Congress will consider, and I trust that we will take our responsibility to protect the voting rights of all Americans very seriously as we pass this legislation. We must renew the expiring sections of the Voting Rights Act in this session of Congress. Thank you."

All right, now that we've got that square. I guess, if you've heard, been on panels with John Lewis before and you've heard him take issue with your interpretation and Justice O'Connor's interpretation of what he said before, leads me some to question your interpretation and your intent on the rest of this. So let me go straight at it.

I can understand how you can question the constitutionality of the statute. The Supreme Court's already ruled on that, so at least you don't mind taking on either John Lewis or the Supreme Court.

Mr. CLEGG [continuing]. The constitutionality of this bill.

Mr. WATT. All right. My question to you is have you read the record. Now, Mr. Hebert said he had read the record in, I mean, almost 9,000 pages that we've developed here. Have you read the record?

Mr. CLEGG. I have——

Mr. WATT. Come on, just tell me whether you have or have not.

Mr. CLEGG. Yes. I have. I can't say that I've read every word, but I've looked at every page.

Mr. WATT. Okay. All right. I got you. So then you might not be surprised to find that there are numerous instances in the record where we have found that jurisdictions and States have been continuing to engage in discriminatory voting actions.

Or maybe I should just make this simpler. Are you contending for the record that States and jurisdictions are not still engaging in efforts to diminish the impact of minority voters?

Mr. CLEGG. Congressman Watt, of course there are still instances——

Mr. WATT. A yes or no answer might suffice. If you're contending that, I mean, I'd like to know that, or if you're not contending it. Don't finesse it, though.

Mr. CLEGG. Congressman Watt, of course I'm not saying that there are no instances of discrimination. But what I said in my testimony, in my written testimony, was that I don't believe that the record that you have compiled——

Mr. WATT. Which you haven't read.

Mr. CLEGG [continuing]. Justifies—looked at every page.

Mr. WATT. Okay.

Mr. CLEGG. And, you know, let's be fair. You haven't read every word of the testimony either.

Mr. WATT. I've been here for all of it, though.

Mr. CLEGG. Yeah, but they don't—the record includes a lot that was not spoken, correct?

Mr. WATT. That's true.

Mr. CLEGG. All right. And, you know, you go through page after page after page of this testimony——

Mr. WATT. I think we've made the point, Mr. Clegg.

Mr. CLEGG [continuing]. And the same people and——

Mr. WATT. Let me move on to another question.

Mr. CLEGG [continuing]. You know what's going to be there. And, I mean, you know, look, if you don't want a full answer, that's fine. But that's not going to help your case in showing that the Subcommittee——

Mr. WATT. No, I think I got a full answer, and in this case you seem to be as willing to disregard the intent and what else is going on around you as you have been willing to disregard the intent of what John Lewis has said over and over and over again, and what I said in my opening statement. We are making progress. I don't think anybody would argue with you on that.

Mr. CLEGG. And my point, Congressman. I'm not trying to mislead anybody. Of course, I know that John Lewis supports this bill. He told me that. He has said that for this record. My point in quoting him is that his statement about the transformation of the American South is completely inconsistent with the reauthorization of section 5. And it was relied upon by Justice O'Connor in *Georgia v. Ashcroft*, which this bill would overturn.

Mr. WATT. That's exactly right.

Mr. CLEGG. Okay? So——

Mr. WATT. Because we think that conclusion is inappropriate at this point, and I think that's Congress's right to think that at this point.

Now, let me——

Mr. CHABOT. The gentleman's time has expired. Would he like an additional minute?

Mr. WATT. Can I get just 1 additional minute, because I want to——

Mr. CHABOT. The gentleman is recognized for 1 minute.

Mr. WATT [continuing]. Deal with my other two colleagues here, Mr. Adegbile and Mr. Hebert. I didn't want this to become just an issue with Mr. Clegg here.

I mean, Mr. Scott and I have had this conversation before. I'm not sure I necessarily agree with you all's interpretation or the implication of what ability to elect candidates of choice means. Because the ability to elect candidates of choice, as I understand it, is not an invitation to protect only majority-minority districts. Electing candidates of choice can be candidates from coalition districts, influence districts also. Is that not the case?

Mr. HEBERT. Yes, it is. It——

Mr. WATT. Okay. That's all. I just wanted to be clear, because I didn't want to leave the wrong impression, because the Supreme Court sometimes picks up, as Mr. Clegg does, the wrong impression from these things. I want this to be specific. There is nothing to suggest that candidates of choice have to be elected from majority-minority districts. Is that correct?

Mr. ADEGBILE. I think *Georgia v. Ashcroft* can be read to suggest that nine justices agreed with that statement.

Mr. WATT. Right. Okay. All right. I just wanted to be clear on that. I wanted to clarify the record.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I thank the witnesses for testifying.

The evaluation of a district, is there anything in this legislation that sets a national standard for ascertaining whether a district is one from which a candidate of choice can get elected? It's been my experience that it varies by district. So my question is does the language in Court precedents require a district-specific evaluation to ascertain whether or not minority voters have an opportunity to elect their choice. Mr. Hebert?

Mr. HEBERT. No, this bill does not create a national standard to that effect. And you're correct that, even under existing Supreme Court precedent, which this bill is consistent with, in my view, the opportunity to elect a candidate of your choice, preferred candidate of your choice in the district can range from, you know, heavily minority in some instances is necessary to less than 50 percent in others.

Mr. SCOTT. Following up on that, in some coalition districts African-Americans have in fact been elected and candidates of choice elected, as the gentleman from North Carolina has indicated. Does the language in the bill protect those districts from being dismantled?

Mr. HEBERT. Yes, it does.

Mr. SCOTT. Under the language in the bill, so long as an opportunity district is not dismantled, does the language allow dismantling a coalition district adjoining the district, or does a plan which keeps the number of opportunity districts equal, but dismantles all of the coalition districts, would that plan violate section 5?

Mr. HEBERT. In my view, it would.

Mr. SCOTT. You have litigated many of these cases, is that right?

Mr. HEBERT. Yes, I have.

Mr. SCOTT. Who pays your legal fees?

Mr. HEBERT. Sometimes no one. [Laughter.]

It varies, actually. If I represent a State or local government, the State or local government pays. In many instances I have served as pro bono counsel for public interest groups. In others, the Democratic Party has paid me.

Mr. SCOTT. If an area has been victimized by an illegal scheme, are there circumstances where they cannot come up with the money to get themselves out of that situation?

Mr. HEBERT. Bringing vote dilution cases, Congressman Scott, is a very, very costly enterprise. You need expert witnesses, you need skilled lawyers, because the other side is going to lawyer up big time, usually. I would estimate that the cost of a vote dilution case, to bring a vote dilution case through trial and appeal, runs close to a half a million dollars in costs.

Mr. SCOTT. And much of that, under present law, is not reimbursable?

Mr. HEBERT. That's correct.

Mr. SCOTT. Under the bill, would most of the costs be recoverable?

Mr. HEBERT. Yes, they would.

Mr. SCOTT. If you win?

Mr. HEBERT. If you prevail.

Mr. SCOTT. Under section 5 preclearance, if there is no preclearance, even if a client plan is clearly illegal, if we don't ex-

tend the preclearance provision, if a plan is clearly illegal, what would happen until a case could be brought?

Mr. HEBERT. The discriminatory system would go into effect. Minority voters, presumably, would be harmed. And it might be too little too late to even bring a suit if you could muster the resources to file it.

Mr. SCOTT. And if you finally win, is it your experience that the person running for reelection would have the advantages of incumbency?

Mr. HEBERT. Absolutely.

Mr. SCOTT. So they would benefit during the time when the illegal plan was in effect and continue to benefit because we did not extend the preclearance provision. With the preclearance provision, the plan never would have gone into effect in the first place, is that right?

Mr. HEBERT. That's correct. Once it goes into effect, you have a sitting incumbent. To get that sitting incumbent out, that would be a fruit of the poisonous tree, an advantage that incumbent would have against a challenger.

Mr. SCOTT. Mr. Hebert, you've represented people in bailout cases. For those who have not discriminated in the last 10 years, is there any problem with bailing out?

Mr. HEBERT. No. No, it's just really the only problem with bailing out is more people should know about it.

Mr. SCOTT. Well, is it not a fact that some areas, for race relations purposes, would prefer just not to bail out so that, as they change election laws, the entire community would know that nobody's being discriminated against?

Mr. HEBERT. That's true. A lot of jurisdictions like section 5 preclearance and like to get a stamp of approval from the Justice Department that their voting system is non-retrogressive. And I've heard a number of officials say that.

Mr. SCOTT. My time's up.

Mr. CHABOT. The gentleman yields back his time.

The gentleman from Iowa I know just arrived, but is he interested in asking some questions?

Mr. KING. Mr. Chairman, I'd be very grateful to have that opportunity.

Mr. CHABOT. Excellent. We appreciate that. The gentleman is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. And I thank the witnesses for their testimony and regret I wasn't able to listen to it all in its entirety, although I do come to this panel with a significant degree of curiosity with regard to this whole subject matter of reauthorization of the Voting Rights Act.

You know, I've watched this society evolve from the time I was a young man and I saw the civil rights demonstrations in the streets, and I do believe and will always contend that it was necessary to establish the Voting Rights Act when we did. But I also don't see a path for us to ever get to the point where we could just simply recognize that this society has evolved to the point where we could get along without it. And I don't see a path that's being proposed on how we might be able to change the preclearance

qualifications, for example, let alone the multilingual language that's in there.

But I just direct my inquiry to Mr. Clegg. Your constitutional view? Could you state that with a little more depth, and your viewpoint on how you see this from a constitutional perspective in the Voting Rights Act?

Mr. CLEGG. Sure. Section 5 is constitutionally problematic for two reasons. First of all, there are federalism concerns because of the extraordinary nature of the preclearance procedure. Voting activities are usually a State matter. Sometimes they are constitutionality committed to the States. And therefore there's a presumption that these matters are going to be handled by the States without the State having to go get permission from the Federal Government beforehand. The Voting Rights Act section 5 obviously changes that.

The other thing that section 5 does is allow the Justice Department to refuse to preclear a change not only when it is retrogressive and there is a discriminatory purpose, but also when it's retrogressive and there is simply a disproportionate effect on one racial group or another. The reason that that's constitutionally problematic is that the Supreme Court has made clear that Congress's authority in this area, that the Constitution prohibits only disparate treatment on the basis of race, not simply State actions that have a disparate impact.

Mr. KING. Mr. Clegg, with regard to that—and I didn't hear you reference the 14th amendment Equal Protection Clause in this—but as I look at the results of this, and the Supreme Court has ruled that it's all right to discriminate on the basis of race as long as you're discriminating on the basis of advantaging a minority, has there been a case brought forward before the Court where there has been a non-minority that has been disadvantaged because of the redistricting and the gerrymandering to benefit minorities?

Mr. CLEGG. Well, yes. That would be the *Shaw v. Reno* decision, which the NAACP referenced here. So the prohibition against—and this is actually a third way that section 5 raises constitutional problems. Again, unfortunately, it has been interpreted to require racial gerrymandering and to require the racial segregation of districts. And that is inconsistent with the Equal Protection Clause and with the 15th amendment, as the Supreme Court explained in *Shaw v. Reno*. I would say that it is unfair and wrong when that kind of segregation occurs not only to White voters, but also with respect to Black voters.

Mr. KING. In Iowa we have a redistricting plan that separates all that and doesn't allow any gerrymandering and it's totally blind and unbiased in many, many regards. And I understand the politics of this on the one side—actually politics on both sides—but would you speculate as to what this country would look like if we just simply didn't reauthorize the Voting Rights Act and we let the conscience of the States and the people in this country regulate?

Mr. CLEGG. Well, it's important to keep in mind, Representative King, that many provisions of the Voting Rights Act are permanent. And——

Mr. KING. Two or three, for example?

Mr. CLEGG. And many of them are uncontroversial. And of course the 15th amendment and the 14th amendment are permanent as well. So just because section 5 is not reauthorized does not mean that a State that decided that it wanted to discriminate on the basis of race would be able to. It would still be blocked from doing that by the 14th amendment, the 15th amendment, and the permanent provisions of the Voting Rights Act. And I think that the point that Representative Lewis made and that I've made today is that the record is just not there to show that the covered jurisdictions, if section 5 were not reauthorized, are going to start acting as if it were 1965.

I mean, one way to look at this, Congressman King, is suppose that we never had a section 5 and somebody came forward today, in 2006, with this bill. Somebody came forward in 2006 with this bill that was going to single out the jurisdictions that are singled out now by this bill and said, "Let's require these jurisdictions to jump through these hoops and to be singled out for the penalty provisions of section 5." Would that bill—would anybody be seriously considering the enactment of that bill? And would anybody seriously think that that bill would withstand constitutional scrutiny? And the answer, of course, is no.

Mr. KING. Thank you, Mr. Clegg. I yield back.

Mr. CHABOT. The gentleman's time has expired.

Did the gentleman from Virginia have a request?

Mr. SCOTT. Mr. Chairman, part of the reason the jurisdictions are the way they are now is because of the Voting Rights Act. And I would like, if any of the witnesses have closing comments on the continuing need for the Voting Rights Act, I would appreciate it if you'd give them an opportunity to respond.

Mr. CHABOT. Okay.

Mr. HEBERT. I would like to make a statement. Very briefly, Mr. Chairman—and thank you, Mr. Scott, for the opportunity to address this issue—first of all the Voting Rights Act does not require quotas, it does not produce segregated districts. Many of the minority opportunity districts that exist today are the most integrated districts in the country. They're 50, 55 percent minority. I mean, you know, there are a lot of Members up on this Committee who have come from districts that are 95 percent White, or better.

I think the best way to look at this is the way I described recently when I was speaking during Black History Month to a class. And they said, well, what's the story with the Voting Rights Act extension? And I thought, what an interesting thing for sixth graders to ask that question. And I said, you know, here's the way to look at this. Back in 1982, Congress decided that strong medicine was still needed and the prescribed three pills a day of penicillin for 25 years. And hopefully, that was going to cure the disease of discrimination in voting.

Now, along the way, what we have found out is that the Supreme Court has said, in *Georgia v. Ashcroft*, well, you don't need to take three a day. Only take two a day. And then they came along with *Bossier Parish* and they said, well, we're going to take one of those others away, so now you're down to one a day.

Well, the problem with that is that the penicillin you were originally prescribed is going to take a lot longer to take effect. What

I see this bill doing is it gets us back to three pills a day, and hopefully a day when we have a healthy America in our political process, and racial discrimination ends. The disease of discrimination will be over.

That, Mr. King, I think is really the simple answer to why we still need the Voting Rights Act, because the engine of racial discrimination runs on.

Mr. SCOTT. Mr. Adegbile?

Mr. ADEGBILE. Two quick points. Mr. Clegg said that section 5 is a penalty clause. Section 5, of course, is not a penalty clause. Section 5 is a remedy for demonstrated discrimination in the area of race in voting. In fact, it may be more appropriate to say that without section 5 the penalties that were imposed on minority voters for nearly 100 years after the passage of the 15th amendment—that is a substantial period of time—for nearly 100 years the Constitution was ignored, and it was tolerated in this country.

Section 5 has begun to move us closer to ensuring the provisions of the Civil War Amendments. But we're not there yet. There's nothing inconsistent with recognizing the progress that we have made and also recognizing some of the mechanisms, legal and otherwise, that have helped to carry us there.

In light of the extensive record before this body, and I would say it's not just the number of pages, but what's contained in it. I will admit I've not looked at or read every page, though I have actively been engaged in helping to build the record, and it's very substantial. It's substantial at the local level. It's substantial at the Statewide level. It's substantial as to redistrictings, as to intentional discrimination, as to discriminatory effects.

And finally, I will just say that history did not begin yesterday. Mr. Clegg says that we should start to analyze the passage or renewal of section 5 by saying, well, let's look at today and see how we find the way forward. The history of discrimination taught us about how it happens. And what the Congress has learned is that discrimination in voting is both adaptive and persistent. And it is that adaptive persistence that made section 5 necessary in 1965 and, based on the record, also today.

Mr. SCOTT. Thank you very much.

Mr. Clegg, did you have something?

Mr. CLEGG. I was just going to say that, with respect to the record, when you all started out, it would seem to me that you would want the record to do a number of things. First of all—and somebody reviewing the record, the Supreme Court reviewing the record, is going to look for a number of things.

First of all, it's going to want to make sure that the Committee came into this with an open mind and was getting evidence from both sides of this debate. It is going to want evidence of intentional, purposeful racial discrimination in the covered jurisdictions. And it iss going to need evidence that the discrimination that it found in the covered jurisdictions was worse than what's going on in the noncovered jurisdictions, because, after all, section 5 covers one and not the other. And then finally, it was going to need evidence that the extraordinary preclearance provisions and the use of an effects test rather than an intent test are necessary to ensure that purposeful discrimination does not occur.

And honestly, Mr. Chairman, I think that the record that you all have built, while it does have some instances of intentional discrimination in covered jurisdictions, is going to be inadequate for all of the four reasons that I've just listed.

The record reads as if you all made up your minds ahead of time and you were trying to compile a record that was going to justify what you had already decided that politically you wanted to do. You found some evidence of intentional discrimination in the covered jurisdictions, but a lot of what's in there is not about purposeful discrimination. There is, I think, no real showing that the covered jurisdictions are more problematic than the noncovered jurisdictions. And finally, there's very little attention to why the preclearance provisions and the effects test are the best way to get at the intentional discrimination that does remain in the covered jurisdictions.

I think this bill is very vulnerable if it's passed in this form and is challenged in court.

Mr. CHABOT. The chair would just note that the record has been open and available for all groups of all opinions to supplement, to add to this record. And any group that would like to add additional information is certainly welcome to do so.

Mr. WATT. Would the gentleman yield?

Mr. CHABOT. I yield to the gentleman, yes.

Mr. WATT. I hope he will make it clear that the record is still open.

Mr. CHABOT. That's correct. So, Mr. Clegg, if you or groups that you are aware of would like to add additional material, we would be happy to receive that.

Mr. Hebert, as at least one person in this room—I know there are others—that has actually read the whole record, would you like to comment on Mr. Clegg's comment about the lack of substance or support for reauthorization of the Voting Rights Act?

Mr. HEBERT. Yes, I would. Thank you for that opportunity.

First of all, I think what the Committee had before it at the time it started its process was a bill that was already in place from 1982, that had been amended and extended in 1982. So you obviously had a starting point, and the appropriate thing to do was to consider whether those special provisions should be continued. You don't start with a clean slate, as Mr. Clegg would have us believe. You know, that kind of ignores the whole history of discrimination that's taking place in the country. You don't come into 2006 and say, okay, could we enact this bill as H.R. 9 today if there had been no Voting Rights Act. I mean, you know, yeah, if the earth was flat, we would have all fell off, too.

The problem with Mr. Clegg's analysis is that Congress had an open mind. The open mind was let's see what evidence is out there about whether we continue to need these special provisions. And if you have evidence, Mr. Clegg, or anybody else, as the Committee said, bring it on. And if those of us who support the extension have evidence showing continued discrimination, bring it on. I think that's what the Committee's process has done.

As to the racial purpose that's out there, the evidence is replete with examples, in this record, of intentional discrimination. And the fact is that though there may be discrimination taking place in

some of the noncovered areas, does that mean that section 5 is not working not only because there's continued evidence of discrimination in the covered areas, but perhaps section 5 has worked to stop it, as it was properly supposed to do?

I mean, for all those reasons, I think that the record that the Committee has put together has been an impartially assembled record with no preconceived notions and has attempted to develop as complete a record as possible to support the extension. And I think that, in fact, it has done so.

Mr. CLEGG. Mr. Chairman, I just want the record to reflect that I appreciate the opportunity the Committee has afforded me to testify and that there have been a number of studies, particularly those published by the American Enterprise Institute, that have been put into the record that I think make my point, that there is not an appreciable difference anymore in the degree of discrimination between covered and noncovered jurisdictions, and that the record of the covered jurisdictions is quite consistent with the sworn testimony that Congressman Lewis gave in *Georgia v. Ashcroft*.

Mr. CHABOT. We appreciate the witnesses' testimony here this afternoon.

Mr. WATT. Mr. Chairman?

Mr. CHABOT. Mr. Watt?

Mr. WATT. I ask unanimous consent just to make a 30-second comment——

Mr. CHABOT. Without objection.

Mr. WATT [continuing]. On something that Mr. Clegg said. Because since Chairman Sensenbrenner and I had throughout this process been monitoring the record and trying to craft a bill, I don't want it to go unchallenged that somehow we started someplace and ended up the same place. That is just absolutely not the case. Had this bill been dropped before we started these hearings, I think it would have been a substantially different bill in a number of respects.

So anybody who has this notion that this process was programmed—and Chairman Sensenbrenner was adamant about it. That's why no bill was dropped until after the hearing record was developed. That's why we made a particular emphasis with the Senate to have them have the benefit of the entire House record by having Chairman Sensenbrenner and Ranking Member Conyers take it over there and put it into their record. We are patently aware of the value of having a record here. And for anybody who's thinking that somehow we started with a notion of what this bill was going to include and ended with exactly that notion is just wrong.

So I just—I think I just needed to clarify that.

Mr. CHABOT. I thank the gentleman, because I know the gentleman has been very involved with many of the negotiations that have gone on with us and we appreciate his work and cooperation on that.

If there are no further witnesses or evidence to come before this Committee, we are adjourned. But I would mention again that we do have a hearing this afternoon at 2 o'clock on section 203.

And no further business, we are adjourned.

[Whereupon, at 10:54 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

Chairman Chabot, as we come to the end of our hearing schedule, I would like to commend you on your commitment to running a fair and open hearing process. Your flexibility and cooperation was essential to ensuring that all voices were heard as we approached the reauthorization of this historic legislation. Your leadership has been critical to the success of the process, thus far, and a testament to the fact that civil rights need not be a partisan issue.

On Tuesday, we are introducing H.R. 9, Voting Rights Act Reauthorization and Amendments Act, which will renew and strengthen the Voting Rights Act for another 25 years. Chief among the expiring provisions of the VRA is Section 5, which requires that any change to voting rules in covered jurisdictions be submitted to either the U.S. Department of Justice or a federal court for "preclearnace" before it can take effect. Through Section 5, the VRA has prevented thousands of discriminatory voting changes from undermining minority voters' meaningful access to the ballot.

Our inquiry in the Act has broken down into two fundamental questions: 1) Is there an adequate record of discrimination to justify reauthorization of the expiring provisions ? and 2) Are the expiring provisions, as interpreted by the courts, still adequate to protect the rights of minority voters ? These questions should continue to guide us as we examine H.R. 9 itself.

There is no right more fundamental than the right to vote, but for nearly a century, many Americans were denied this fundamental right of citizenship. While we applaud the substantial progress which has been made in the area of voting rights over the last 40 years, we must continue our efforts to protect the rights of every American voter with the reauthorization and restoration of the expiring provision of the Act. I look forward to the testimony of our witnesses.

PREPARED STATEMENT OF THE HONORABLE MELVIN L. WATT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION

Thank you, Mr. Chairman. I want to begin by thanking Chairman Sensenbrenner for scheduling these hearings on H.R. 9 so that we can move forward towards passage of a Voting Rights Act reauthorization this Congress. Let me also thank you and Ranking Member Nadler for overseeing our compilation of an exhaustive record that fully and completely supports the policy choices that we have made with the introduction of this bill. Our record consists of an abundance of evidence that supports the continuing need for the expiring provisions of the Voting Rights Act, and was developed with an acute understanding of and attention to the Supreme Court's "congruence and proportionality" standard that imposes limitations on Congressional enforcement powers under the 14th (and likely the 15th) Amendment(s).

This morning we focus primarily on the coverage, preclearance, and federal observer provisions in the bill. Section 4 of H.R. 9 effectuates a 25 year extension of these provisions. In addition, Section 3 makes changes to the examiner/observer provisions of the original bill by, in effect, updating the bill to reflect current circumstances. Federal examiners are eliminated, while Federal observers are retained and made subject to independent criteria for deployment and no longer tied to whether an examiner has been certified. Section 5 of H.R. 9 makes additional, necessary changes to Section 5 of the original Voting Rights Act, by addressing restric-

tive Supreme Court decisions that misconstrued the original intent of Congress. *Reno v. Bossier Parish II* (2000) and *Georgia v. Ashcroft* (2003) unhinged over 30 years of judicial interpretation and administrative implementation of the Voting Rights Act from their moorings. Together, these two cases returned back to jurisdictions with a history of discrimination the very discretion in implementing voting changes that Congress intended to curtail. Without the fix contained in H.R. 9, covered jurisdictions—those with a history **and** ongoing record of discrimination precluding the ability to bail-out from coverage—could enact and enforce, with impunity, voting changes that purposefully discriminate or undermine minority voters ability to elect candidates who share their values and represent their interests.

We've always known that not everyone would appreciate the conclusions reflected in H.R. 9. Some critics of the bill—one of whom appears on this panel (Mr. Clegg)—maintain in one breath that our record is one-sided and, yet in another, cite extensive evidence that is contained in our record in support of a different approach to reauthorization. Academics, litigators, election officials, and voters, all no doubt have a variety of views inspired by various motivations on the voting rights issues with which we deal in this bill. But it is our responsibility, our duty to sift through the record and make a determination how best to serve the interests of society based upon congressional fact finding.

The cynical notion—articulated in submitted testimony today—that bipartisan, bicameral consensus on a civil rights bill is tantamount to racial pandering is not only wrong, it is offensive. A Congress with far fewer African Americans, Latinos and Asian Americans passed the Voting Rights Act of 1965 because the Constitution had been violated for too long. As we sit here today and evaluate the renewal bill, we do so because the record demonstrates that the work is incomplete. We have deliberated long and hard over months and months of internal debate; we have assembled an extraordinary record with competing facts and policy perspectives; we have listened to every side of this issue from the left, from the right; and we have reached the considered judgment that H.R. 9, supported by factual evidence of ongoing discrimination, vindicates the Constitutional rights of racial and language minorities to participate fully in the electoral process. This bill is not a panacea for all of the concerns raised by the record before us. But as the Supreme Court noted in the first challenge to the Voting Rights Act, in *South Carolina v. Katzenbach,* "legislation need not deal with all phases of a problem at the same time." We must remain vigilant in crafting legislative remedies to secure the electoral franchise for all Americans. H.R. 9 goes a long way towards satisfying that goal.

PREPARED STATEMENT OF THE HONORABLE JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Statement of Congressman John Lewis
Thursday May 4, 2006 - 9:00 AM
2141 Rayburn House Office Building
Committee on the Judiciary
Subcommittee on the Constitution
Legislative Hearing on H.R. 9, "A Bill to Reauthorize and Amend the Voting Rights Act of 1965"

Mr. Chairman, I want to thank you and Chairman Sensenbrenner and Ranking Members Conyers and Nadler, and the Chairman of the Congressional Black Caucus, Mel Watt, for your leadership and commitment to the introduction and passage of a strong and revitalized Voting Rights Act. I am pleased to join you and the bi-partisan leadership of the U.S. Congress to renew those sections of the Voting Rights Act that are about to expire.

The vote is precious, almost sacred. It is the most powerful, non-violent tool we have in a democratic society.

At one time in America, not so long ago, it was almost impossible for some citizens to register and vote. People stood in unmovable lines. Some were harassed, evicted from farms and plantations, or fired from their jobs.

Many were jailed, beaten, and some were even killed for trying to participate in the democratic process.

Because of the actions of hundreds, thousands, and millions of American citizens, because of the action of President Lyndon Johnson and the U.S. Congress, because of the passage of the Voting Rights Act of 1965, this nation has witnessed a non-violent revolution under the rule of law, a revolution of values, a revolution of ideas.

The temporary provisions of the Voting Rights Act, which are about to expire, have been vital to the success of the Voting Rights Act. These important temporary provisions have ensured that no American's right to vote is denied because of race, national origin or proficiency in English. By introducing this legislation and passing it in a bipartisan manner, we will ensure that we do not return to the dark past.

I have worked with Mr. Watt and others on the Committee on the language of this legislation that we are considering today. I have confidence that this bill, H.R. 9, restores the intent of Congress with respect to the scope of the Voting Rights Act. The legislation rejects the Supreme Court's attempts to narrow the Voting Rights Act in *Bossier II*, by making clear that a voting rule change motivated by any discriminatory purpose, including a discriminatory purpose that is not retrogressive, cannot be precleared. It also partly rejects the Court's decision in *Georgia v Ashcroft*, by restoring the standard to protect the minority community's ability and opportunity to elect their candidates of choice. I am also confident that the record created by this Committee provides ample constitutional justification for each and every provision contained in this legislation.

The Voting Rights Act was necessary in 1965, and, unfortunately, it is still necessary today, as the extensive Committee record makes clear. We have come a great distance, but we still have a great distance to go before all Americans have free and equal access to the ballot box. This legislation is among the most important that this Congress will consider and I trust that we will take our responsibility to protect the voting rights of all Americans very seriously as we pass this legislation.

We must renew the expiring sections of the Voting Rights Act in this session of Congress. Thank you.

PREPARED STATEMENT OF THE HONORABLE WILLIAM J. JEFFERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

I would first like to thank Chairman Chabot and Ranking Member Nadler for their leadership on this most important issue. It is critical that Congress reauthorize the Voting Rights Act and I am appreciative of your support of this bill.

Mr. Chairman, the passage of the Voting Rights Act 41 years ago has had a powerful impact on this nation. Prior to its passage scores of African-Americans, Latinos, Asians, and Native Americans were excluded from the process. Yet now it has resulted in so many minorities of all cultures gaining substantive access to the democratic process. In my own district, passage of the Voting Rights Act has allowed my constituents to elect the first black Mayor of New Orleans in Dutch Morial as well as the first black member of Congress from Louisiana since Reconstruction.

However, the gains that have been made due to the Voting Rights Act must not overshadow the need to reauthorize the expiring provisions. Since Section 5 coverage of the state began, the Civil Rights Division has object to discriminatory voting changes in Louisiana 146 times, 96 of which have occurred since the last extension in 1982. That is to say 65% of the objections placed against the state have occurred since Congress last extended protections to minority voters.

Of the 96 objections since 1982 no fewer than half a dozen have directly concerned attempts to dilute minority influence in Orleans Parish. These include attempts by the state legislature to eliminate minority opportunity districts in 1982, 1991, and as recently as 2000. In 2000, the state's redistricting plan was opposed by the United States Department of Justice under Attorney General John Ashcroft as the state once again attempted to eliminate minority opportunity districts in Orleans Parish despite the fact that the African-American population of New Orleans had increased in real numbers and as a percentage of the Orleans Parish population.

According to reports from the National Association for the Advancement of Colored People (NAACP), People for the American Way (PAFW), and various press reports, students at Prairie View A&M University, a largely African-American institution, were erroneously told that they were ineligible to vote. This is particularly disturbing as I have three Historically Black Colleges in my district.

Yet this issue goes beyond intimidation and disenfranchisement of black voters. The Latino population in the United States continues to grow at fast rate we must continue to provide the growing community with the resources to participate in the process. To that end, we must work to reauthorize provisions in the Voting Rights Act that provide these voters with bi-lingual ballots. It is in large part because of the important provisions of the Voting Rights Act that over 5,000 Latinos now hold public office in this country. The demographics of the nation are changing and we must continue to change with it. Only then will minorities earn true political incorporation. This is why we must reauthorize section 203 of the Voting Rights Act providing bi-lingual ballots.

. The displacement caused by Hurricane Katrina makes it even more critical that this bill come to the floor quickly to be voted on, passed, and presented for signature. New Orleans has historically taken an active role in the struggle for minority voting rights. During the Civil War, free blacks there demanded suffrage; their efforts resulted in Lincoln's first public call for voting rights for some blacks in the final speech of his life. Once these rights were won, New Orleans blacks took an active part in politics, leading to the establishment of the South's only integrated public school system. In the aftermath of Hurricane Katrina, New Orleans finds itself at a turning point again in the struggle for voting rights.

The Supreme Court declared more than a century ago that the equal right to vote is fundamental because it is "preservative of all rights." Every citizen of New Orleans, spread across 44 states, must be able to vote and it is only through the protections afforded to them by the Voting Rights Act that this will happen. Without the protection of the Voting Rights Act, these proposed changes would have been allowed, effectively disenfranchising a large segment of the population of the state.

Reauthorization of Section 5 of the Act, requiring Department of Justice preclearance of changes to voting policies and procedures in certain jurisdictions, is vital. Section 5 must not be removed or weakened. This is of especial importance in areas with a documented history of exclusion and discrimination such as Louisiana.

Reauthorization of the Voting Rights Act of 1965 is essential to our Nation because of the continuing efforts of some to deny voting rights to segments of our population. While progress has undeniably been made the task is far from over. Reauthorizing this act will bring us one more critical step forward to fulfilling the dream of over 500 non-violent protestors who bore the brunt of the backlash on Bloody Sunday. It will send a clear message to those who would seek to suppress voting

rights that their machinations will not be tolerated. Reauthorizing this act will send a clear message to multitude of minority voters that their voices have been and will continue to be heard. Most importantly, it will bring this country one more crucial step toward fulfilling the ideals articulated by the Founding Fathers and true inclusion for all.

American Enterprise Institute

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An Assessment of Voting Rights Progress in Alaska, Michigan, New Hampshire, and South Dakota

Executive Summary

By Edward Blum

Alaska, Michigan, New Hampshire, and South Dakota exhibit different levels of progress in Voting Rights. Voter participation in the covered jurisdictions continues to lag for minority voters compared to Anglo whites, but there is contextual evidence of greater Native than white participation in Alaska, and of greater black than white voter participation in Buena Vista Township, Michigan.

There is little evidence of legally significant, racially-polarized voting in Alaska, and Native Alaskans make up over a quarter of all elected legislators (almost all elected Native legislators are candidates of choice). The overwhelmingly-white, covered townships of New Hampshire show lower rates of voter participation than the rest of the state, though a majority of voting age population participated in the covered New Hampshire townships in the 2000 general election. One New Hampshire township covered by Section 5 has no residents as of the 2000 census.

South Dakota shows the least progress of these four states, though the state is poised to attain Native American proportionality in the legislature. What progress has been accomplished on this front is more a product of efforts under section 2 of the Voting Rights Act than of the application of preclearance authority under section 5.

An Assessment of Voting Rights Progress in Alaska, Michigan, New Hampshire, and South Dakota

Prepared for the Project on Fair Representation
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Assessment of Voting Rights Progress in Alaska, Michigan, New Hampshire, and South Dakota

When the Voting Rights Act was initially passed in 1965, Section 5 did not apply to Alaska, Michigan, New Hampshire or South Dakota. Select counties or townships in three of these states became subject to preclearance under the Voting Rights Act subsequent to the passage of the 1970 or 1975 VRA amendments, which expanded the trigger for coverage. The only exception is Alaska, which is entirely subject to preclearance review based on the 1975 provisions, and which had initially been caught in the trigger of the 1965 Act and was subsequently released in 1966.

Original coverage of a jurisdiction by the preclearance provision of the Voting Rights Act is determined by a formula in Section 4. This formula had two components in the original 1965 Act. First, the state or political subdivision maintained a "test or device" restricting the opportunity to vote as of November 1, 1964.[1] Second, less than half of the state or political subdivision's voting age population had registered to vote as of November 1, 1964, or had cast a ballot in the 1964 presidential election.

The 1970 reauthorization extended Section 5 coverage to jurisdictions that had a test or device as a prerequisite to registering and in which fewer than half the voting age population had registered to vote or voted in the 1968 presidential election.

The 1975 reauthorization extended the preclearance requirement to address low voting rates among linguistic minorities, defined as "American Indian, Asian American, Alaskan Natives" or people "of Spanish heritage." The definition of "test or device" was rewritten to encompass the failure to provide election materials in the language of a covered linguistic population in the jurisdiction. Jurisdiction came under coverage if: Over five percent of the voting-age citizens were members of a single language minority group as of November 1, 1972; registration and election materials were provided only in English in 1972; and fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 presidential election.

This report explores the progress on voting rights in the covered portions of four states. As indicated in Table 1, only Alaska is entirely covered by Section 5. In two of the states (Michigan and New Hampshire) it is the smallest possible political subdivision to administer elections– townships within counties – that are subject to preclearance. South Dakota has two counties subject to Section 5 enforcement.

(Table 1 goes here)

Table 2 shows how infrequently the Justice Department has objected to changes in the administration of elections in the four states. The Department of Justice (DOJ) has issued

[1] The Act defined a "test or device" as requirements such as a literacy test, a good character test, or requiring that another registered voter vouch for an applicant's qualifications to vote.

a total of four objections since 1975. Of these, three were in South Dakota and one in Alaska. There have been no preclearance objections in either Michigan or New Hampshire, and since 1995 only South Dakota has encountered even a single objection.

(Table 2 goes here)

ALASKA

Alaska has a little-known history of discrimination and segregation.[2] A hundred years ago, natives were often systematically excluded from business establishments, with "No Natives" signs often posted, and public accommodations were segregated. Alaska's Constitution barred many Natives from voting by requiring that registrants speak English, a requirement repealed in 1970. The previous use of this test, when combined with low registration and participation among Native Alaskans, led to coverage under Section 5 of the Voting Rights Act. The state was initially covered by the original trigger but was released from coverage in 1966. With the 1975 amendments, Alaska again came under federal oversight. The only DOJ challenge to a voting change in Alaska, an objection to the state's legislative districts, came in the early 1990s.

The population of Alaska is nearly 70 percent Anglo and 15.6 percent Native Alaskan. Alaska elects only one member to the US House of Representatives, and the state's rate of population growth indicates no likelihood of a second district in the foreseeable future.

The initial state legislative districting plan for the current decade, as crafted in 2001, included four state House districts and two state Senate districts with majority-Native populations, and another two state House districts and one Senate district having more than 35 percent Native population. Despite a challenge to the districting scheme by Aleut and other Native American groups, who objected to population equalization driving the map over other communities-of-interest consideration, the map was easily precleared.[3] This map was later rejected in March 2002 by the state Supreme Court in an opinion that cited compactness, population deviations, and other communities-of-interest arguments related to social and economic integration. A map satisfactory to the state courts was adopted in May of 2002, by the state's five-member redistricting board.

Voter Participation

Alaska originally fell under the Voting Rights Act for low voter participation and the use of a test (English language ability) as a qualification to vote. Tables 3 and 4 reveal that, more recently, voter participation as an estimated proportion of voting age population exceeds 50 percent, but that differences between Native and non-Native turnout have emerged in the most recent decade. This change is a consequence of increased

[2] Ben Speiss, "Racist history put state on fed's list," *Anchorage Daily News* (May 1, 2003): B1.
[3] Mike Chambers, "Justice approves redistricting plan over Aleut objection." Associated Press, October 3, 2001.

participation among non-Natives, rather than any downturn in Native participation. As indicated in Table 3, Natives and non-Natives turned out at comparable rates in the 1996 general election. OLS regression estimates indicate slightly higher non-Native than Native turnout, while Ei estimates show slightly higher rates of Native than non-Native participation. In 2000 Ei and OLS estimates indicate slightly higher Native turnout compared to 1996, and analysis for 2004 indicates slightly lower Native turnout. Estimated non-Native turnout jumped substantially, to over two-thirds of the voting age population by 2004.

(Table 3 goes here)

Estimates of localized participation paint a slightly different picture. Lisa Handley estimates Native and non-Native turnout in 1996-1998-2000 for ten contests for state Senate and state House across six different districts. All featured either Anglo-versus-Native or Native-versus-Native general election contests.[4] The estimates, which appear in Table 4, indicate that Native turnout exceeded non-Native turnout in nine of these ten contests. In three contests Native turnout exceeded 50 percent while a majority of non-Natives turned out only once. Under circumstances generally expected to pique minority interest – the presence of a minority candidate-- the minority turnout usually met or exceeded non-minority voting.

(Table 4 goes here)

Minority Legislators

Democrats were the first to recognize the value of the "Bush" (rural, isolated) vote. In 1966 Mike Gravel, then speaker of the state House, courted the Native vote in a failed US House bid. Those efforts would later pay off in his election to the US Senate. These efforts at courting and mobilizing minority voters created an electoral environment where, by 1972, Natives Americans and Aleuts constituted a quarter of all turnout. By 1972, despite reapportionment which reduced the electoral potential of the rural Alaskan Bush, nine Native American and Eskimo legislators were serving, which at the time accounted for over half of all Native American legislators in the United States.

While legislative districting, especially the one-person, one-vote requirements, has threaten the power of rural, Native communities of interest, it has not impeded the nomination or election of Native Alaskan candidates who are candidates of choice of Native voters. As reported in Table 5, Native legislators held 13 or 14 of the 60 seats in the 1990s. Natives consistently held 20 percent of seats in the state House of Representatives and 25-30 percent of seats in the Senate. These numbers are consistently greater than Alaska's Native population which stood at 15.4 percent in 2000.

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[4] Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts.* Prepared for the Alaska Redistricting Board, July 26, 2001.

(Table 5 goes here)

Vote Choices and Candidates of Choice

In contemporary America, Anglos have a tendency to vote Republican while African-Americans, Hispanics, and Native people generally prefer Democrats in general elections. This pattern has frequently emerged in recent, major Alaska elections. As indicated by the exit poll data in Table 6, Native and Anglo preferences are generally in opposition. In seven of eight major statewide contests for which there are exit poll data since 1992, a plurality of Alaska whites preferred the Republican candidate.[5] In five of eight instances, a plurality of Native/Other voters preferred the Democratic candidate. The differences in preferences are not terribly stark, and, in three instances, including the most-recent US House contest in 2004, a plurality of both groups voted Republican. Ecological regression estimates of Native and non-Native preferences for President and the US House in 2000 confirm the fluidity of Native preferences.

(Table 6 goes here)

As shown in Table 7, in 2000, an estimated 47.2 percent of Native voters cast Democratic ballots for President (compared to just 25.1 percent of non-Native voters). In that year's congressional election the ecological regression estimate is that 16.0 percent of the Native voters cast Democratic ballots, a proportion nearly the same as that estimated to have been cast by non-Natives (16.5 percent).

(Table 7 goes here)

Down-ticket, in state legislative contests, Native candidates enjoyed great success, and estimates of racial polarization in state legislative contests do not reveal legally-significant, racially-polarized voting. Tables 8 and 9 present data originally compiled by Lisa Handley that show Native candidate success and the frequency of election of Native candidates of choice in contested elections.[6] As indicated in Table 8, of the 85 Native candidates who competed in a legislative primary between 1994 and 2000, 57 (67 percent) succeeded. Native candidates competed in 61 districts elections and won the nomination in 57. Of the 58 Native candidates in general elections, 43 (74 percent) were elected, according to Handley. In 50 districts that might have been won by Native candidates, 43 elected a Native candidate to the legislature.

(Table 8 goes here)

Table 9 presents data on Native and non-Native preferences in general elections with at

[5] Since Republican Lisa Murkowski won the 2004 Senate race by 9,349 votes, the exit poll showing a plurality of the whites and two-thirds of the Other/Native voters preferring the Democrat is slightly off.
[6] Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts.* Prepared for the Alaska Redistricting Board, July 26, 2001.

least one Native candidate. Of the fifteen contested general elections for House and Senate, eleven indicate different preferences between Native and non-Native votes on at least one of the three measures. However, in thirteen of fifteen instances, the Native-preferred, Native candidate prevailed over either a Native or Anglo opponent. All but one of the winning, Native-preferred candidates were Democrats, and the two Native candidates who lost, lost to other Native candidates who pulled substantial minorities of the estimated Native vote.

While Native Alaskans and no-Natives vote differently, those differences do not impede the election of candidates of choice by Native voters. Handley concludes that a district as low as 35 percent Native voting age population is sufficient to allow a Native candidate of choice to be elected. [7]

MICHIGAN

Two townships in Michigan are subject to Voting Rights Act Section 5 preclearance: Clyde Township, in the southwestern part of the lower peninsula of Michigan, and Buena Vista Chartered Township, in Saginaw County north of Detroit in the eastern part of the state. As reported in Table 10, Clyde Township had a voting age population of 1,469 according to the 2000 census, with a 25.3 percent Hispanic voting age population. The township is located in Allegan County, which had a total voting age population of 75,170 and a 4.4 percent Hispanic voting age population. Buena Vista Township had a 52.7 percent African-American voting age population and a 7.8 percent Hispanic voting age population. In 2000 the voting age population of Saginaw County was 16.2 percent African-American and 5.1 percent Hispanic.

(Table 10 goes here)

Low voter registration and participation rates, combined with the presence of the linguistic minority and the failure to provide election materials in Spanish in 1972 made these jurisdictions subject to Section 5. Voter participation in these jurisdictions still lags behind the rest of the larger respective counties and in the state of Michigan as reported in Table 11. Presidential election year turnout in Buena Vista Township for the two most recent presidential elections still fails to exceed 50 percent of registrants (who are numerically fewer that the voting age population). By comparison, the rest of Saginaw County had voter turnout in excess of 60 percent of registration for both presidential years.

(Table 11 goes here)

Clyde Township had higher rates of voter participation, exceeding half of the registrants in the two most recent presidential elections, and approaching 40 percent for the 2002 midterm. Turnout in Clyde lagged that in the rest of Allegan County by anywhere from 8.2 to 14.2 percentage points.

[7] *Ibid.*

Of the three general elections held in Clyde Township since 2000, in only one (2004) does voter turnout as a share of voting age population exceed 50 percent (51.3 percent); in 2000 and 2004, voter turnout was 42.3 percent and 29.7 percent, respectively, of voting age population. The Census Bureau estimates that in Michigan, 60.1 percent of the voting age population went to the polls in 2002 and 64.7% turned out in 2004.

Michigan does not maintain voter registration or turnout data by race, ethnicity, or language group. However, Table 12 presents estimates of voter participation by racial and ethnic group for 1996 through 2004 for Buena Vista Township. The Township is divided into five precincts, three that are majority African-American, one in excess of 80 percent, and one that is over 90 percent Anglo by voting age population.[8] Two sets of estimates are presented: ecological inference estimates and ecological regression estimates.

(Table 12 goes here)

Separate Ei estimates were made for African-Americans, Hispanics, and non-Hispanic whites. In each of the five elections, African Americans went to the polls at higher rates than did non-Hispanic whites. For all three presidential year elections, the estimated share of the African-American, voting age population that turned out in Buena Vista Township exceeded 60 percent, and is estimated as high as 80 percent in the most recent election. In one of the two midterms, turnout for African-Americans is estimated to exceed 50 percent, and the estimated level of black voting age population turnout in 2002 is comparable to the registered voter turnout for all Michigan in 2002. Non-Hispanic white turnout was estimated lower, at between 32.9 percent and 38.7 percent for presidential years, and between 25.6 percent and 26.2 percent for midterms.

Estimates using ordinary least squares regression indicated higher black than white, Anglo turnout, but produced unrealistic (less than zero) estimates of Hispanic participation. An effort to determine Hispanic turnout with Ei produced estimates of Hispanic turnout as high as 50 percent, but the standard errors around these estimates were sufficiently large to make the estimates undifferentiated from zero. So, while black voter participation is strong in Buena Vista Township, the rationale for coverage – Hispanic voter participation – is not refuted, due to the lack of evidence of healthy Hispanic participation. Moreover, overall estimates of participation in Table 11 indicate that most of Buena Vista's voting age population still does not go to the polls in presidential elections. However, the absence of Section 5 objections suggests that the persistent low turnout rates among Hispanics has not resulted from attempts to change electoral laws in ways that would discourage Hispanic participation.[9]

Buena Vista Township has been consistently placed in a congressional district (MI-5) that

[8] Similar estimates are impossible for Clyde Township since it has a single precinct.
[9] A multivariate OLS regression model was used to estimate voter turnout, controlling simultaneously for black and Hispanic voting age population shares. All Ei estimates are based on bivariate (racial group versus non-racial group) estimates of participation.

elects Democrats, who have probably been the preferences of most black and Hispanic Michiganders. Clyde Township was in the Second congressional district and more recently the Sixth district 6, both of which have consistently sent Republicans to Congress.

NEW HAMPSHIRE

Ten New Hampshire townships are subject to Section 5 preclearance (Table 1). These townships are located in seven counties: one each in Cheshire, Grafton, Hillsborough, Merrimac, Rockingham, and Sullivan, and four townships in Coos County.[10] New Hampshire came under coverage of Section 5 subsequent to the terms of the renewal of the VRA in 1970.

New Hampshire is among the whitest of the United States, with a minority population of less than four percent. Of the New Hampshire townships covered by Section 5, none is less than 95% non-Hispanic white by voting age population, and one, Millsfie in Coos County, is completely white (see Table 13). A total of 511 racial or linguistic minorities reside in the ten townships. It is little-known to some in the redistricting and voting rights industry that New Hampshire is subject to Section 5. For example, South Carolina based redistricting expert Bobby Bowers, appointed by the state court to assist in the New Hampshire state legislative redistricting as a technical advisor, was surprised when informed by a reporter (during the redistricting process) that New Hampshire was subject to Section 5.[11]

(Table 13 goes here)

No election law change by New Hampshire has ever been denied preclearance. In 2002, the state redrew its congressional boundaries, moving two townships -- Epsom and Pittsfield – from the First to the Second congressional district.

The tiny minority populations of these townships preclude any effort to analyze minority voting patterns in the constituencies. The state notes in its most recent redistricting submission to the Justice Department (2004) that "no data is available from state sources by racial or language group" and asserts that "New Hampshire is racially homogenous. Statewide statistics report the population is 96% white . . . the census tract with the largest population of non-whites is Hanover CDP, home of the State's Ivy league College – Dartmouth, with 14.7 percent" minority population."[12] On average, voter turnout in these ten townships is 12 points lower than in the rest of the state in 2000. Our examination of voter turnout in these townships in the 2000 general election revealed an average of 54.3 percent of the voting age population turned out in the covered New Hampshire townships, compared to 66.3 percent of the voting age population that turned

[10] One covered township, Pinkham's Grant, has no population.
[11] Tom Fahey, "Anthem's a done deal -- more or less." *Union-Leader,* June 02, 2002: B-3
[12] "New Hampshire Section 5 Submission," June 1, 2004, cover letter to the Voting Section Chief of the US Department of Justice, from Orville B. Fitch II, Assistant Attorney General of the State of New Hampshire.

out in the rest of the Granite State.[13]

SOUTH DAKOTA

Parts of South Dakota came under Section 5 authority subsequent to the 1975 amendments to the Voting Rights Act. The trigger mechanism has made two entire counties – Shannon and Todd – subject to preclearance. Both counties are located on the Nebraska-South Dakota border, and are separated by a third county, Bennett County, which has a sparse population.

The primary minority of interest in South Dakota is Native Americans. Most Native Americans in the state are members of the Sioux Nation, primarily the Lakota, but also the Nakota and Dakota tribes. Shannon County contains most of the Pine Ridge Reservation, and Todd County has the Rosebud Reservation. As indicated in Table 14, Shannon and Todd counties are the two most-heavily Native American counties in South Dakota, followed closely by Buffalo County. Bennett County, located between Todd and Shannon, is, by contrast, barely majority Native American. The percentage Native American is growing in all of the reservation counties, and this is readily evident in the size of the young populations in these counties. On average, the proportion of whites in a county who are under 18 is just half the proportion of Native Americans under 18. The presence of a large, young, non-voting population is common to Native American tribes, and especially the Lakota, more so than among African-Americans, Hawaiians, or Latinos. And, as noted in Table 15, Native American participation is substantially lower than other voter participation as recently as 2000, though intensive efforts to mobilize Native American voters can generate higher turnout.

(Tables 14 and 15 go here)

Entering the 2001 redistricting, Native Americans held five of 105 state legislative seats in South Dakota (4.76 percent of seats).[14] Native American constitute 6.25 percent of the state's voting age population. Election of one additional Native American member would bring them into rough proportionality with the voting age population share. A recent federal court decision has forced the state to institute a new map for the 2006 elections, which divides existing District 26 into a pair of single member districts, in order to enhance the prospects of electing a candidate of choice of the Native American community. This case is one in a set of five successful challenges by the ACLU regarding Native American voting rights in South Dakota.

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[13] Data obtained from David Lublin and D. Stephen Voss. 2001. "Federal Elections Project." American University, Washington, DC and the University of Kentucky, Lexington, KY.

[14] South Dakota is apportioned into 35 Senate districts, each of which elects one senator and two house members. One district – 28 – has been traditionally divided into a pair of single-member districts to accommodate Native American electoral opportunities in the northwestern part of the state, and district 26 is to be divided into a pair of single-member districts starting with the 2006 election, in order to accommodate Native American voting opportunities in the southern part of the state.

Historically the state has placed Todd and Shannon counties in one, heavily Native American Senate district that also served as a two-seat state House district from which representatives were selected using a "pure' multimember district election system. South Dakota is apportioned into 35 Senate districts, each of which elects one senator and two House members. One district – 28 – has been traditionally divided into a pair of single-member districts to accommodate Native American electoral opportunities in the northwestern part of the state, and District 26 is to be divided into a pair of single-member districts starting with the 2006 election, in order to accommodate Native American voting opportunities in the counties subject to Section 5.

This change results from a successful challenge to Senate District 27. In August 2005 a federal district court held that this district illegally packed Native Americans.[15] The district's population was nearly 90 percent Native American before and after redistricting, and had been precleared by the Justice Department. The court instituted a redistricting plan that altered District 27, the one district previously subject to preclearance review in 2001; District 26, which is redrawn to include Todd County and then divided into two single-member house districts; and District 21. The new map separates Shannon and Todd Counties, so that Shannon and the entire Pine Ridge Reservation become the basis for a new, 66 percent Native American voting age population Senate district. District 26 is divided so that Todd county becomes the foundation of a 74 percent Native American voting age House district, and also incorporates all of the Rosebud Reservation. District 21 is altered to accommodate these other changes. Plaintiffs demonstrated the *Gingles* prongs to the satisfaction of the federal court, including presentation of evidence of racially polarized voting. The new map appears in Figure 1.

(Figure 1 goes here)

Interestingly, the problem confronted by Native Americans in South Dakota was resolved not by Section 5 to which the area of interest is subjected, but instead by a suit brought under Section 2, a provision that applies nationwide. In the 30 years since coming under the sway of Section 5, the Department of Justice has found only one legislative change affecting the two counties to be unacceptable.

[15] *Bone Shirt v. Hazeltine (2005)* 3:01-cv-03032-KES.

TABLE 1: COVERAGE BY SECTION 5 OF THE VOTING RIGHTS ACT IN ALASKA, MICHIGAN, NEW HAMPSHIRE, AND SOUTH DAKOTA

Jurisdiction	Date	Fed Register	Date
Alaska (Entire State)	Nov 1, 1972	40 FR 49422	Oct 22, 1975
Michigan:			
Allegan County:			
Clyde Township	Nov 1, 1972	41 FR 34329	Aug 13, 1976
Saginaw County:			
Buena Vista Township	Nov 1, 1972	41 FR 34329	Aug 13, 1976
New Hampshire:			
Cheshire County:			
Rindge Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Coos County:			
Millsfield Township	Nov 1, 1968	39 FR 16912	May 10, 1974
Pinkhams Grant	Nov 1, 1968	39 FR 16912	May 10, 1974
Stewartstown Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Stratford Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Grafton County:			
Benton Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Hillsborough County:			
Antrim Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Merrimack County:			
Boscawen Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Rockingham County:			
Newington Town	Nov 1, 1968	39 FR 16912	May 10, 1974
Sullivan County:			
Unity Town	Nov 1, 1968	39 FR 16912	May 10, 1974
South Dakota:			
Shannon County	Nov 1, 1972	41 FR 784	Jan 5, 1976
Todd County	Nov 1, 1972	41 FR 784	Jan 5, 1976

Source: http://www.usdoj.gov/crt/voting/sec_5/covered.htm, accessed September 21 2005

TABLE 2: PRECLEARANCE OBJECTIONS SINCE 1975, CALIFORNIA, MICHIGAN, NEW HAMPSHIRE, SOUTH DAKOTA, AND ALASKA

State	1975-1984	1985-1994	1995-Present
Michigan	0	0	0
New Hampshire	0	0	0
South Dakota	2	0	1
Alaska	0	1	0

Compiled by the authors from U.S. Department of Justice data posted at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (accessed September 15, 2005).

TABLE 3: ESTIMATED NATIVE AND OTHER TURNOUT (AS PERCENT OF VAP), ALASKA, 1996-2004

Year	Method	Native Turnout	Non-Native Turnout
1996	OLS	.427	.446
	Ei	.452	.441
2000	OLS	.438	.641
	Ei	.473	.635
2004	OLS	.414	.684
	Ei	.448	.676

TABLE 4: NATIVE AND OTHER VOTER TURNOUT RATES, SELECT ALASKA LEGISLATIVE DISTRICTS, 1996, 1998, 2000 GENERAL ELECTIONS

Year	District	Native Turnout	Non-Native Turnout
2000	House 5	***53.2***	45.7
	House 36	46.4	51
1998	House 36	***48.3***	42.1
	House 39	***43.8***	42.1
	Senate "R"	***46.4***	45.1
	Senate "T"	***45***	13.9
1996	House 5	***54.2***	45.6
	House 36	***46.1***	40.9
	House 39	***43.1***	28.2
	Senate "C"	***51.2***	39.6

Source: Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts.* Prepared for the Alaska Redistricting Board, July 26, 2001.

TABLE 5: MINORITY LEGISLATORS IN ALASKA, 1994-2000

	House			Senate		
Year	**White**	**Native**	**Black**	**White**	**Native**	**Black**
1994	31	8	1	15	5	0
	(77.5%)	(20.0%)	(2.5%)	(75.0)	(25.0)	(0.0%)
1996	32	8	0	14	6	0
	(80.0%)	(20.0%)	(0.0%)	(70.0)	(30.0)	(0.0%)
1998	32	8	0	14	6	0
	(80.0%)	(20.0%)	(0.0%)	(70.0)	(30.0)	(0.0%)
2000	31	8	1	14	5	1
	(77.5%)	(20.0%)	(2.5%)	(70.0)	(25.0)	(5.0%)

TABLE 6: WHITE AND OTHER (NATIVE) VOTE PREFERENCES, EXIT POLL DATA, 1992-2004

Year	Office	Vote Race	%D	%R	n
1992	President	White	32.2	40.0	423
		Other/Native	54.5	18.2	33
1992	US Senate	White	37.7	54.3	416
		Other/Native	58.8	32.4	34
1996	President	White	34.2	51.5	682
		Other/Native	39.5	33.3	81
1996	US Senate	White	8.6	80.3	654
		Other/Native	19.2	71.8	78
2000	President	White	27.8	61.2	623
		Other/Native	38.0	48.1	79
2004	President	White	42.5	54.2	931
		Other/Native	58.1	37.1	105
2004	US Senate	White	48.5	46.2	913
		Other/Native	67.6	22.5	102
2004	US House	White	26.0	64.4	899
		Other/Native	37.0	53.0	100

Source: VNS Exit Polls, various years.

TABLE 7: OLS ESTIMATES OF VOTE SHARES IN ALASKA, 2000, PRESIDENT AND US HOUSE OF REPRESENTATIVES

President

Voter Group	**Democrat**	**Republican**	**Other**
Native	47.2	45.1	7.7
Non-Native	25.1	59.1	15.7

US House of Representatives

Voter Group	**Democrat**	**Republican**	**Other**
Native	16.0	73.2	10.7
Non-Native	16.5	67.5	16.1

TABLE 8: FREQUENCY OF NATIVE CANDIDATE SUCCESS AND FAILURE IN ALASKA LEGISLATIVE PRIMARIES AND GENERAL ELECTIONS, 1994-2000

Year	Election	Total Native Candidates	Total Districts with Native Candidates	Notes
1994	Primary	11 of 15	11 of 11	All four Native losers lost to other Native candidates
	General	10 of 12	10 of 11	One of two Native losers lost to a Native candidate
1996	Primary	17 of 27	17 of 18	Five of ten native losers lost to a Native candidate
	General	12 of 17	12 of 15	Six of nine Natives running against Anglo whites prevailed
1998	Primary	13 of 18	13 of 14	Four of five Native losers lost to a Native candidate
	General	10 of 13	10 of 10	All three Native losers lost to Native candidates
2000	Primary	16 of 25	16 of 18	Three Native losers lost to other Native candidates
	General	11 of 16	11 of 14	Five of ten Native losers lost to other Native candidates

Source: Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts.* Prepared for the Alaska Redistricting Board, July 26, 2001.

TABLE 9: RACIAL POLARIZATION ANALYSIS OF SELECT ALASKA LEGISLATIVE GENERAL ELECTIONS, 1994-2000

				Native Preference			Non-Native Preference		
District/Candidate	**Year**	**Native/ Party**	**%Vote**	**HP**	**OLS**	**Ei**	**HP**	**OLS**	**Ei**
House 5									
Kookesh	2000	N, D	***60.7***	80	90.7	79.7	55.8	52.5	48.8
Pardee	2000	R	39.1	20	10.3	20.3	44.2	47.5	51.2
House 36									
Nicholia	2000	N, D	49.3	63.9	67.7	63	23.2	32.3	30.7
Morgan	2000	N, R*	***50.4***	50.4	26.4	37	76.8	73.6	69.3
House 36									
Nicholia	1998	N, D	49.9	53.7	57.1	57.8	31.6	37.9	37.9
Morgan	1998	N, R	***49.9***	46.3	42.9	42.2	68.4	62.1	62.1
House 39									
Notti	1998	N, D	26.6	26.4	28.1	28.1		21.1	21.1
Sattler-Kapsner	1998	R	***72.2***	73.6	71.9	72.2		75.7	78.9
Senate "R"									
Lincoln	1998	N, D	***54.0***	88.4	95.7	91.3	33.1	34.1	36.7
Smith	1998	R	46.0	11.6	4.3	8.7	66.9	65.9	63.3
Senate "T"									
Hoffman	1998	N, D	***73.5***	80.2	80.7	82.6	59.2	55.3	62.2
Hawk	1998	R	26.0	19.8	19.3	17.4	40.8	44.7	37.8
House 5									
Collins	1996	R	46.5		34.4	33.2	47.8	50.5	51.1
Kookish	1996	N, D	***53.2***		65.6	65.6	52.2	49.5	49.5
House 36									
Nicholia	1996	N, D	***52.0***	57.8	63.6	60.1	29.4	33.8	40.9
Morgan	1996	N, R	47.8	42.2	36.4	39.9	70.6	66.2	59
House 39									
Ivan	1996	N, D	***54.7***	65.6	68.8	65.8		0	21.6
Kasayulie	1996	N, WAI	45.1	34.4	31.2	34.3		100	78.3
Senate "C"									
Mackie	1996	N, D	***58.1***	87.5	60.5	74	55	53.3	56.2
Stevens	1996	R	41.5	12.5	39.5	27	45	46.7	43.5

District/Candidate	Year	Native/ Party	%Vote	Native Preference HP	Native Preference OLS	Native Preference Ei	Non-Native Preference HP	Non-Native Preference OLS	Non-Native Preference Ei
House 1									
Williams	1994	N, D	***43.3***		80	64.5		34.6	40.6
Davis	1994	D, I	24.3		25	31.2		23.2	22.5
Hargaves	1994	R	32.3		0	0.4		42.2	37.4
House 36									
Hurlburt	1994	O	37.1	26.4	24.9	27.6	61.4	55.6	50.5
Nicholia	1994	N, D	***62.8***	73.6	75.1	72.1	38.6	44.4	49.8
House 37									
Maclean	1994	N, O	***79.2***	70.6	70	73.2		100	75.3
Schaeffer	1994	N, D	26.9	29.4	30	27.1		0	23.9
Senate "R"									
Lincoln	1994	N, D	***62.1***	83.8	94.6	91.3	52.1	46.8	49
Miller	1994	R	37.7	16.2	5.4	8.4	47.9	53.2	51.3
Senate "T"									
Hoffman	1994	N, D	***50.5***	75.6	62.7	65.8	25.4	0	24.8
Freitas	1994	O	4.9	2	2.8	4.3	11.7	13	4.4
Edgmon	1994	O	44.5	22.4	34.6	32.9	62.9	93	65.2

*Handley designates Morgan as a Democrat in 2000, though he is identified by public sources as a Republican.

N = Native American Candidate; D = Democrat; R = Republican; O = Candidate who is not a Democrat or a Republican; WAI = Alaska Independence.

HP = Homogeneous Precinct analysis; OLS = Ecological Regression using ordinary least squares; Ei = Ecological Interence

Source: Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts.* Prepared for the Alaska Redistricting Board, July 26, 2001.

TABLE 10: VOTING AGE POPULATION DATA FOR COVERED JURISDICTIONS AND SURROUNDING COUNTIES, MICHIGAN, 1990 AND 2000 CENSUS

	Total	African-American	Hispanic
Buena Vista Township 1990	7,658	3,382	626
Buena Vista Township 2000	7,194	3,792	561
Saginaw County 1990	152,369	22,627	7,799
Saginaw County 2000	154,179	24,920	7,953
Clyde Township 1990	1,331	26	273
Clyde Township 2000	1,469	23	372
Allegan County 1990	63,644	1,076	1,700
Allegan County 2000	75,170	883	3,341

TABLE 11: REGISTERED VOTER PARTICIPATION RATES IN SECTION 5-COVERED AND GREATER JURISDICTIONS IN MICHIGAN, 2000-2004

	2000	2002	2004
Buena Vista Township	44.0	30.5	49.7
--Rest of Saginaw County	62.4	48.5	66.4
Clyde Township	52.7	39.3	64.2
--Rest of Allegan County	66.9	50.6	72.4
Michigan	62.4	46.7	67.5

TABLE 12: *Ei* AND OLS ESTIMATES OF BLACK AND OTHER VOTER PARTICIPATION IN BUENA VISTA TOWNSHIP, 1996-2004

	1996	**1998**	**2000**	**2002**	**2004**
Black (Ei)	63.6	53.4	69.6	46.6	79.8
Hispanic (Ei)*	53.1	10.7	50.9	0.16	49.7
Non-Hispanic whites (Ei)	38.3	26.2	32.9	25.6	38.7
Black (OLS)	85.3	76.0	87.6	65.9	90.8
Hispanic (OLS)*	<0	<0	<0	<0	<0
Non-Hispanic whites (OLS)	49.6	43.4	52.5	42.4	33.8

*Ei estimates of Hispanic voter participation resulted in very large predictive errors so large as to render Hispanic turnout estimates highly unstable.

**OLS estimates failed to return a positive rate of Hispanic turnout for any election.

TABLE 13: DEMOGRAPHIC PROFILE OF COVERED SECTION-5 NEW HAMPSHIRE TOWNSHIPS, 2000 CENSUS

County	Town	Turnout	HispVAP	BlackVAP	NativeVAP	WhiteVAP
Cheshire	Rindge	.551	.010	.012	.001	.961
Coos	Millsfie	.526	.000	.000	.000	1.000
Coos	Pinkham's Grant*	.000	.000	.000	.000	.000
Coos	Stewarts	.416	.001	.000	.001	.988
Coos	Stratfor	.392	.001	.000	.008	.969
Grafton	Benton	.482	.000	.000	.000	.980
Hillsbor	Antrim	.666	.008	.001	.002	.979
Merrimac	Boscawen	.511	.007	.005	.003	.975
Rockingh	Newingto	.844	.019	.013	.001	.953
Sullivan	Unity	.497	.005	.000	.000	.989

*The 2000 census revealed no population in this town.

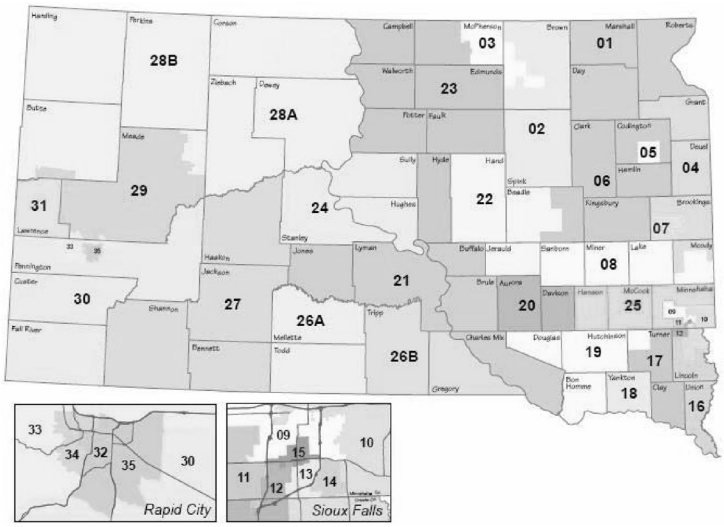
TABLE 14: NATIVE AMERICAN (LAKOTA, DAKOTA, NAKOTA) POPULATION CONCENTRATIONS IN RESERVATION COUNTIES OF SOUTH DAKOTA 1980-2000

County	%Native	County	%Native
Bennett		Lyman	
1980	44.4	1980	23.4
1990	46.2	1990	28.9
2000	52.1	2000	33.3
Buffalo		Mellette	
1980	70.6	1980	38.8
1990	77.6	1990	46.7
2000	81.6	2000	52.4
Charles Mix		Roberts	
1980	17.5	1980	19.4
1990	21.8	1990	23.0
2000	28.3	2000	29.9
Cotton		Shannon	
1980	47.3	1980	93.4
1990	48.5	1990	94.7
2000	60.8	2000	94.2
Dewey		Todd	
1980	58.0	1980	77.6
1990	66.6	1990	82.4
2000	74.2	2000	85.6
Jackson		Zlebach	
1980	43.4	1980	58.1
1990	42.4	1990	64.0
2000	47.8	2000	72.3

TABLE 15: ESTIMATED NATIVE AMERICAN AND NON-NATIVE TURNOUT, SOUTH DAKOTA, 2000

Year	Method	Native Turnout	Non-Native Turnout
2000	OLS	.347	.638
	Ei	.353	.603

FIGURE 1: NEW SOUTH DAKOTA LEGISLATIVE DISTRICTS FOR 2006



APPENDIX TO THE STATEMENT OF ROGER CLEGG: AN ASSESSMENT OF VOTING RIGHTS PROGRESS IN CALIFORNIA

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Executive summary of the Bullock-Gaddie expert report on California

By Edward Blum

California is only partially subject to the preclearance requirement of Section 5 of the Voting Rights Act. Two counties, Monterey and Yuba, became subject to preclearance following the adoption of the 1970 amendments to the legislation. This first extension of the original Voting Rights Act introduced a second trigger which covered two California counties because they had a test or device as a prerequisite to voting and fewer than half of the voting age citizens had either registered or turned out to vote in the 1968 presidential election.

The 1975 extension of the Voting Rights Act included a third trigger mechanism and this caught three California counties, one of which, Yuba, was already subject as a result of the 1970 extension of the legislation. The 1975 standards broadened the definition of a test or device as a prerequisite to voting to include the availability of election materials in languages other than English. Kings, Merced and Yuba counties came under the provisions of the 1975 act because more than five percent of their voting-age citizens belonged to a single language minority group as of November 1, 1972.

Minority success at the polls has grown steadily since 1972. The four covered counties are represented by four state senate and five state assembly districts. Yuba County is wholly contained in state Senate District 2 (12 percent Hispanic population) and Assembly District 3 (8.4 percent Hispanic population, 4.7 percent Hispanic registration) neither of which elects Hispanic legislators. Merced County is wholly in Senate District 12 (49 percent Hispanic -- the district also takes in part of Monterey County) and Assembly district 17 (39.4 percent Hispanic population, 27.11 percent Hispanic registration); neither of which elect Latino representatives. Kings County is entirely within Senate District 16 (63.2 percent Hispanic) represented by Dean Florez, and Assembly District 30 (55.7 percent Hispanic population, 39.9 percent Hispanic registration) which elects Nicole Parra. Monterey County is divided between two Senate districts: 12, noted above, and 15, which is 24.4 percent Hispanic by population and elects a Latino Republican, Abel Maldonado. Monterey is also part of two Assembly districts. Assembly District 27 (15.6 percent Hispanic population, 8.4 percent Hispanic registration) elects an Anglo while District 28 (54.1 percent Hispanic population, 37.7 percent Hispanic registration) elects Simon Salinas. Two of four Section 5 counties are currently in districts that send Latinos to the state Senate and Assembly.

An Assessment of Voting Rights Progress in California

Prepared for the Project on Fair Representation
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An Assessment of Voting Rights Progress in California

The Golden State is one of those only partially subject to the preclearance requirement of Section 5 of the Voting Rights Act. Two counties (Monterey and Yuba) became subject to preclearance following the adoption of the 1970 amendments to the legislation. This first extension of the original Voting Rights Act introduced a second trigger which covered two California counties because they had a test or device as a prerequisite to voting and fewer than half of the voting age citizens had either registered or turned out to vote in the 1968 presidential election.

The 1975 version of the Voting Rights Act included a third trigger mechanism and this caught three California counties. One of these, Yuba, was already subject to preclearance as a result of the 1970 version of the legislation. The 1975 standards broadened the definition of a test or device as a prerequisite to voting to include the availability of election materials in languages other than English. Kings, Merced and Yuba counties came under the provisions of the 1975 act because more than five percent of their voting-age citizens belonged to a single language minority group as of November 1, 1972. Moreover, the registration and election materials in the counties were printed only in English and fewer than half of the voting-age citizens had registered or voted in the 1972 presidential election.

The four California counties subject to preclearance contain only a small fraction of California's population. At the time of the 1970 census, the largest of the four, Monterey, had a quarter of a million residents. The population of Merced was slightly above 100,000 while Kings' population was 64,610 and Yuba had the smallest population, 44,736. The 2000 Census showed substantial growth in each county with their populations being: Merced 210,554; Monterey 401,762; Kings, 129,461; Yuba, 60,219. Even with the growth experienced by these four counties, as of 2000 they accounted for less than 2.5 percent of California's population.

The 2000 census showed two of the four California counties subject to Section 5 of the Voting Rights Act to have fewer than 100,000 citizens of voting age. The largest of these, Monterey had 217,069 voting age citizens while Merced had almost 110,000 voting age citizens. At the other extreme, Yuba County had only 37,332 voting age citizens and Kings County had almost 80,000 voting age citizens.

As has become true for the state, in three counties, Anglos comprised less than half of the total population. In Monterey, almost 47 percent of the total population was Latino. Latinos also constituted approximately 45 percent of the population in Merced and 44 percent in Kings County. Only in Yuba County did Anglos make up most of the population with Latinos accounting for only approximately one in six residents. Asian-Americans, another group protected by Section 5 of the 1975 Voting Rights Act made up less than ten percent of the population in any of the four counties. The numbers of American Indians and Alaska natives are even smaller in each county. African Americans accounted for less than ten percent of the population in any of the four counties and in three of the counties were less than five percent of the residents.

Minority Registration and Turnout

California does not maintain registration or turnout records by race or ethnicity. However the U.S. Bureau of the Census conducts large surveys after each general election and beginning with 1980 these data provide estimates of registration and turnout by ethnicity for each state. The information on registration and turnout are self-reported and consequently tend to over-report the actual levels of political involvement. The Census Bureau figures, while probably inflating estimates of participation, provide the best available data on California political activity and can be used for comparative purposes across time and across states on the assumption that the inflation is of similar magnitude across time and space. Moreover, these surveys were the basis for the kinds of estimates that the Census Bureau used in determining whether registration or turnout rates for jurisdictions were so low as to make them subject to the trigger mechanisms included in the 1965, 1970 and 1975 Voting Rights Act.

Table 1 provides the Census Bureau estimates for registration in California from 1980 through 2004 for Latinos, African Americans and whites. Figures are not provided for individual counties and therefore only the state-level figures are available. We can only assume that the patterns for the state are similar in the counties subject to Section 5 of the Voting Rights Act. The share of the California Latino voting age population that reported registering shows little fluctuation between 1980 and 2004. The pattern in Table 1 shows a slight decline from approximately 30 percent registration down to approximately 25 percent registrants from 1988 through 1994 and then a gradual return to approximately 30 percent reporting being registered since 2000. Over the last quarter of a century, the share of the Latino age-eligible population reporting being registered varies between 24.4 percent in 1988 and 30.9 percent in 1984.

(See Table 1)

White registration rates declined over the last two decades. After peaking at 64.1 percent in 1984, the figures drift downward, bottoming out at 51.8 percent in 2002 before rebounding to 56.4 percent in 2004. These figures for the most recent presidential election are more than five percentage points below the registration rate in 1980. The registration of only 51.8 percent of whites in 2002 is more than eight percentage points lower than in the first mid-term election in the time series. One of the factors that impact the figures for whites is that they include most of the Spanish-surname population of California. While it is now possible to separate non-Hispanic whites from other whites, that separation is reported by the Census Bureau only beginning in 1998. Therefore in order to maintain comparability throughout the time period, figures in Table 1 include white Latinos along with Anglos.

Figures for black registration show a range from 53.3 percent in 2002 to almost 70 percent in 1988. The figure for 2002 is an outlier since at least 60 percent of the African American voting-age population reports being registered in other years. Since the low 2002 percentage is bracketed by much higher figures, it would not be surprising if the

53.3 percent resulted from a bad sample. In presidential election years, from 61.5 to 69.5 percent of African-American adults report having registered. The 67.9 percent of the African-American adult population registered in 2004 is the second highest figure for the last quarter century. Beginning with 1990, mid-term figures are typically a few percentage points lower than in the adjacent presidential years.

After the first year in the time series, a larger proportion of California's black than white population reported registering to vote. The greatest disparity comes in the most recent election when 67.9 percent of the African Americans but only 56.4 percent of the whites had registered.

At the bottom of Table 1 are national registration figures. A comparison of the Latino figures in the two halves of the table show that Latinos in California register at lower rates than in the nation as a whole. For the first four presidential elections in Table 1, the registration rate for Latinos nationwide runs approximately 10 percentage points higher than in California. In the three most recent presidential elections, the disparity has narrowed and is only four percentage points in 2004. The difference in mid-term elections tends to be smaller than in the earlier presidential elections with the least difference occurring in 2002. For most mid-term elections, the rate of Latino registration nationwide is about six percentage points greater than in California; but in 2002, the difference drops to 3.6 points.

Part of the explanation for disparities observed between national figures and those for California is the Golden State's location along the border with Mexico. Since the figures reported here are for all voting age residents and do not exclude non-citizens, a state in which the non-citizen population is larger will almost certainly have a smaller share of its Hispanic population on the registration rolls. Controlling for the presence of non-citizens and calculating the registration percentage as a share of Latino citizens narrows but does not eliminate the disparity between the registration rate nationwide and in California. Among citizens, 55.4 percent of the Latinos of voting age are estimated to have registered in California in 2004; the comparable national figure is 57.9 percent. With 55.4 percent of the Latino voting age citizens registered to vote, the figure is very close to the 56.4 percent for whites. However if the Latino citizen registration figures are compared with that for whites, excluding Hispanics a sizeable gap remains since in 2004, 70.9 percent of the non-Hispanic whites had registered.

African Americans generally register to vote at higher rates in California than nationwide. In only three election years (1984, 2000 and 2002) did a larger share of the black population nationwide than in California report being registered. The disparities are often small and in some years would be within the sampling error. The largest difference for the three years comes in 2002 when 58.5 percent of blacks nationally compared with 53.3 percent in California registered. On the other hand, in 1982 and 1988, the registration rates of blacks in California are at least five percentage points above the national figure. In the most recent election 3.6 percentage points more blacks reported being registered in California than nationally.

The share of the Latino voting-age population in California that reports having voted peaks in 1984 at 26.1 percent. The figures in Table 2 show a drop in the share of the Latino population that voted that bottoms out at 17.8 percent in 1990. Thereafter, the proportion of Latinos voters falls below 20 percent only in 2002 when it dips to 17.3 percent. In the two most recent presidential elections, a quarter of the Latino age-eligible population went to the polls. The only year in which a higher proportion of the Latinos voted came in the 1984 presidential election when 26.1 percent of the Latinos cast ballots.

(See Table 2)

The disparity between the turnout rates for Latinos and whites in California has declined. Through the 1996 election, the turnout rate for whites typically ran about 30 percentage points above the Latino figure and in 1992 it reached 35 percentage points. In the four most recent elections, the difference has dropped to as little as 19.2 percentage points in 2002 before rising to 25.7 points in 2004.

Black turnout follows the typical seesaw pattern, rising in presidential years before dipping two years later. From 1984 – 1996, black turnout in presidential years ran between 56.1 and 58.4 percent. In the first year, 1980, 53.7 percent of African Americans reported voting. The highest percentage of black participation comes in 2004, 61.3 percent. In mid-term elections, a declining share of blacks has voted. The high point for mid-term elections comes in 1982 when 53.3 percent of African Americans voted. The figure slides to 48.8 percent in 1986 and drifts on down to 42 percent in 1990. After stabilizing for three mid-term elections, the bottom is reached in 2002 when little more than a third of the black adults report voting.

African Americans have voted at higher rates than whites in each of the five most recent presidential elections. In the Bush-Kerry election, blacks turned out at a rate ten percentage points higher than whites. In mid-term elections, blacks voted at higher rates than whites in 1982 and 1986. African Americans and whites turned out at the same rate in 2002. Otherwise the white voting rates that for blacks in mid-terms.

The comparison of the upper with the lower halves of Table 2 shows that in most elections, Latinos have turned out at a higher rate nationwide than in California. The largest differences occur prior to 1994. In the 1988 and 1992 presidential elections the national Latino turnout rate is at least eight percentage points higher than in California. In the two most recent presidential elections, 2.4 - 3 percentage points more Latinos voted nationwide than in California. Only in 1994 and 1998 did slightly higher percentages of the California than the national Latino population go to the polls.

Once the figures are adjusted so that the denominator is the Hispanic citizen population, then the difference between participation rates in California and nationwide is essentially eliminated. In the 2004 presidential election, the turnout rate for Latino citizens was 46.9 percent in California compared with 47.2 percent nationwide. When Latino citizen participation rates are compared with those for non-Hispanic whites in California a gap of almost 18 percentage points remains. In 2004, 64.6 percent of the Anglo citizens voted

compared with less than half of the Latino citizens.

In all but two elections, California African Americans voted at higher rates than did blacks nationwide. The greatest difference came in 1982 when 53.3 percent of California's African Americans voted compared with 43 percent nationwide. Differences of at least six percentage points occurred in 1988, 1994 and 1996. In the most recent election, African Americans in California voted at a rate more than five percentage points above the national figure. The figure for black voting nationwide exceeded that in California in two of the three most recent elections. In 2000, the national figure is 1.5 percentage points above that for California while in 2002, national African-American participation was 39.7 percent compared with 36.5 percent in California.

In the four counties subject to Section 5 of the Voting Rights Act, in 2000 at least 61 percent of the age-eligible had registered with 74 percent of the eligible registering in Monterey. A second part of the trigger considers whether at least half of the age-eligible voted. The 2000 presidential election participation rates show that in none of the four counties did most of the age-eligible turnout. The 50 percent threshold comes closest to being reached in Monterey where 48.7 percent of the adult citizens cast ballots. In Kings and Yuba, turnout was only approximately 41 percent of the age eligible. A total of thirteen California counties had turnout rates below 50 percent. Kings and Yuba had the lowest rates of participation in the state.

OLS regression estimates of voter turnout in 2000 in the four Section 5 counties and the rest of the state reveal differences in Hispanic and Anglo voter turnout across the covered counties and in comparison to the rest of California. The technique, using tract-level data, produced no reliable turnout estimates for African-Americans in the covered counties, but indicated a 46.4 percent turnout rate among African-Americans in the rest of the state. Anglo white turnout was estimated at 66.1 percent in Merced County, 79.8 percent in Kings County, 67.4 percent in Yuba County, and 66.1 percent in Monterey County, compared to 60.8 percent Anglo turnout in the rest of the state. Hispanic turnout was estimated at 11.0 percent in Merced County, 29.8 percent in Kings County, 20.0 percent in Yuba County, and 16.1 percent in Monterey County, compared to 12.6 percent for the rest of California. These estimates are based on voting age population data and likely underestimate the rate of turnout among the citizen-eligible Hispanic population.

Election of Minority Officials

Minorities in Congress

California has a very diverse congressional delegation. In the 109th Congress, the delegation had among its 53 House members, six Latinos, four African Americans and two Asian Americans.

The six Latinos, including sisters Loretta and Linda Sanchez, all come from southern California. Three of the four African Americans also come from southern California while both of the Asian Americans come from the northern part of the state. None of the

minorities serving in the U.S. House come from any of the four counties covered by Section 5 of Voting Rights Act.

In addition to the above groups represented in the delegation, four of its members are of Portuguese descent.[1] All of these members represent parts of the agriculturally rich Central Valley and three of them came to Congress after 2002. Two of these members, Richard Pombo and David Munes, are Republicans while Dennis Cardoza and Jim Costa are Democrats. Cardoza represents much of Merced County while Costa has Kings County in his district. According to the 2000 census, the 20th district, which is represented by Costa, is 63 percent Hispanic origin. The 18th represented by Cardoza and California's 21st District represented by Munes were each approximately 43 percent Hispanic origin at the time of the last census.

Of the six districts represented by Latinos, all are between 58 percent and 77 percent Hispanic origin. Lucille Roybal-Allard, who succeeded her father in the House in 1992, represents the most heavily Hispanic district (77 percent Hispanic origin).

Unlike the districts that have elected Latinos, all of which have populations that are predominantly of Hispanic origin, none of the four California districts currently represented by an African American is even plurality black. The heaviest black concentration is found in Maxine Waters' 35th District that was 34 percent black at the time of the 2000 census. Barbara Lee's 9th District and Juanita Millender-McDonald's 37th District were each approximately a quarter black. In the Waters' and Millender-McDonald districts, a plurality of the population is of Hispanic origin with Hispanics accounting for 47 percent of the population of the 35th District.

Continued population shifts, turnover of personnel and perhaps the next redistricting may result in Latinos winning additional districts both in the Los Angeles area and in the Central Valley.

State Legislative Representation

The first modern Latinos elected to the California legislature were Phil Soto and John Moreno, both elected in 1962. Soto represented La Puente for four years, while Moreno spent two years representing Los Angeles. Following a hiatus of Latino representation, Alex Garcia (D-Los Angeles) was elected to the Assembly in 1968 and was joined in 1970 by Peter Chacon (D-San Diego).[2] In 1972, three more Latinos were elected to the State Assembly: Joseph Montoya, Ray Gonzales, and Richard Alatorre. Aware of their unified strength, the five Latinos serving formed the Chicano Legislative Caucus in 1973. As indicated in Table 3, Latino state legislators increased from just seven members in the early 1980s to 27 of 120 members (22.5 percent in each chamber) by 2003. While 2004

[1] Michael Barone with Richard E. Cohen, *The Almanac of American Politics, 2006* (Washington, DC: National Journal, 2005), p. 214.
[2] http://democrats.assembly.ca.gov/LatinoCaucus/history_purpose.htm

Census Bureau estimates place the share of the state's voting age population that is Hispanic at 31.2 percent, the share of the citizen voting age population is much smaller – 21.4 percent. Thus the share of Hispanic state legislators slightly exceeds the Hispanic share of citizen adults.

(See Table 3)

Latino power was evident prior to the 21st century, however, as the Latino caucus wielded substantial power within the legislative Democratic Party. In 1996, the Assembly named Cruz Bustamante the first Latino Speaker, and Antonio Villaraigosa became the first Latino Majority Floor Leader. In the Senate, Charles Calderon became the first Latino Senate Majority Leader. Joe Baca had previously served as the first Latino Assembly Speaker pro tempore in 1995. By 1998, Latino members gained leadership positions in both chambers, as Antonio Villaraigosa was elected Speaker of the Assembly, and Richard G. Polanco, became Majority Leader of the Senate. Of the twenty-four Latino senators and assemblymembers in 2005, nineteen either chair a standing committee or hold a major leadership position, including Assembly Speaker Fabian Nunez.

According to the Democratic Latino Caucus, Hispanic interests have had a strong advocate in the legislature through Latino legislators:

> Many point to Assembly Member Alatorre's leadership in formulating the 1980 reapportionment plan as a turning point for the Chicano Caucus. Alatorre ensured that the reapportionment plan protected seats for Democratic majorities in Congress, the State Senate, and the State Assembly, and laid the groundwork to ensure that legislative seats were drawn to increase Latino representation. Earlier Supreme Court decisions based on the Voting Rights Act of 1965 ensured that several legislative districts were drawn to increase Latino representation. Also of great importance in this decade was the election of Gloria Molina to the State Assembly in 1982, the first Latina elected to the State Legislature.[3]

During the 2001 redistricting, the Latino Caucus independently hired professional consultants

> to monitor and evaluate the reapportionment plan developed by the Legislature to ensure that the plan reflects the growing Latino population in California. Caucus Members met with consultants to review the individual characteristics of each district. The Latino Caucus effectively utilized this information to assist members in determining the outcome of the final reapportionment plan that was adopted by the Legislature.[4]

A consequence of these efforts is that, of the 57 legislative Hispanic Democrats who served in the Assembly or Senate since 1962, 43 were initially elected subsequent to the 1991 redistricting round (see Table 4).

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[3] *Ibid.*
[4] *Ibid.*

(See Table 4)

The four covered counties are represented by four state senate and five state assembly districts. Yuba County is wholly contained in state Senate District 2 (12 percent Hispanic population) and Assembly District 3 (8.4 percent Hispanic population, 4.7 percent Hispanic registration) neither of which elects Hispanic legislators. Merced County is wholly in Senate District 12 (49 percent Hispanic -- the district also takes in part of Monterey County) and Assembly district 17 (39.4 percent Hispanic population, 27.11 percent Hispanic registration); neither of which elect Latino representatives. Kings County is entirely within Senate District 16 (63.2 percent Hispanic) represented by Dean Florez, and Assembly District 30 (55.7 percent Hispanic population, 39.9 percent Hispanic registration) which elects Nicole Parra. Monterey County is divided between two Senate districts: 12, noted above, and 15, which is 24.4 percent Hispanic by population and elects a Latino Republican, Abel Maldonado. Monterey is also part of two Assembly districts. Assembly District 27 (15.6 percent Hispanic population, 8.4 percent Hispanic registration) elects an Anglo while District 28 (54.1 percent Hispanic population, 37.7 percent Hispanic registration) elects Simon Salinas. Two of four Section 5 counties are currently in districts that send Latinos to the state Senate and Assembly.

Local Hispanic Elected Officials

The last twenty years have witnessed a dramatic increase in Latino representation, especially in municipal government. Table 5 reports that the number of Latinos elected in California increased from 460 in 1984 to 757 by 2000. Latinos holding city offices grew from 168 in 1984 to 308 by 2000, and Latino school board members increased from 222 to 330 by 2000 (down from a peak of 393 in 1992). County officials more than doubled from 8 to 19.

(See Table 5)

Current Latino elected officials in the Section 5 counties are not numerous. Merced and Monterey counties each have one Latino county supervisor (our of a total of five each). The assessor of Merced County is also Hispanic. These are the only minorities currently holding elective office in the four counties.

The Racial and Ethnic Structure of California Voting

In the United States, there is a general racial and ethnic structure to the behavior of voters. Anglo whites are more prone to vote for Republicans than are African-Americans or Latinos. In California this division is observed, though the division does not result in the type of extreme division seen in some other Section 5 states. Most often in major elections California Anglos, Latinos, and African-Americans all express majority preferences for Democratic candidates.

Table 6 presents Voter News Service exit polls from 1992 through 2002. In nine of fourteen elections the Democratic candidate attracted at least a plurality of white voters along with solid majorities of Latinos and African-Americans. In two of the remaining instances the Republican candidate attracted only a plurality among whites. In two other contests the Republican nominee polled a narrow majority -- less than 52 percent -- of the white vote. The only Republican to receive landslide support from Anglos, Gov. Pete Wilson, got 58.7 percent of the white vote in 1994. According to exit polls, Latinos cast more than 70 percent of their votes for Democrats in all but three contests (US Senate 1994, President 2000 and Governor 2002), while African-American cohesion dipped below 80 percent Democratic just once (US House 1996).

(See Table 6)

Racial differences cropped up in the 2003 gubernatorial recall when more than 58 percent of the whites voted to remove Democrat Gray Davis, compared with just 27.9 percent of blacks and 43.1 percent of Hispanics (see Table 7). The exit poll data from the replacement election (held on the same ballot) showed 48 percent of Anglo voters preferred the Republican Arnold Schwarzeneggar, 27.3 percent voted for Hispanic Democrat Cruz Bustamante, with the remaining 19.8 percent of the Anglo vote scattered. Black voters cast 53.6 percent of their ballots for Bustamante, 15.7 percent for Schwazeneggar, and 17.4 percent scattering, while over 13 percent did not cast a gubernatorial ballot. Hispanics cast 55.1 percent of ballots for Bustamante, 24.3 percent for Schwazeneggar, and 15.7 percent scattering, while fewer than 5 percent did not express a preference. The lower cohesion among Hispanics and African-Americans, prompted in part by the very large candidate field in the replacement election, contributed to Schwarzeneggar's plurality victory.

(See Table 7)

Estimates of Anglo and Hispanic candidate preferences in the Section 5 counties as reported in Table 8 were made using 2000 election data collected by David Lublin and Steven Voss.[5] The presidential, congressional and state legislative contests are included in these returns. The four counties display three different ethnic voting patterns.

(See Table 8)

In Kings and Yuba counties Hispanic and Anglo voters had opposing preferences in all contests analyzed. Anglos preferred Republicans at all levels of office, while solid majorities of Hispanics supported Democrats for statewide and district legislative offices. The African-American population in these counties is too small to yield reliable estimates.

A second pattern emerges in Merced County where whites and Hispanics differ in the nationalized statewide contests for President and US Senate, with Hispanics

[5] David Lublin and D. Stephen Voss. 2001. "Federal Elections Project." American University, Washington, DC and the University of Kentucky, Lexington, KY.

overwhelmingly favoring the Democrats and Anglos giving majorities of 66.4 percent and 53.5 percent to Republicans for President and the Senate respectively. In the US House and Assembly contests, more than 60 percent of the Anglos joined with a nearly unanimous Hispanic electorate in supporting the Democrats.

Monterey County displays a third pattern, and one more akin to the exit poll results in Table 6, with Anglos and Hispanics rallying behind the Democratic nominees in four of five contests. The sole exception, a state Senate election, saw 80 percent of Latinos voting Democratic while more than two-thirds of Anglos supported the Republican.

The bottom of Table 8 presents estimates for California exclusive of the four Section 5 counties. In all four sets of contests Democratic nominees polled overwhelming majorities among Latino and African-American voters. A plurality of Anglos joined in supporting Sen. Diane Feinstein's (D) reelection. In the presidential election a plurality of California Anglos backed George Bush. In elections to the US House and the California Assembly Anglo majorities cast GOP ballots.

The proportion of Anglos preferring Republicans in the two down-ticket was greater statewide than in Merced and Monterey Counties, but less than in Yuba. Fewer Anglos statewide than in Kings County voted Republican for Congress. In Assembly contests Anglo voters in Kings behaved much like those statewide. In every Section 5 county except Monterey whites gave more support to George Bush and to GOP Senate candidate Tom Campbell than they did statewide.

Conclusion

The four California counties subject to Section 5 of the Voting Rights Act contain only a tiny share of the Golden State's population. Because of the small proportion of California's population that lives in the four counties of interest, it is risky to make projections from statewide data to one of the counties or to the four as a collectivity. On the other hand, the information on participation for the four counties is often limited Much of what appears in this report reflects statewide results that need not apply to the Section 5 counties.

As of 2000, most of the voting age population of these counties has registered; however in none did most adults vote. The Census Bureau estimates are that statewide 46.4 percent of all adults voted in the year of the Bush –Gore contest. The estimates from the Census Bureau can be adjusted to remove non-citizens and when that is done, the participation rate for citizen adults statewide rises to 57.9 percent. A comparable adjustment might lead to the conclusion that most citizen adults participated in the 2000 presidential election in the Section 5 counties.

Although California has large contingents of Latino and African-American members of Congress, state legislators and local officials, minorities hold few offices in the Section 5 counties.

The voting behavior in the Section 5 counties varies. In Monterey, Anglos tend to unite with Hispanics in supporting Democrats. In Merced, Latinos and Anglos vote Democratic down ticket but split along partisan lines in the 2000 presidential and US Senate elections. Kings and Yuba returns show Anglos consistently voting Republican while Hispanics are strong supporters of Democrats. The pattern of ethnic voting witnessed in Monterey comes closest to approximating the behavior statewide where in most recent high profile elections, the winning Democrats mobilized a broad coalition consisting of Latinos, African Americans and Anglos.

TABLE 1: REPORTED REGISTRATION BY RACE IN CALIFORNIA, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
CALIFORNIA													
Latino	27.0	29.2	30.9	26.9	24.4	25.7	25.4	24.9	28.7	27.9	29.5	29.0	30.2
White	62.1	60.3	64.1	59.6	60.7	57.0	60.5	58.4	58.9	54.3	54.8	51.8	56.4
Black	61.5	64.4	65.8	65.5	69.5	62.4	64.0	60.0	66.3	60.9	61.9	53.3	67.9
NATIONAL													
Latino	36.3	35.3	40.1	35.9	35.5	32.3	35.0	31.3	35.7	33.7	34.9	32.6	34.3
White	68.4	65.6	69.6	65.3	67.9	63.8	70.1	64.6	67.7	63.9	65.6	63.1	67.9
Black	60.0	59.1	66.3	64.0	64.5	58.8	63.9	58.5	63.5	60.2	63.6	58.5	64.3

Source: Various post-election reports of the U. S. Bureau of the Census

TABLE 2: REPORTED TURNOUT BY RACE IN CALIFORNIA, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
CALIFORNIA													
Latino	22.8	22.4	26.1	19.8	19.4	17.8	20.9	20.6	22.6	21.4	24.5	17.3	25.6
White	55.9	51.1	58.2	47.3	53.4	44.8	55.9	49.1	51.1	43.0	48.7	36.5	51.3
Black	53.7	53.3	57.6	48.8	58.4	42.0	56.1	43.7	56.7	42.4	52.0	36.5	61.3
NATIONAL													
Latino	29.9	25.3	32.6	24.2	28.8	21.0	28.9	20.2	26.7	20.0	27.5	18.9	28.0
White	60.9	49.9	61.4	47.0	59.1	46.7	63.6	47.3	56.0	43.3	56.4	44.1	60.3
Black	50.5	43.0	55.8	43.2	51.5	39.2	54.0	37.1	50.6	39.6	53.5	39.7	56.1

Source: Various post-election reports of the U.S. Bureau of the Census

TABLE 3: LATINO STATE LEGISLATORS IN CALIFORNIA, 1973-2005

Year	Senate	percent	House	percent
1973	0	0.00	5	6.25
1985	3	7.50	4	5.00
1987	3	7.50	4	5.00
1989	3	7.50	4	5.00
1991	3	7.50	4	5.00
1993	3	7.50	9	11.25
1999	7	17.50	17	21.25
2003	9	22.50	18	22.50
2005	9	22.50	18	22.50

Source: Various volumes of *The National Directory of Latino Elected Officials* (Los Angeles: NALEO Educational Fund); http://democrats.assembly.ca.gov/LatinoCaucus.

TABLE 4: DEMOCRATIC, LATINO STATE LEGISLATORS IN CALIFORNIA SINCE 1962

Latino Members of the Assembly, December 2005:
Juan Arambula 2004 - Present
Joe Baca Jr. 2004 - Present
Rudy Bermúdez 2002 - Present
Ronald S. Calderón 1998 - Present
Ed Chavez 2000 - Present
Hector De La Torre 2004 - Present
Joe Coto 2004 - Present
Dario Frommer 2000 - Pesent
Cindy Montañez 2002 - Present
Gloria Negrete McLeod 2000 - Present
Pedro Nava 2004 - Present
Fabian Núñez 2002 - Present
Jenny Oropeza 2000 - Present
Nicole Parra 2002 - Present
Lori Saldaña 2004 - Present
Simón Salinas 2000 - Present
Alberto Torrico 2004 - Present
Juan Vargas 2000 – Present

Latino Members of the Senate, December 2005:
Richard Alarcón Senator 1998-present
Gil Cedillo Assembly, 1997-2002, Senator 2002-present
Denise Ducheny Assembly, 1994-2000, Senator 2002-present
Martha Escutia, Assembly, 1992-1998, Senator 1998-present
Liz Figueroa Assembly, 1994 - 1998, Senator 1998-present
Dean Florez Assembly, 1998 - 2002, Senator 2002-present
Deborah Ortiz Assembly, 1996-1998, Senator 1998-present
Gloria Romero Senator 2001-present
Nell Soto Senator 1998-present

Previous Latino Members of the Legislature:
Manny Diaz Assembly, 2000-2004
Marco Antonio Firebaugh Assembly, 1998 - 2004
Lou Correa Assembly, 1998-2004
Sarah Reyes Assembly, 1998-2004
Richard G. Polanco Assembly, 1986-1994, Senator 1994-2002
Thomas Calderón Assembly, 1998 - 2002
Tony Cardenas Assembly, 1996 - 2002
Sally Morales Havice Assembly, 1996 - 2002
Hilda Solis Assembly, 1993 - 1998
Martin Gallegos Assembly, 1994 - 2000
Antonio Villaraigosa Assembly, 1994 - 2000
Cruz M. Bustamante Assembly, 1993 - 1998
Joe Baca Assembly, 1992 to 1998, Senator 1998 - 1999
Louis Caldera Assembly, 1992 - 1997
Diane Martinez Assembly, 1992 - 1998
Grace Napolitano Assembly, 1992 - 1998
Xavier Becerra Assembly, 1990 - 1992
Lucille Roybal-Allard Assembly, 1987 - 1992
Chuck Calderón Assembly, 1982-1990, Senator 1990-1998
Gloria Molina Assembly, 1982 - 87
Matthew Martinez Assembly, 1980 - 1982
Ruben Ayala Senator 1974 - 1998
Art Torres Assembly, 1974 - 1982, Senator 1982 - 1994
Joseph Montoya Assembly, 1972-1978, Senator 1978-1990
Ray Gonzáles Assembly, 1972 - 1974
Richard Alatorre Assembly, 1972 - 1985
Peter Chacón Assembly, 1970 - 1992
Alex Garcia Assembly, 1968-1974, Senator 1974-1982
John Moreno Assembly, 1962-1964
Phillip Soto Assembly, 1962-1966

Source: http://democrats.assembly.ca.gov/LatinoCaucus.

TABLE 5: NUMBER OF LATINO ELECTED OFFICIALS IN CALIFORNIA, SELECT YEARS BETWEEN 1984-2000

Year	Total	County	Municipal	School Board
1984	460	8	168	222
1986	466	7	154	251
1989	580	15	180	293
1991	617	13	173	349
1992	682	14	194	393
1999	762	20	296	338
2000	757	19	308	330

Source: Various volumes of *The National Directory of Latino Elected Officials* (Los Angeles: NALEO Educational Fund).

TABLE 6: RACE AND VOTE CHOICE IN CALIFORNIA ELECTIONS, EXIT POLLS, 1992-2002

Year	Office	Race	Democrat	Republican	Other	N
2002	Governor	White	37.4	49.1	11.8	1455
		Black	89.3	4.5	5.6	178
		Hispanic	67.8	19.5	11.3	113
2002	US House	White	41.1	51.5	3.8	1434
		Black	89.6	6.4	1.7	173
		Hispanic	70.8	22.9	4.5	424
2000	President	White	48.3	47.2	4.3	933
		Black	88.2	10.8	0	102
		Hispanic	69	25.1	5.9	171
2000	Senate	White	50.1	45.3	4.6	896
		Black	88.8	10.2	1	98
		Hispanic	71.5	24.8	3.6	165
1998	Senate	White	54.4	42.4	3.1	417
		Black	91.3	8.7	0	23
		Hispanic	70.2	27.2	2.4	420
1998	Governor	White	57.1	40.2	2.6	420
		Black	87.5	12.5		24
		Hispanic	85.4	14.6		82
1998	US House	White	54.3	43.9	1.7	403
		Black	95.8	4.2	0	24
		Hispanic	77.2	19	3.8	79
1996	President	White	50.2	36.9	7.9	861
		Black	84.8	9.7	4.2	165
		Hispanic	76.8	16.2	5.1	198
1996	US House	White	52.9	44.4	2.6	799
		Black	78.3	21.1	0.7	152
		Hispanic	78.6	18.7	2.7	187

TABLE 6 (Continued)

Year	Office	Race	Democrat	Republican	Other	N
1994	Senate	White	46.2	49.3	4.5	872
		Black	83.8	14.3	1.9	105
		Hispanic	68.9	21.4	9.7	103
1994	Governor	White	37.9	58.7	3.4	886
		Black	82.9	16.2	1	105
		Hispanic	77.5	20.6	2	102
1994	US House	White	44.6	51.8	3.6	85.5
		Black	91.3	6.7	1.9	104
		Hispanic	70.5	22.9	6.7	105
1992	President	White	45.1	31.9	22.9	824
		Black	90.3	4.5	5.2	155
		Hispanic	78.3	10.8	10.8	120
1992	Senate	White	51.4	40.1	5.7	807
		Black	88.6	5.4	1.3	149
		Hispanic	70.1	17.9	8.5	117

TABLE 7: RACE AND VOTE CHOICE IN THE 2003 CALIFORNIA GUBERNATORIAL RECALL ELECTION

Year	Office	Race	Schwarzeneggar	Bustamante	Others	N
2003	Governor	White	48	27.3	19.8	2857
		Black	15.7	53.6	17.4	293
		Hispanic	24.3	55.1	15.7	486
			Yes	No		N
2003	Recall	White	58.4	40.1		2866
		Black	27.9	70.4		297
		Hispanic	43.1	52		490

TABLE 8: ECOLOGICAL REGRESSION ESTIMATES OF RACIAL PREFERENCES IN SECTION 5 COUNTIES OF CALIFORNIA, 2000

Merced		**Democrat**	**Republican**	**Other**
President	White	31.2	66.4	2.4
	Black	47.1	<0	52.9
	Hispanic	>100	<0	<0
US Senate	White	41.0	53.5	5.5
	Black	32.4	<0	67.6
	Hispanic	91.6	<0	8.4
US House	White	61.0	38.8	0.2
	Black	<0	<0	<0
	Hispanic	93.8	<0	6.2
Assembly	White	61.5	38.5	---
	Black	<0	<0	---
	Hispanic	99.1	0.9	---
State Sen.	White	---	---	---
	Black	---	---	---
	Hispanic	---	---	---

Kings		**Democrat**	**Republican**	**Other**
President	White	23.1	73.2	3.4
	Black	<0	<0	<0
	Hispanic	84.6	12.9	2.5
US Senate	White	42.8	51.6	5.5
	Black	<0	<0	<0
	Hispanic	84.6	12.9	2.5
US House	White	27.8	70.4	1.8
	Black	<0	<0	<0
	Hispanic	79.2	18.4	2.4
Assembly	White	45.1	54.9	---
	Black	<0	>100	---
	Hispanic	>100	<0	---
State Sen.	White	---	---	---
	Black	---	---	---
	Hispanic	---	---	---

Yuba		Democrat	Republican	Other
President	White	29.5	65.9	4.7
	Black	<0	<0	<0
	Hispanic	>100	<0	<0
US Senate	White	33.7	59.2	7/0
	Black	<0	<0	<0
	Hispanic	89.8	<0	10.2
US House	White	22.5	74.1	3.4
	Black	>100	<0	<0
	Hispanic	90.9	<0	9.1
Assembly	White	29.0	66.0	5.0
	Black	<0	<0	<0
	Hispanic	>100	<0	<0
State Sen.	White	32.0	64.2	3.8
	Black	<0	<0	<0
	Hispanic	>100	<0	<0

Monterey		Democrat	Republican	Other
President	White	47.6	44.9	7.5
	Black	<0	<0	>100
	Hispanic	84.1	15.3	0.6
US Senate	White	48.6	44.6	6.7
	Black	<0	<0	<0
	Hispanic	81.6	10.5	7.7
US House	White	56.3	36.6	7.0
	Black	<0	<0	<0
	Hispanic	90.1	8.6	1.3
Assembly	White	51.2	42.6	6.2
	Black	<0	<0	<0
	Hispanic	68.5	31.4	0.1
State Sen.	White	25.6	69.3	5.1
	Black	<0	<0	<0
	Hispanic	80.4	17.0	2.6

Rest of CA		Democrat	Republican	Other
President	White	45.1	49.1	5.8
	Black	97.9	<0	2.1
	Hispanic	>100	<0	<0
US Senate	White	48.4	44.0	7.6
	Black	95.2	<0	4.8
	Hispanic	91.3	<0	8.7
US House	White	38.1	56.4	5.5
	Black	98.2	<0	1.8
	Hispanic	85.6	3.6	10.8
Assembly	White	39.0	55.5	5.5
	Black	95.0	<0	5.0
	Hispanic	98.3	1.7	<0

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Executive Summary of the Bullock-Gaddie Report
Voting Rights Progress in Arkansas

By Edward Blum

Arkansas, once the center of controversy and symbolism in the confrontation over civil rights, has been quiet in the debate over voting rights. The state is one of two southern states covered neither in whole or in part by Section 5 of the Voting Rights Act. The state has a history of the use of discriminatory devices such as the poll tax, but the levels of voter participation in the1964 presidential election were sufficiently robust to not trip the VRA trigger.

In the two most critical "voting assessment" categories—voter registration and election participation—blacks in the majority of section 5 states are usually as successful and often, more successful, than blacks in Arkansas.

Currently, African-American voters in Arkansas are nearly as often registered as whites in Arkansas although they register at lower rates than do blacks in Section 5 states. African-American turnout typically trails that for white Arkansans, blacks in the non-South and, over the last decade, blacks in the section 5 South. Black office holding increased substantially over the last three decades and especially since 1993, but black legislative office holding has not increased appreciably in either chamber since the beginning of the 1990s. A brief flurry of black county office holding in the 1970s has been followed by the effective disappearance of blacks from county office for over 20 years. Black officeholders are not evident in congressional and statewide office, though Democrats continue to be highly competitive for the white vote, especially when running as incumbents.

An Assessment of Voting Rights Progress in Arkansas

Prepared for the Project on Fair Representation
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An Assessment of Voting Rights Progress in Arkansas

Arkansas and Tennessee are the two southern states never to have been required to request preclearance for election law changes pursuant to Section 5 of the Voting Rights Acts. Arkansas is also distinctive in that it is the least populous southern state and is the smallest state west of the Mississippi River.

Over the last half century the share of Arkansas's population that is African American has declined by approximately one-third. The 1960 Census showed Arkansas to be 22 percent African American. Each of the last two censuses has found the black population to be just under 16 percent.

Despite its small size and relatively small black population (15.6 percent in 2000), Arkansas at one time dominated the civil rights struggle. The first massive unrest surrounding school desegregation erupted in Little Rock at Central High School. When the governor failed to oversee implementation of the court order requiring desegregation, President Dwight Eisenhower sent in federal troops to restore order. Those troops had to remain on duty for an entire school year to protect the black students both in the halls of the schools and from mobs that gathered outside of the facility.

Governor Orval Faubus who wanted to break with tradition and serve more than two consecutive two-year terms as governor did nothing to prevent violent white opposition. Siding with the forces of segregation paid off for Faubus as he won four more terms. In 1958, in the first election held after the Little Rock school protest, Faubus captured his largest vote share, 82.5 percent.

Following Faubus's six terms, a series of progressive governors led Arkansas. The first of these, Winthrop Rockefeller, who was elected in 1966, joined Florida's Claude Kirk as the first two southern Republicans to be elected governors in the South since 1920. Dale Bumpers, David Pryor and Bill Clinton succeeded Rockefeller, with the future president tying the Faubus record by serving a dozen years as chief executive.[1]

Although Arkansas has not had to comply with the requirements of Section 5, the state's history includes use of techniques designed to restrict black political participation. The state adopted a poll tax in 1892 and for many years limited participation in the decisive Democratic primary to whites. It did not, however, ever make use of a literacy test or an understanding test.[2] When ordered to eliminate the white primary, Arkansas established a complicated quadruple primary system that it used in 1946. The quadruple primary separated the nomination of federal and state offices and for each of these offices had a pre-primary something akin to the Jaybird primary used in Texas' Fort Bend County.[3] Under this stratagem, only whites would vote in the election that determined the identity of the ultimate office holder. Thus only whites could vote in the pre-primary for both federal and state offices where the field of candidates would be narrowed. Then in the regular Democratic primary, where blacks could participation, the electorate would confront only one candidate per office. V.O. Key reports that except for the heavily black counties along the Mississippi River, African Americans could generally

[1] Faubus would attempt a political comeback, but the emergence of the black electorate and the decline of race as a salient issue limited his ability to garner majority support. See Alexander Lamis, *The Two-Party South.* (London: Oxford University Press, 1988)
[2] J. Morgan Kousser, *The Shaping of Southern Politics* (New Haven: Yale University, 1974), p. 239.
[3] V.O. Key, Jr., *Southern Politics* (New York: Alfred A. Knopf, 1949): p. 637.

participate during this last-gasp effort to maintain an exclusively white primary selection process.[4]

By 1965 when the Voting Rights Act was first passed, Arkansas did not have a test or device as prescribed by Section 4 of that legislation. Furthermore, the state easily surpassed the requirement that most of its voting age population be registered since the number of registrants prior to the act exceeded 60 percent of the 1960 census voting age population. This included 65.5 percent of the white adults and 40.4 percent of non-white adults.[5] The number of votes cast in the 1964 presidential election equaled almost 54 percent of the state's adult population as of the 1960 census thus exceeded the threshold for coverage under Section 5 of the Voting Rights Act.

Black Turnout and Registration

Although not subject to Section 5 and therefore not a state to which federal registrars were sent to increase African American registration and not a state carefully monitored by the federal government, Arkansas experienced a substantial increase in black registration immediately after passage of the Voting Rights Act. The U.S. Commission on Civil Rights estimates that Arkansas saw an increase of more than 33,000 African American registrants that brought its share of the non-white adult population registered to vote to 62.8 percent. This was the third highest black registration rate in the South, exceeded by Tennessee and Florida.[6] While Arkansas had the third highest rate of black registrants, its white registration rate was the third lowest, exceeding only Texas

[4] *Ibid.*
[5] U.S. Commission on Civil Rights, *Political Participation* (Washington, DC: U.S. Government Printing Office, 1968), p. 222-223.
[6] *Ibid.*, p. 223.

and Virginia. In Arkansas it was estimated that 72.4 percent of the white adults had signed up to vote in the immediate aftermath of the Voting Rights Act.

At the time that *Political Participation* was compiled, actual current figures for registration from Arkansas were unavailable so that the post-act figures are estimates. The pre-act figures, however, were compiled from the poll tax receipts that included a racial identifier.

While Arkansas' pre-Voting Rights Act registration rate of 40 percent made it the fourth highest in the South, the state has some problem areas. The 1960 census identified five counties in eastern Arkansas in which a majority of the adult population was non-white. In none of the counties, however, was this reflected in the registration. In each of the majority-black counties most registered voters were white. The share of the adult non-white population registered to vote in these counties was as low as 13.8 percent in Crittenden and reached its highest point in Chicot where 52.6 percent of the adult black population had registered. In four of the counties, Crittenden, Lee, Phillips and St. Francis, most of the adult population had not registered prior to passage of the legislation and therefore had these counties used tests or devices as prerequisites to registration, they would have been made subject to Section 5 preclearance.

While Arkansas once maintained its poll tax records by race, it does not currently keep its registration or turnout data by race. The U.S. Bureau of the Census however conducts large-scale surveys after each federal general election to determine rates of registration and turnout. Beginning with 1980, the Census Bureau figures provide separate estimates for black and white adults by state. While these figures are self-reported and therefore likely over-estimate actual levels of participation, they are the

most reliable figures available in most states and can be used to make comparisons over time and across jurisdictions on the assumption that the inflation is of similar magnitude across time and space. Moreover these figures provide the basis for the kinds of estimates of participation that the Census Bureau used to determine whether registration or turnout rates for jurisdictions were so low as to subject them to the trigger mechanisms included in the Voting Rights Acts of 1965, 1970, or 1975.

Table 1 provides estimates of black and white adult registration rates in Arkansas beginning in 1980. In most years the reported registration of blacks and whites has been quite similar. In all but three years the two figures have been within five percentage points. In 1984, 1986, 1988, 2000 and 2002, the difference in racial registration rates did not exceed one percentage point. The largest differences came in two mid-term election years. In 1990, white registration was 11.8 percentage points above that for blacks and in 1998 white registration exceeded black registration by 14.1 percentage points. In 1984, 1988, 1996 and 2000, African American registration slightly exceeded white registration. Throughout the quarter century covered in Table 1, overall registration rates in Arkansas exceed the 50 percent threshold that triggered coverage by Section 5 in three different versions of the Voting Rights Act.

(See Table 1)

Immediately below the figures for Arkansas are comparison figures for the non-South. In half of the years black registration in Arkansas was greater than in the non-South although typically the differences were not large. The greatest advantage for Arkansas African Americans comes in 2002 when 62.0 percent of black Arkansans were registered compared with 57.0 percent in the non-South. On the other hand, the greatest

disparity in favor of the non-South African Americans comes in 1990 when 58.4 percent of blacks outside of the South reported registering compared with 50.8 percent in Arkansas.

The bottom of Table 1 presents median figures for the seven southern states initially covered by the 1965 Voting Rights Act.[7] In the initial years, African Americans in Arkansas registered to vote at rates higher than the median figure for the covered jurisdictions. In 1982 and 1984, the black registration rate in Arkansas ran almost ten percentage points higher than the median state. Even in 1988, the Arkansas figure was 4.2 points higher. Beginning with 1990, the median figure exceeds that in Arkansas except in 1996 when the Arkansas registration rate is less than one percentage point above the median state. On the other hand, in 1990, the median figure is 11 points above the Arkansas registration rate and in 1998 the median figure is more than 16 points higher than in Arkansas. In each of the two most recent presidential years, the median figure for the covered jurisdictions is approximately eight percentage points above that for Arkansas. Thus while the African-American registration rates in Arkansas are fairly close to those for whites in the state and to those for blacks living in the non-South, over the last decade and a half, the median rate of registration for African Americans in southern states subject to Section 5 since 1965 regularly outpace the Arkansas figures and sometimes by substantial margins.

Table 2 presents Census Bureau estimates for turnout. In every year except 2000, African-American turnout is less than that for white Arkansans. The largest disparities come in 1990, 1992 and 1998 when the turnout for whites is approximately 14 percentage

[7] The seven states are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia.

points higher than for blacks. The participation rates converge in 1996, 2000, and 2002 when differences are less than 3.5 percentage points. However, in 2004, just under half of the African-American adults voted compared with almost 59 percent of the whites.

(See Table 2)

The familiar seesaw pattern prevails for both races with higher participation rates in presidential than mid-term years. Although the rate at which African Americans turn out sometimes slips below 50 percent in presidential years, the overall turnout rate for the state in presidential elections always exceeds the 50 percent threshold that was the cut point for coverage by the 1965, 1970 and 1975 Voting Rights Acts.

When African-American turnout in Arkansas is compared with that for the non-South, Table 2 shows that blacks outside of the South always report voting at higher rates than did those in Arkansas except in 2002. Frequently the differences are small and in four years are less than one percentage point. The most pronounced difference comes in 1998; 40.4 percent of non-southern blacks compared with 31.1 percent of black Arkansans voted. In 2002, the one year in which higher proportions of blacks in Arkansas than in the non-South went to the polls, the difference is slightly less than five percentage points.

The final set of figures presented in Table 2 provide turnout rates for the median state among the seven states covered by the preclearance provision included in the 1965 version of the Voting Rights Act. In four of the six mid-term elections, the black turnout rate in Arkansas is greater than the median for the seven states. In 1982, Arkansas blacks voted at a rate almost nine percentage points higher than the median figure. On the other hand, in the two mid-term elections in which black turnout was greater in the median

state than in Arkansas, differences were sizable. In 1990, the difference was ten percentage points and in 1998, it exceeded nine percentage points.

Arkansas African Americans also turned out at higher rates than the median state figure in the presidential elections of the 1980s. However, in the four more recent presidential elections, the median state figure exceeds that for Arkansas except in 1996. The greatest differences came in 1992 and 2004 when black turnout in the median state was approximately 12 percentage points above that in Arkansas. The recent trend, particularly in presidential elections, is for black turnout to be greater in the median state than in Arkansas. The pattern for the participation rate in the median state to exceed that in Arkansas also extends to the white electorate where the turnout figure for the median state has been higher in Arkansas in every presidential election beginning with 1988. In contrast, in mid-term elections, the white vote in Arkansas has exceeded the median figure in every year accept 1994.

African American Office Holding

At the time of the first survey of black elected officials Arkansas had 55. Two-thirds of these served on school boards and most of the remainder held municipal offices. None served as a county official. As Table 3 shows, across the next 32 years, the number of African Americans holding office in Arkansas increased more than nine fold and exceeded 500 by the beginning of the 21st century. Most officeholders since the mid-1980s have served in cities. The large number of black municipal officials in Arkansas is attributable to the numerous small towns that dot the state. In the most recent enumeration approximately one-fourth of the black officeholders in Arkansas sat on

school boards. Table 3 shows approximately two dozen blacks in county offices during the latter part of the 1970s and then the number drops abruptly to zero.

(See Table 3)

African Americans in Congress

Arkansas is the only southern state not to have sent an African American to Congress since the onset of the Civil Rights Movement. With a black population of less than 20 percent and with only four congressional districts, it would be difficult to create a majority-black district. While having a population that is majority African American is no longer a requirement for electing blacks to public office in much of the South, parts of Arkansas are so Republican that it might be difficult to create a district in which a black and white coalition could elect an African American to Congress. The Third District that fills the northwest corner of the state has been represented by a Republican for decades.

Currently the district that has the greatest black concentration is the Fourth District that spreads across the southern half of the state. As of the 2000 census, the Fourth District was just under one-quarter African American. It currently is represented by a Democrat who defeated the incumbent Republican in 2000. In 1998, an African American, Judy Smith, ran in the Fourth District which at that time was 26.6 percent black. Smith managed 42 percent of the vote which was a stronger showing than the Democratic nominee of 1996 but weaker than the 1994 challenger to the Republican incumbent. Smith gave up a seat in the legislature to make the run.

African American State Legislators

The first African Americans in modern time to enter the Arkansas legislature did so following the redistricting necessitated by the 1970s census. In 1973 the legislature had one black senator and three black representatives. Since Arkansas is not subject to Section 5, the federal government was not in a position to require that it redraw its districts in order to enhance the likelihood of electing minority legislators. The Senate did not gain an additional African-American senator until a redistricting prior to the 1990 election prompted by a voting rights suit brought under Section 2. This redistricting carried out at the very end of the 1980s, which relied upon Census data almost ten years, resulted in blacks winning three Senate districts. As Table 4 shows, as of 2006 Arkansas continues to have three African-American senators.

(See Table 4)

In the House, the number of African-American members grew slightly until the 1989 court ordered redistricting. With the new districts of that plan, the number of black representatives jumped from five to nine. A tenth black representative won with the new plan based upon the 1990 census. Over the last dozen years, the number of African American House members has increased gradually and currently stands at 13. With 13 percent of the House membership, Arkansas blacks are slightly underrepresented in a state which the Census Bureau estimated to be 14.7 percent African American in its voting age population as of 2004.

African Americans in Statewide Office

Arkansas has not elected an African American to a statewide constitutional office. It has had African Americans serving on its Supreme Court, a body chosen through non-partisan elections. The African-American justices were initially appointed, so no black justice was initially elected to the court without the implicit advantage of holding the seat. There are currently no African-American justices on the court although an African American has indicated that he will likely seek a position on the Supreme Court in 2006.

Racial Voting Patterns

Regression estimates of voter preferences in U.S. House races held in presidential years do not reveal extensive racially polarized voting (see Table 5). White and black preferences differ in less than half (three of eight) of the elections for which estimates for both races could be derived. In four contests, white and black majorities lined up behind the same candidate and in the eighth contest, the African-American vote split evenly between the two candidates.

Three estimations suggest that most blacks preferred the Republican candidate. In one instance it is in a district with a GOP incumbent, and the other times it was in a part of Arkansas where blacks had supported Republican Winthrop Rockefeller's gubernatorial campaigns. It is estimated that in House District 2 in 1996 and 2000 the Democratic incumbent failed to attract the bulk of the black vote and won reelection

based on white support.[8] All six Democrats who commanded majority support from whites were incumbents.

(See Table 5)

Arkansas exit polls since 1996 reproduced in Table 6 reveal racial differences in six of seven recent contests. The African-American vote in Arkansas is less cohesive than is frequently observed elsewhere as it reaches 90 percent only three times including two presidential elections. In the 1998 gubernatorial election the black vote splits almost evenly with a bare majority supporting the Democratic nominee, Bill Bristow. Most whites vote Republican although in 1998, 53 percent of the whites helped send Blanche Lincoln to the U. S. Senate. Two years earlier, native son Bill Clinton won a plurality of the white vote. In 2004 when Lincoln won reelection, the exit poll estimates that she took 49 percent of the white vote although given the error term associated with the poll, it is possible that she was the choice of most white voters. Thus it is possible that black and white preferences differed on as few as three of the seven contests if the actual share of the black vote for Bristow was less than 50 percent and the actual white vote gave Lincoln a majority in 1996.

Democrats did best among whites in the 1996 presidential election and the 1998 and 2004 Senate elections. They performed worst among whites in the 1998 gubernatorial campaign and the 2004 presidential campaign, falling below 40 percent in both contests.

(See Table 6)

[8] These regression estimates are made using county-level data. Potential problems are the small number of counties in District 2 (8 for the 1996 and 2000 elections) and the distribution on the independent variable. The range in the black population is from 1 to 43 percent, so that the estimate for preferences in a 100 percent black county involves a great deal of extrapolation.

Conclusion

African-American voters are nearly as often registered as whites in Arkansas although they register at lower rates than do blacks in Section 5 states. African-American turnout typically trails that for white Arkansans, blacks in the non-South and, over the last decade, blacks in the Section 5 South. Black office holding increased substantially over the last three decades and especially since 1993, but black legislative office holding has not increased appreciably in either chamber since the beginning of the 1990s. A brief flurry of black county office holding in the 1970s has been followed by the effective disappearance of blacks from county office for over 20 years. Black officeholders are not evident in congressional and statewide office, though Democrats continue to be highly competitive for the white vote, especially when running as incumbents.

TABLE 1

REPORTED REGISTRATION BY RACE IN ARKANSAS AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
ARKANSAS													
Black	62.6	63.3	71.2	62.5	68.0	50.8	62.4	56.0	65.8	51.8	60.0	62.0	63.7
White	67.4	65.3	70.8	63.5	67.9	62.6	67.8	61.0	64.5	65.9	59.5	62.9	67.1
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63.0	58.3	62.0	58.5	61.7	57.0	NA
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	NA
Seven-State Median													
Black	61.4	53.6	62.2	66.5	63.8	61.9	64.5	59.0	65.5	68.0	68.6	67.6	71.1
White	67.0	62.5	67.0	65.8	68.5	63.6	70.8	63.9	70.4	67.9	68.2	66.2	72.3

Source: Various post-election reports by the U.S. Bureau of the Census

TABLE 2

REPORTED TURNOUT BY RACE IN ARKANSAS AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
ARKANSAS													
Black	50.8	47.7	56.9	43.3	49.6	34.5	46.4	34.5	50.6	31.1	52.2	44.0	49.4
White	58.6	54.3	61.5	47.9	57.3	48.2	60.7	43.1	52.1	45.0	49.0	46.1	58.6
Non-South													
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	NA
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	NA
Seven State Median													
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2

Source: Various post-election reports by the U. S. Bureau of the Census

TABLE 3

NUMBERS OF AFRICAN-AMERICAN ELECTED OFFICIALS
IN ARKANSAS, 1969-2001

Year	Total	County	Municipal	School Board
1969	55	0	15	37
1970	55	0	14	37
1971	76	0	32	38
1972	97	0	44	48
1973	141	1	67	50
1974	150	19	74	52
1975	171	21	80	65
1976	209	35	92	74
1977	218	29	102	77
1978	223	30	105	79
1980	227	30	106	83
1981	218	0	100	81
1984	296	0	150	101
1985	317	0	169	121
1987	319	0	181	92
1989	318	0	188	85
1991	351	0	196	102
1993	380	0	214	100
1995	No Report from the Joint Center in 1995			
1997	484	2	260	147
1999	504	5	292	125
2001	502	8	290	122

Source: Various volumes of the *National Roster of Black Elected Officials* (Washington, D.C.: Joint Center for Political and Economic Studies).

TABLE 4

RACIAL MAKE UP OF THE ARKANSAS GENERAL ASSEMBLY, 1965-2005

	Senate		House	
Year	Number	Percent	Number	Percent
1965	0	0	0	0
1967	0	0	0	0
1969	0	0	0	0
1971	0	0	0	0
1973	1	2.86	3	3.00
1975	1	2.86	3	3.00
1977	1	2.86	3	3.00
1979	1	2.86	3	3.00
1981	1	2.86	4	4.00
1983	1	2.86	4	4.00
1985	1	2.86	4	4.00
1987	1	2.86	4	4.00
1989	1	2.86	5	5.00
1991	3	8.57	9	9.00
1993	3	8.57	10	10.00
1995	3	8.57	10	10.00
1997	3	8.57	10	10.00
1999	3	8.57	12	12.00
2001	3	8.57	13	13.00
2003	3	8.57	13	13.00
2005	3	8.57	13	13.00

TABLE 5

ECOLOGICAL REGRESSION ESTIMATES OF WHITE AND BLACK VOTER SUPPORT FOR DEMOCRATS IN CONTESTED ARKANSAS CONGRESSIONAL ELECTIONS, 1996, 2000, 2004

Year/District	Incumbency	White	Black	Dem Win?
1996				
House 1	D	51.7	81.8	Yes
House 2	D	51.6	45.8	Yes
House 3	R	40.6	No estimate	No
House 4	R	34.6	46.6	No
2000				
House 1	D	56.9	99.7	Yes
House 2	D	59.0	48.6	Yes
House 4	R	46.3	87.7	Yes
2004				
House 1	D	64.6	>100.0	Yes
House 2	D	57.0	50.0	Yes
House 3	R	43.7	No estimate	No

TABLE 6

EXIT POLL RESULTS FOR BLACK AND WHITE VOTER SUPPORT FOR DEMOCRATIC CANDIDATES, 1996-2004

Year	Contest	Black	White
1996	President	90	49*
	US Senate	79	43
1998	Governor	52	38
	US Senate	73	53
2000	President	40	55
		84	41
2004	President	94	36
	US Senate	96	49

* Bill Clinton won a plurality of the white vote as whites gave Bob Dole 41 percent of their vote with 9 percent going to Ross Perot.

Source: VNS Exit Polls, various years.

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Executive Summary of the Bullock-Gaddie
Assessment of Voting Rights Progress in Oklahoma

By Edward Blum

With a very small African-American population and not having even been a state at the time that most of the barriers to black participation were adopted, Oklahoma was not subject to the trigger mechanisms of the 1965 Voting Rights Act. The state, however, does not have a totally clean record when it comes to black political participation. Oklahoma was home to the case that struck down the grandfather clause, which allowed the descendants of individuals who had been eligible to vote prior to the Civil War to register and vote without meeting the demands of literacy.

In the two most critical "voting assessment" categories—voter registration and election participation—blacks in the majority of section 5 states are more successful than blacks in Oklahoma.

From 1980 to 2004, black registration rates in Oklahoma trailed white registration rates. As a matter of comparison, black registration rates in Oklahoma are lower than in most of the states currently covered by section 5 of the Voting Rights Act. In 1980, black registration in the median section 5–covered states was 9.5 points higher than in Oklahoma. For the most recent presidential election, the disparity remained at 9.3 percentage points. In the other elections of the 21st Century, black registration in the median section 5–covered states was more than ten percentage points higher than in Oklahoma. Throughout the quarter century chronicled in this report, white voting participation rates in Oklahoma exceeded those of blacks. For the period 1980 to 2004, black turnout figures for the median section 5–covered states are higher than in Oklahoma in all but three election years. Minority office holding as a percentage of the population in Oklahoma has not reached levels seen in many of the states covered by section 5 of the Voting Rights Act.

Assessment of Voting Rights Progress in Oklahoma

Prepared for the Project on Fair Representation
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An Assessment of Voting Rights Progress in Oklahoma

In *The Negro in Southern Politics*, H.D. Price developed a schema for answering the question "How Southern is Florida?"[1] The schema involved a Guttman Scale composed of seven parts (see Table 1). The states that seceded appeared in four groups. In the first group as the most southern Price placed Alabama, Louisiana, Mississippi and South Carolina. Slightly less southern because they did not support the 1948 presidential candidacy of Strom Thurmond are Georgia and Arkansas. He placed Florida, North Carolina and Virginia in the third category because they cast their Electoral College votes for the Republican Herbert Hoover in 1928. Tennessee and Texas constituted the fourth category because their black populations had fallen below 20 percent in the 1950 census.

[1] H.D. Price, *The Negro in Southern Politics: A Chapter of Florida History* (New York: New York University Press, 1957), pp. 8-9.

In the fifth category Price placed the five Border states because they did not secede in 1861. In the sixth category he placed Oklahoma, which was not a slave state in 1860 but did have state-mandated school segregation in 1954. The remaining 31 states he placed in a seventh category.

(See Table 1)

Oklahoma falls into Price's sixth category because it was not a state in 1860. Had it been a state, it would probably have permitted slavery since its neighbors all did, and the "civilized tribes" were slaveholding. Moreover, the Confederate Congress allocated seats to the Cherokee tribe that occupied parts of the Oklahoma Territory at the time of the Civil War, and many in the tribe stood with the South. Moreover, unauthorized white settlement in the Indian Territory came mainly from the South, especially Arkansas, Mississippi, and Texas. For these reasons had Oklahoma been admitted to the Union prior to 1860, it would have fallen into Price's category four, a state that seceded, which voted for Herbert Hoover in 1928 and which had a black population of less than 20 percent in 1950.

Although initially set aside as an Indian Territory and populated by the Cherokee Chickasaw, Choctaw, Seminole and Muscogee, the Sooner State was almost three-fourths white as of the 2000 census. It has a black population substantially less than any of the states that seceded, 7.5 percent. Indeed, African Americans are slightly outnumbered by Native Americans (7.7 percent). Hispanics constitute a sizeable remainder of the non-Anglo, white population at 5.2 percent in the 2000 census.

With a very small African-American population and not having even been a state at the time that most of the barriers to black participation were adopted, Oklahoma was

not subject to the trigger mechanisms of the 1965 Voting Rights Act. The state, however, does not have a totally clean record when it comes to black political participation. The case striking down the grandfather clause that allowed the descendants of individuals who had been eligible to vote prior to the Civil War to register and vote without meeting the demands of literacy, originated in Oklahoma. The original Oklahoma Constitution allowed anyone entitled to vote prior to January 1866 or that person's lineal descendants to register and vote without passing a literacy test. The Supreme Court ruled that the grandfather clause ran afoul of the Enforcement Acts of 1870 because it discriminated against those who could participate in congressional elections.[2] Although this unequal enforcement of a literacy clause was invalidated, Oklahoma continued to discriminate against a number of its African Americans. In reaction to *Guinn*, the legislature provided only a twelve-day period from April 30 until March 11, 1916, for those who had not voted in 1914 to register. Individuals who did not sign up to vote during that brief window of opportunity were permanently banned from voting. Although this action would seem to be as racially offensive as the initial grandfather clause, it went unchallenged for a generation until invalidated by the Supreme Court on the eve of World War II.[3]

With regard to the foreign language provisions of the 1975 amendments, Oklahoma is again not subject to preclearance. However, three counties have been covered by section 203 of the Voting Rights Act that requires provision of foreign language ballots. In the 1990s, Adair County provided Cherokee language ballots, and currently Texas County and Harmon County provide Spanish language ballots.

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[2] *Guinn v. United States,* 238 U.S. 347 (1915).
[3] *Lane v. Wilson,* 307 U.S. 268 (1939).

Black Turnout and Registration

Oklahoma does not maintain its registration or turnout records by race and thus conforms to the practice in 45 states. The surveys done by the U.S. Bureau of the Census after each federal election provide the best resource for figures on participation rates in Oklahoma. The registration and turnout figures generated by these surveys are self-reported and thus subject to inflation. Despite a problem of over reporting of participation, these are the most reliable figures available and can be used for making comparisons over time and across jurisdictions on the assumption that the inflation is of similar magnitude across time and space. Moreover, these surveys provided the basis for the kinds of estimates that the Census Bureau used in determining whether registration or turnout rates for jurisdictions were so low as to make them subject to the trigger mechanism included in the 1965, 1970 and 1975 Voting Rights Acts.

Throughout the 24-year period covered in Table 2, black registration trailed white registration rates. African-American registration most closely approached that for whites in three election years when the difference fell below five percentage points (1982, 1996 and 1998). In seven other years, the difference equaled or exceeded ten percentage points and in yet two more elections years the difference was slightly less than ten points. Across the generation of figures presented in Table 1 there is no consistent evidence that the disparity between the two races has been narrowed. In the first two presidential elections in the time series, white registration exceeded black registration by 15.8 points in 1980 and 11.9 points in 1984. In the two most recent presidential elections, white registration outpaced black registration by 12.1 points in 2000 and 9.6 points in 2004.

Although black registration rates invariably trail white registration rates, figures for both groups are always above 50 percent in presidential years and only in 1994 does the black figure slip below 50 percent in a mid-term election. Consequently were one to apply the cut point from the earlier Voting Rights Acts that focused on whether half of the voting age population had registered in a presidential year; Oklahoma surpasses that threshold.

(See Table 2)

The second set of figures in Table 2 provides comparison with the non-southern states. While black registration never exceeded white registration in Oklahoma, on three occasions during the 1990s, black registration in Oklahoma exceeded that for the non-South. The greatest difference came in 1996 when 67.1 percent of Oklahoma's black adults compared with 62 percent of the black voting age population outside the South had registered to vote. Overall there is a tendency for the difference between registration rates of blacks in Oklahoma and outside the South to narrow. Beginning with 1996, in two election years black registration in Oklahoma was greater than outside of the South while in two other election years, the non-South advantage over Oklahoma was less than five percentage points. The Census Bureau configurations do not provide figures to make a comparison for 2004.

At the bottom of Table 2 are the median figures for the seven states that have been covered by Section 5 of the Voting Rights Act since 1965.[4] When black registration rates in Oklahoma are compared with those for the median state among the ones initially subject to Section 5, the figures for the median state exceed Oklahoma's black registration figures for all but three years. In 1992 and 1996, African American

[4] The seven states are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia.

registration in Oklahoma exceeds that for the median state by less than two percentage points. In 1982, the figure for Oklahoma is 5.6 percentage points higher than for the median state. In years in which the median state figure is greater than for Oklahoma, the difference is often in the range of ten percentage points. There is no clear evidence of the disparity having been reduced over time. In 1980, black registration in the median state was 9.5 points higher than in Oklahoma. For the most recent presidential election, the disparity remained at 9.3 percentage points. In the other elections of the 21st Century, African-American registration in the median state was more than ten percentage points higher than in Oklahoma.

Self-reported turnout figures for Oklahoma appear at the top of Table 3. Throughout the quarter century chronicled in the table, white voting rates exceeded African-American turnout. Beginning with 1988, a majority of Oklahoma's African Americans report having voted in presidential elections, except in 2000 when the figures slumped to 44.5 percent. Participation rates among African Americans are substantially lower in mid-term elections. Except for 1982, black mid-term voting has always been below 40 percent and from 1986 through 1998 it hovered around 30 percent. The drop off from presidential to mid-term elections has generally been of about the same magnitude for African Americans and whites. A majority of Oklahoma's voting age population has turned out in presidential elections and therefore had something like the trigger mechanism of the past been applied from 1980 through 2004, in all likelihood Oklahoma would not have been made subject to preclearance.

(See Table 3)

The middle portion of Table 3 provides turnout figures for the non-South. Election participation by African Americans is lower in Oklahoma than outside the South except for 1996 when the Oklahoma rate exceeds that for the non-South by less than one percentage point. During much of the middle period in Table 3, African-American voting in presidential elections is at similar rates in Oklahoma and the non-South. However in 2000, the most recent presidential election for which comparable figures are available, black turnout in the non-South exceeded that in Oklahoma by more than eight percentage points a difference almost exactly paralleling that visible in 1980.

At the bottom of Table 3 are turnout figures for the median state among the seven that were made subject to preclearance by the 1965 Voting Rights Act because of their low rates of registration and or turnout. In all but three election years, African-American turnout in the median state exceeded that in Oklahoma. The exceptions were 1982 when the Oklahoma participation rate was six points higher than in the median state, 1988 when the Oklahoma figure was 5.3 points higher, and 1996 when the Oklahoma figure was 2.1 points higher. In some of the years in which turnout in the median state exceeded that for Oklahoma, the differences were striking. In 1984, 1986, 1990, and 2000, African Americans in the median state turned out at rates at least ten percentage points above the figure for Oklahoma.

Minority Officeholding

At the time of the first enumeration of African-American officeholders, Oklahoma had 25. The great bulk of these served on school boards while none held a county office and only one held a city office. With the coming of a new decade,

Oklahoma experienced a substantial jump in its number of black officeholders and by 1971 had 61. The increase came primarily in municipalities which boasted 35 African Americans holding public office. For the next decade, growth came slowly but as Table 4 shows in the early 1980s a second burst occurred. As with the earlier spurt in the numbers of black officeholders, the new additions came in cities, which by 1984 had 63 African Americans holding office. Also beginning in the mid-1980s African Americans came to hold a few county offices.

(See Table 4)

The three most recent enumerations show a drop in the number of black officeholders from the high point of 123 reached in 1993. From 1997 to 2001, the number of black officeholders held at just above 100. Almost three-fourths of these serve in municipalities while school boards account for approximately a fifth.

African Americans in Congress

Among the new Republicans who helped the GOP take control of Congress in 1994 was J.C. Watts, Jr. When Watts entered Congress he joined Connecticut's Gary Franks as the only African-American Republicans in the chamber.

Watts' represented a district that began in the Oklahoma City suburbs and included the University of Oklahoma where he starred as the Sooners' quarterback and also Fort Sill in Lawton. While the district included some Oklahoma City suburbs, it also took in the rural southwestern corner of the state. In sharp contrast to the majority-black districts that elect most black Democrats, Watts represented a district that was only 7.5 percent African American and had a racial mix very much like the state as a whole.

Watts established a conservative voting record that reflected the dominant views of his district. He was especially conservative on social and economic issues. The effectiveness of his representation was indicated by the strong margins that returned him to office for a total of four terms. Watts' increasing margins were a function of a continued shift of the rural vote of southern Oklahoma to his favor. In his initial congressional campaign, he garnered less than a third of the vote of (largely white) rural Democrats in the southern part of the state. By the time of his last election in 2000, Watts was carrying an estimated majority of those votes. Exit polling performed by the University of Oklahoma in 1996 found Watts garnering about four in ten black votes in his congressional district.[5]

While Watts' voting record bore little similarity to that of the Democratic members of the Congressional Black Caucus, he found great favor with his Republican colleagues. In 1998, he defeated John Boehner (OH) to become the chair of the Republican Conference, the fourth ranking post in the GOP House hierarchy. In 2002, Watts did not seek reelection and despite rumors that he might have ambitions for higher office, he has remained in private life and currently does not reside in Oklahoma.

African American State Legislators

As Table 5 shows, Oklahoma has a long history of black representation in its legislature. Until 1983, the Senate had one black Senator among its 48 members. For the last generation, there have been two. For more than 30 years, the House has had three black representatives among its 101 members. All of the black legislators are elected

[5] Ronald Keith Gaddie and Scott E. Buchanan, "Oklahoma: GOP Realignment in the Buckle of the Bible Belt," in Charles S. Bullock, III, and Mark Rozell, eds., *The New Politics of the Old South*, 1st edition. (Boulder, CO: Rowman and Littlefield Press, 1998).

from traditionally black constituencies in Oklahoma City and Tulsa. These districts are heavily African-American by population, though not necessarily majority-black.

(See Table 5)

African Americans in Statewide Office

During the four years before winning a seat in Congress, J.C. Watts, Jr., served on the Oklahoma State Corporation Commission. For the last two years he chaired that body. In his statewide run for corporation commissioner, Watts pulled a comfortable majority (55 percent) as one of the first elected, down-ticket statewide Republicans and the first (and last) African American elected to a statewide office.

Watts' father, a Baptist minister, ran for Labor Commissioner in 1998, challenging a popular Republican incumbent, Brenda Reneau. While name recognition carried the elder Watts in early polling – late summer telephone surveys showed him polling nearly a majority of the electorate as a Democrat – his support collapsed as the incumbent's campaign made it clear that this J. C. Watts was not the popular Republican congressman. The elder Watts ran last among all statewide Democrats, pulling 31.6 percent of the vote, nearly half of which came from the straight-party pull. His percentages were comparable to that of the white, Democratic candidate for lieutenant governor as reported in Table 6.

(See Table 6)

Native Americans in Congress

In the 108th Congress, Oklahoma claimed the distinction of having the most-heavily Native American congressional delegation. Of the five members elected from

Oklahoma, two – Rep. Brad Carson (D-OK2) and Rep. Tom Cole (R-OK4) – were members of a recognized Indian tribe. Carson, from Claremore, is a member of the Cherokee Nation, and while that heritage descended from distant lineage, his father had been a BIA attorney and Carson grew up on or near reservations in four other states. Cole, a former state legislator and executive director of the state Republican Party, is a member of the Chickasaw Nation, and is now the only Native American currently serving in the US House of Representatives. It is asserted, though difficult to prove, that the respective Indian nations actively worked to assist the election of these members of their tribes.

Racially Polarized Voting

Oklahoma exhibits less explicit history of racially polarized voting than other southern states during the era of civil rights change. Strom Thurmond did not appear on the ballot in the Sooner State in 1948. In 1964 the strongest support for Lyndon Johnson was in the traditionally Democratic rural regions with the strongest southern heritage. The state did cast more than 20 percent of its votes for George Wallace in 1968, with Wallace exhibiting his greatest appeal in the traditionally Democratic southeast. The absence of a large, geographically concentrated minority mitigates against the development of an explicit racial-threatened white vote:

> The racial threat hypothesis is of relatively little use in explaining Oklahoma politics in general – nowhere is there a significant concentration of blacks who are positioned to wield majority power. Even in the major urban counties, blacks

> constitute less than 15% of the population. The dynamic of black threat is far less likely because the prospects for majority-black government are nil.[6]

No evidence exists that proximity makes whites more or less opposed to minority interests in Oklahoma.

Racial threat voting may not be at work in Oklahoma, but there is a racial structure to the white-versus-nonwhite vote in Sooner State elections. Tables 7 and 8 present ecological regression estimates of white and nonwhite preferences from elections for congressional and statewide state constitutional offices since 1998.

(See Tables 7 and 8)

Ecological regression can generate meaningful estimates for white and nonwhite preferences in 16 congressional elections held since 1998. Most cases involved Republican incumbents. In two cases, no Democratic challenged the Republican incumbent. In nine of sixteen two-party contests, the preference of most white voters differed from the preferences of minority voters. In five elections, most whites and nonwhites voted together while in two other contests the white vote split evenly between the Democratic and Republican candidates. Two elections in which whites and non-whites shared candidate preferences involved J.C. Watts' last campaigns in congressional District 4. In the two most recent elections in congressional District 2, Native American Democrat Brad Carson (who did campaign as an Indian) won with majority support of whites and minority voters. Two open seat contests saw half the whites unite with solid majorities of non-whites behind the Democratic candidate. One of these took place in congressional District 4, in 2002. The OLS estimates show the white vote evenly

[6] Gaddie and Buchanan, 1998, 219.

divided, though the Native American Republican Tom Cole (who did not campaign as an Indian) prevailed in the district.

In 1998 and 2002, Oklahoma elected individuals to fill fifteen statewide constitutional offices. Twelve of those contests involved incumbents, seven Republicans and five Democrats. In ten of the fifteen elections the OLS estimates show differences between the preferences of most white and most non-whites voters. In the five cases where whites and nonwhites shared preferences, the Democratic candidate prevailed. In three other instances, a Democrat won despite not commanding the majority of the white vote: Insurance commissioner in 1998, Governor in 2002, and Auditor in 2002. The lowest support among whites for a Democratic candidate was in 1998, when Jack Morgan, candidate for Lieutenant Governor, pulled just 21.3 percent of the white vote. The only black candidate in the set, J.C. "Buddy" Watts, Sr., garnered just an estimated 24 percent of the white vote in his 1998 bid for Labor Commissioner.

The lowest share of the white vote with which a Democrat prevailed was 39.4 percent by Governor Brad Henry. Henry won with 44 percent statewide in a three-cornered race. The lowest share of the white vote by a prevailing Democrat in a two-way race was 43.1 percent by Carroll Fisher, 1998 candidate for Insurance Commissioner. All of the Democrats who captured majority-white support ran as incumbents, and mainly for low-profile, low-salience executive offices.

Conclusion

Although Oklahoma has been a state for less than a century, its history includes efforts to exclude some African Americans from political participation. However, the

relatively small and dispersed black population lessened the saliency of race for the state's politics, and as a consequence the need for aggressive actions to disfranchise black voters was fewer than in the Deep South. However, racial differences in political participation and voter behavior persist in the Sooner State.

Oklahoma African Americans vote at a lesser rate than whites, and black participation in the state oscillates between being above and below the average for the rest of the non-South. Black registration and turnout in Oklahoma is usually lower than in southern states subject to Section 5 since 1965. Black officeholding grew throughout the 1970s and early 1980s, but has since been stable at the local and state legislative level. Voting for Congress and statewide offices exhibits a pattern in which whites usually vote for Republicans while nonwhites opt for Democrats. White Democrats are capable of commanding majorities of minority and white votes when running as incumbents. When Republican incumbents run, Democratic shares of the white vote fall to less than a third of total.

TABLE 1: PRICE'S SOUTHERN CRITERIA

Rank		**1**	**2**	**3**	**4**	**5**	**6**
I	Mississippi	**O**	**O**	**O**	**O**	**O**	**O**
	Alabama	**O**	**O**	**O**	**O**	**O**	**O**
	South Carolina	**O**	**O**	**O**	**O**	**O**	**O**
	Louisiana	**O**	**O**	**O**	**O**	**O**	**O**
II	Georgia		**O**	**O**	**O**	**O**	**O**
	Arkansas		**O**	**O**	**O**	**O**	**O**
III	Virginia			**O**	**O**	**O**	**O**
	North Carolina			**O**	**O**	**O**	**O**
	Florida			**O**	**O**	**O**	**O**
IV	Tennessee				**O**	**O**	**O**
	Texas				**O**	**O**	**O**
V	West Virginia					**O**	**O**
	Maryland					**O**	**O**
	Kentucky					**O**	**O**
	Missouri					**O**	**O**
	Delaware					**O**	**O**
VI	Oklahoma				**Δ**	**Δ**	**O**
VII	Other States						

Criteria:
1. Opposition to Civil Rights – Supported Thurmond in 1948
2. Loyal to Historic Democratic Party in both 1924 and 1928
3. Black population over 20% of total in 1950
4. Member of the CSA in 1861
5. Slave state area as of 1860
6. Required statewide public school segregation as of 1954.

Note: "O" indicates the presence of an attribute; "Δ" indicates the implicit presence of an attribute depending on one's treatment of certain historical factors.

Source: H. D. Price (1957) *The Negro And Southern Politics: A Chapter of Florida History* (9-10).

TABLE 2

REPORTED REGISTRATION BY RACE IN OKLAHOMA AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
OKLAHOMA													
Black	51.9	59.2	60.7	58.5	59.8	51.6	65.5	49.8	67.1	60.3	57.4	54.2	61.8
White	67.7	63.3	72.6	68.4	66.5	69.2	75.5	68.5	71.3	65.1	69.5	69.3	71.4
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63.0	58.3	62.0	58.5	61.7	57.0	NA
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	NA
Seven-State Median													
Black	61.4	53.6	62.2	66.5	63.8	61.9	64.5	59.0	65.5	68.0	68.6	67.6	71.1
White	67.0	62.5	67.0	65.8	68.5	63.6	70.8	63.9	70.4	67.9	68.2	66.2	72.3
Source:	Various post-election reports by the U.S. Bureau of the Census												

TABLE 3

REPORTED TURNOUT BY RACE IN OKLAHOMA AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
OKLAHOMA													
Black	44.5	44.9	43.5	29.9	53.0	29.2	52.4	31.5	52.0	31.8	44.5	36.4	54.7
White	61.1	47.5	62.6	51.3	57.6	52.0	69.3	49.8	60.5	41.6	59.3	50.8	62.6
Non-South													
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	NA
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	NA
Seven State Median													
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2
Source:	Various post-election reports by the U. S. Bureau of the Census												

TABLE 4

NUMBERS OF AFRICAN AMERICAN ELECTED OFFICIALS
IN OKLAHOMA, 1969-2001

Year	Total	County	Municipal	School Board
1969	25	0	1	19
1970	36	0	12	19
1971	61	0	35	18
1972	62	0	35	19
1973	67	0	43	18
1974	66	0	40	20
1975	68	1	42	20
1976	67	1	41	20
1977	69	0	46	18
1978	68	0	45	18
1980	77	0	50	21
1981	85	0	43	20
1984	122	2	63	23
1985	122	2	91	22
1987	117	2	84	23
1989	115	2	81	25
1991	122	3	90	21
1993	123	3	92	21
1995	No Report from the Joint Center in 1995			
1997	102	2	74	19
1999	105	1	79	16
2001	105	1	74	21

Source: Various volumes of the *National Roster of Black Elected Officials* (Washington,D.C.: Joint Center for Political and Economic Studies).

TABLE 5

RACIAL MAKE UP OF THE OKLAHOMA GENERAL ASSEMBLY, 1965-2005

			Senate				House	
Year		Number		Percent		Number		Percent
1965		1		2.08		2		2.10
1967		1		2.08		2		2.10
1969		1		2.08		4		3.96
1971		1		2.08		4		3.96
1973		1		2.08		3		2.97
1975		1		2.08		3		2.97
1977		1		2.08		3		2.97
1979		1		2.08		3		2.97
1981		1		2.08		3		2.97
1983		2		4.17		3		2.97
1985		2		4.17		3		2.97
1987		2		4.17		3		2.97
1989		2		4.17		3		2.97
1991		2		4.17		3		2.97
1993		2		4.17		3		2.97
1995		2		4.17		3		2.97
1997		2		4.17		3		2.97
1999		2		4.17		3		2.97
2001		2		4.17		3		2.97
2003		2		4.17		3		2.97
2005		2		4.17		3		2.97

TABLE 6

THE 1998 AND 2002 ELECTIONS FOR STATEWIDE CONSTITUTIONAL OFFICE

OFFICE	DEMOCRATIC CANDIDATE	VOTES/%Vote	
1998:			
GOVERNOR	LAURA BOYD**	357,552	40.93%
LIEUTENANT GOVERNOR	JACK MORGAN**	281,379	32.45%
STATE AUDITOR	*CLIFTON H. SCOTT*	513,065	60.48%
SUPERINTENDENT OF PUBLIC INSTRUCTION	*SANDY GARRETT*	520,270	60.25%
COMMISSIONER OF LABOR	J.C. WATTS*/**	273,043	31.58%
STATE INSURANCE COMMISSIONER	CARROLL FISHER**	427,961	50.15%
CORPORATION COMM.	CHARLEY LONG	338,676	39.86%
2002:			
GOVERNOR	BRAD HENRY	448,143	43.27%+
LIEUTENANT GOVERNOR	LAURA BOYD**	400,511	38.95%
STATE AUDITOR	JEFF A. McMAHAN	516,425	51.43%
ATTORNEY GENERAL	*DREW EDMONDSON*	615,932	60.10%
SUPERINTENDENT OF PUBLIC INSTRUCTION	*SANDY GARRETT*	609,851	59.69%
COMMISSIONER OF LABOR	LLOYD L. FIELDS**	479,339	47.82%
STATE INSURANCE COMMISSIONER	*CARROLL FISHER*	586,871	58.13%
CORPORATION COMM.	KEITH BUTLER	415,355	41.24%

*Black candidate

**Republican incumbent

+Plurality winner

Italics indicate a Democratic incumbent

TABLE 7

ESTIMATES OF WHITE AND NONWHITE PREFERENCES IN OKLAHOMA CONGRESSIONAL ELECTIONS, 1998-2004

Year/District	Race/ Incumbency	Democrat's White Share	Democrat's NonWhite Share	Winner
1998				
US House 1	R	No reliable estimates		R
US House 2	R	33.8	63.3	R
US House 3	R	25.6	>100.0	R
US House 4	R*	44.6	<0.0	R
US House 5	R	26.7	79.0	R
US House 6	R	13.1	>100.0	R
2000				
US House 1	R	No reliable estimates		R
US House 2	Open**	50.0	80.4	D
US House 3	R	---	---	R
US House 4	R*	34.3	<0.0	R
US House 5	R	20.9	85.0	R
US House 6	R	32.4	99.4	R
2002				
US House 1	R	No reliable estimates		R
US House 2	D**	75.2	72.9	D
US House 3	R	---	---	R
US House 4	Open***	50.0	76.3	R
US House 5	R	42.6	84.9	R
2004				
US House 1	R	No reliable estimates		R
US House 2	Open	68.0	68.7	D
US House 3	R	15.9	>100.0	R
US House 4	R***	20.9	91.4	R
US House 5	R	31.6	43.4	R

*Republican candidate is an African-American, J.C. Watts.

**Democratic candidate is a Cherokee Indian, Brad Carson.

***Republican candidate is a Chickasaw Indian, Tom Cole.

TABLE 8

ESTIMATES OF WHITE AND NONWHITE PREFERENCES IN OKLAHOMA STATEWIDE CONSTITUTIONAL OFFICE ELECTIONS, 1998 AND 2002

Year/Office	Race/ Incumbency	Democrat's White Share	Democrat's NonWhite Share	Winner
1998				
Governor	R	30.1	>100.0	R
Lt. Governor	R	21.3	>100.0	R
Insurance Comm.	R	43.1	>100.0	D
Supt. Of Education	D	55.3	>100.0	D
Auditor	D	59.2	>100.0	D
Corporation Comm.	R	31.1	>100.0	R
Labor Comm.	R*	24.0	>100.0	R
2002				
Governor	Open	39.4	>100.0	D
Lt. Governor	R	29.4	>100.0	R
Insurance Comm.	D	52.9	>100.0	D
Supt. Of Education	D	50.2	>100.0	D
Auditor	Open	47.7	>100.0	D
Corporation Comm.	Open	34.6	>100.0	R
Labor Comm.	R	40.7	>100.0	R
Attorney General	D	55.0	>100.0	D

*Democratic nominee, J.C. "Buddy" Watts, Sr., was African-American.

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An Assessment of Voting Rights Progress in Mississippi
Executive Summary

By Edward Blum

Of all the states of the South and all of the states subject to Section 5 of the Voting Rights Act, Mississippi has had the longest journey from out of the darkness of segregation and racial subjugation. Early in the 1960s Mississippi had the lowest rates of black voter registration and participation maintained by the most unabashedly violent and vehement efforts to deny black suffrage.

By the beginning of the 21st century, proportionally more blacks than whites were registered to vote in Mississippi, and for two decades Mississippi blacks have registered to vote at higher rates than African-Americans outside the South. Until recently Mississippi whites voted at higher rates than blacks, though the difference between the races has largely been eliminated as of 1998. Mississippi blacks often turn out at rates higher than blacks in the rest of the country.

Mississippi has the highest proportion black population of the United States, though the state has fewer African Americans than in New York City. With approximately 900 officials, blacks hold more public office in the Magnolia State than elsewhere, and a black person is more likely to be represented by or to get to vote for a black officeholder in Mississippi than anywhere else in the US. Since 1987, an African-American has represented the majority-black Delta congressional district. Black representation is approaching proportionality in the state House of Representatives, though the black proportion in the state Senate still lags.

For statewide and congressional elections, voting divisions run along largely parallel partisan and racial lines. Frequently the divisions are in the neighborhood of 80-20 with blacks and Democrats facing off against whites and Republicans. These divisions are affected by incumbency more so than a candidate's race, and reflect the wholesale movement of the respective races into separate parties, and an increasing tendency to vote those party preferences up and down the ticket.

By every measurement, the Voting Rights Act has accomplished what it was designed to do in this state. Within two years of its implementation, black voter registration rates in Mississippi soared to nearly 60 percent, up from less than 7 percent prior to the act's passage.

An Assessment of Voting Rights Progress in Mississippi

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An Assessment of Voting Rights Progress in Mississippi

V.O. Key was but one of many observers of the Southern political scene who saw in Mississippi the politics of the region taken to extremes. The theme which Key enunciated throughout his classic study is that concerns of race determine the nature of the politics in the region. "In its grand outlines the politics of the South revolves around the position of the Negro…in the last analysis the major peculiarities of southern politics go back to the Negro. Whatever phase of the southern political process one seeks to understand, sooner or later the trail of inquiry leads to the Negro."[1] Key goes on to note that, "It is the whites of the black belts who have the deepest and most immediate concern about the maintenance of white supremacy."[2] Mississippi remained the last southern state in which African Americans constituted a majority of the population, making up 49.2 percent of the state's residents as recently as 1940. Even as the state's white population edged ahead of its black population, 60 of Mississippi's 82 counties had black majorities in 1940.

Key introduces his chapter on Mississippi with the following. "On the surface at least, the beginning and end of Mississippi politics is the Negro. He has no hand in the voting, no part in the factional maneuvers, no seats in the legislature; nevertheless, he fixes the tone - - so far as the outside world is concerned - - of Mississippi politics."[3] As the state

[1] V.O. Key, Jr., *Southern Politics* (New York: Alfred A. Knopf, 1949), p. 5.
[2] *Ibid.*
[3] *Ibid.*, p. 229.

with the largest black percentage in its population Mississippi more than its neighbors strove mightily to perpetuate white supremacy.[4] Efforts to deny African Americans any semblance of equality extended to the brutal lynching 50 years ago of Emmett Till a young visitor from Chicago, who showed off to his Mississippi cousins by flirting with the wife of a white store owner.

Mississippi's leading political figures during much of the 20th century castigated the national government for seeking to interfere in the state's mistreatment of its black citizens. And while the Deep South as well as much of the rest of the region objected to federally-mandated school desegregation, Mississippi took its resistance further than other states. Alabama's George Wallace went through the charade of standing in the school house door to prevent integration at the University of Alabama but once the television cameras had been packed away, he stepped aside and allowed the school to be desegregated. In contrast, when desegregation came to Ole Miss, a night of rioting erupted that left two dead.[5]

The 1964 presidential election sledgehammered the Deep South states away from their moorings in what had been the solid Democratic South. Given the choice between native southern Lyndon Johnson, who had just pushed the 1964 Civil Rights Act through Congress, and Barry Goldwater, one of the handful of Republicans to oppose that legislation, the Deep South joined the Republican's native Arizona to provide the challenger's only Electoral College votes. Again, in this action, Mississippi proved more extreme than its neighbors. Although Mississippi cast fewer votes than any of the other states carried by Goldwater, it provided him with his largest margin of victory, 303,910. The 87.1 percent of the Mississippi vote going to Goldwater was 17 percentage points larger than his second most sweeping victory in Alabama. The explanation for why the state with the largest black population gave barely ten percent of its votes to the Democratic nominee is, of course, that on the eve of the Voting Rights Act the Magnolia State rarely permitted African Americans access to the ballot.

As a result of having a substantial black majority, as the 19th Century drew to a close Mississippi launched a series of initiatives to purge its registration rolls of blacks. The critical document was a new constitution adopted in 1890 that required voters to be able to read or if illiterate to be able to explain portions of the constitution when read to them. The 1890 Constitution also implemented a poll tax, came up with a list of crimes for which a voter could be disfranchised, and extended the residency requirement prerequisite to registering to vote. Kousser estimates that these new prerequisites for registering to vote reduced black turnout by more than two-thirds and white turnout by approximately one third.[6]

More than three generations later, Mississippi remained in the forefront of opponents of African-American political participation. Following the passage of the 1965 Voting

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[4] *Ibid.*, p. 229-253.
[5] See, for example, James W. Silver, *Mississippi: the Closed Society* (New York: Harcourt, Brace and World, 1963).
[6] J. Morgan Kousser, *The Shaping of Southern Politics* (New Haven: Yale University Press, 1974), p. 241.

Rights Act when it became clear that federal power would be used to promote black access to the ballot box, Mississippi adopted a series of stratagems intended to minimize the influence of a recently expanded black electorate. The state enacted legislation that allowed counties to make the county school superintended an appointed rather than elected office. Counties could also shift from single-member districts to at-large elections for county commissioners. A third statute substantially increased the number of signatures to get on the ballot as an independent candidate. Civil rights attorneys filed challenges to each of these changes arguing that they should not be allowed to take effect until approved by federal authorities pursuant to Section 5 of the Voting Rights Act. When the U.S. Supreme Court reviewed these new statutes, it expanded the scope of Section 5 by broadly interpreting congressional intent. Attorneys for the state of Mississippi had argued that Section 5 applied only to legislation dealing specifically with registering to vote. A majority of the Supreme Court, in an opinion written by Chief Justice Earl Warren, ruled that, "We must reject a narrow construction that appellees would give to Section 5. The Voting Rights Act was aimed at the subtle as well as the obvious state regulations that have the effect of denying citizens of their right to vote because of their race."[7] As a consequence, all matters relating to the conducting of elections that take place in states subject to Section 5, including redistricting, must be submitted for review either to the Attorney General of the United States or the district court in the District of Columbia.

Black Turnout and Registration

Incomplete estimates reported by the Commission on Civil Rights are that in 1964, Mississippi had only 28,500 registered black voters compared with 525,000 whites on its registration rolls.[8] The Commission on Civil Rights provided figures for fewer than half of the Mississippi counties. Of those counties for which figures are available, Warren County with 22.7 percent had the highest percentage of the adult black population registered to vote before enactment of the new law. Only four other counties had as much as 10 percent of their black adults registered. At one, extreme, in Humphreys County, where black adults outnumbered whites by a margin of almost two to one, none of the 5,561 adult African Americans were on the voting rolls. In Holmes County with blacks making up more than 60 percent of the adult population, 20 of 8,757 adult blacks had managed to register. In Claiborne where blacks made up more than two –thirds of the population, 26 of 3,969 African Americans had gotten on to the registration rolls. In Tunica County, the nation's poorest until casinos were built in this county just south of Memphis, 1,407 of 2,011 adult whites but only 38 of 5,822 blacks had signed up to vote.

As in the rest of the South, implementation of the Voting Rights Act spurred black registration. Two years following enactment, the share of the black voting age population registered to vote in Mississippi burgeoned from 6.7 to 59.8 percent.[9] Of the 181,233

[7] *Allen v. State Board of Elections*, 393 U.S. 544 (1969).
[8] U.S. Commission on Civil Rights, *Political Participation* (Washington, DC: U.S. Government Printing Office, 1968), pp. 244-247.
[9] *Ibid.*

blacks who signed up to vote, almost a third had been added to the rolls by federal examiners dispatched to the Magnolia State under the authority of the Voting Rights Act. Within the first two years, federal examiners signed up voters in 31 of the state's 82 counties. In Hinds County where Jackson is located, more than 10,000 black voters registered with federal examiners. In some counties, most of the blacks on the registration rolls signed up with the federal officials. For example, in LaFlore, of 7,526 blacks who were registered in 1967, 7,230 had signed up with federal examiners. In Madison County federal officials enrolled 6,586 of the 7,037 black registrants

Figures reported by the Commission on Civil Rights indicate that by the fall of 1967, ten Mississippi counties had more black than white voters registered although in some of these counties, the number of voters for whom race was not given might mean that more whites than blacks were actually on the registration list. In at least some of these counties, blacks had gone from having virtually no one registered to dominating the registration rolls. For example, in Claiborne County, prior to the Voting Rights Act, only 26 blacks were registered to vote but by 1967 the number had swelled to 3,092 so that African-Americans constituted more than 60 percent of the registrants.

The U.S. Bureau of the Census provides more recent estimates of registration by race. It conducts surveys to determine the rates at which the voting age population registers and turns out in the biennial federal elections. While these self-reported figures tend to overestimate levels of participation, they are the most reliable figures available in most states and can be used for making comparisons over time and across jurisdictions on the assumption that the inflation is of similar magnitude across time and space. Since 1980 the Census Bureau has provided figures on a state-by-states basis. These surveys provided the basis for the kinds of estimates that the Census Bureau used in determining whether jurisdictions had such low registration or turnout rates as to make them subject to the trigger mechanisms included in the 1965, 1970 and 1975 Voting Rights Acts.

Table 1 reports the Census Bureau estimates for registration in Mississippi from 1980 through the 2004 presidential election. With four exceptions, whites report registering at higher rates than blacks in Mississippi. The greatest disparity comes in 1980 when 85.2 percent of the voting age whites compared with only 72.2 percent of blacks reported registering. Disparities have narrowed and in the four most recent elections, the differences have never reached four percentage points. Two of the four instances in which black turnout exceeds that for whites came in the two most recent presidential elections. In 2004 76.1 percent of blacks compared with 72.3 percent of whites had registered reversing the 1998 pattern when 75.2 percent of whites and 71.3 percent of blacks had registered.

(See Table 1)

Materials in the bottom half of Table 1 permit comparisions between the registration rates in Mississippi and the non-South. Throughout the quarter century reviewed in Table 1, African-American registration has been greater in Mississippi than in the rest of the nation. In all but two year (1988 and 1996), Mississippi's black registration ran at least

ten points above that for the non-South. Not only has the reported rate of registration of Mississippi African Americans exceeded that for blacks elsewhere, it has exceeded non-southern white registration for every year except for 1996. The evidence in Table 1 suggests that racial disparities in Mississippi registration rates have largely been eliminated and that black Mississippians are more likely to be registered than citizens in other parts of the country.

Self-reported turnout rates estimated by the Census Bureau appear in Table 2. In all but two years, white Mississippians report voting at higher rates than African Americans. The rate at which white participation exceeds that for blacks varies with an upper range of 11.4 points in 1980 and 10.5 points in 1996. The difference is less than 4 percentage points in 1982, 1984,1988, 1990, 1998, 2000 and 2002. The only two years in which blacks report voting at higher rates than whites are 1984 when the difference is negligible 0.4 points and the most recent presidential election when two-thirds of Mississippi's African Americans but fewer than 60 percent of the whites went to the polls. According to Census Bureau estimates, since 1998 the disparities in turnout have largely been eliminated.

(See Table 2)

The lower half of Table 2 provides comparative data for the non-South. In most years black turnout in Mississippi exceeds that for the rest of the country. In every presidential year except 1996, Mississippi blacks reported voting at higher rates than non-southern blacks. In 1992 the difference is eight percentage points while in 1984 it exceeds ten percentage points. In mid-term elections African-American turnout in Mississippi exceeds that in other parts of country half the time. The figures are higher in Mississippi in 1982, 1994 and 2002 and the figures are identical in 1998 although in the mid-term years in which turnout is higher in Mississippi the differences are modest. In 1986 and 1990 when turnout is higher among non-southern blacks than Mississippians, the differences are between four and six percentage points.

When the voting rate for Mississippi blacks is compared with whites outside the South, Mississippi African Americans come close to equaling the turnout rate for non-southern whites in presidential years except in 1996 and actually exceed the white rate outside the South in 1984 and 2000. The Mississippi black turnout rate of 66.8 percent in 2004 exceeds white voting outside of the South for any year in Table 2. In mid-term elections, non-southern whites invariably go to the polls at higher rates than do Mississippi blacks.

The data presented in Tables 1 and 2 demonstrate that African-American participation in Mississippi has come to rival that for whites and frequently exceeds that for blacks or whites outside of the South. This constitutes a remarkable turnaround given the extraordinarily low levels of black participation permitted by the dominant white society 40 years ago. One interpretation of the subsequent enthusiastic participation of African-Americans is that once having finally broken through the decades-old barriers of participation, Mississippi blacks treasured the franchise more than citizens elsewhere.

African American Officeholding

In 1969 in the first tabulation of African-American elected officials, blacks held 67 offices in Mississippi. Many of these served in virtually all-black communities. For example Mound Bayou had an African-American mayor and ten members of its council. Fayette also had an African-American mayor, five council members, a constable, two justices of the peace, and two election commissioners. Winstonville had a black major and five council members.[10]

With the extension of the franchise, black Mississippians began winning offices in communities other than those in which their race was concentrated. By the early 1980s, as Table 3 shows, more than 400 African Americans held public office at the state. In the mid-1980s, the number exceeded 500 and in the early 1990s, they passed the 700 mark. In the most recent enumeration done by the Joint Center for Political and Economic Studies, almost 900 African Americans held office in the Magnolia State. Blacks hold almost 200 county posts with approximately 100 of the state's 410 county commission seats. In addition, there are more than 400 African American municipal officers in Mississippi and well over 100 school board members. Mississippi leads the nation in its number of African American elected officers.

(See Table 3)

African Americans in Congress

Historically, one of Mississippi's congressional districts included the Delta - - the rich bottom land along the Mississippi River extending from the northwestern corner of the state south to Vicksburg. After the 1960 Census when the state lost a congressional district because of slow population growth what had been the Delta district expanded eastward to pick up some of the hill country, counties in which the bulk of the population was white. Following the *Wesberry v. Sanders*[11] demand that congressional districts have equal populations, the state made further adjustments. In the plan adopted in 1966, portions of the old Delta district ended up in three districts that now ran east and west across the state.[12] Civil rights lawyer Frank Parker characterized the new Second District as a "phantom majority-black district." The Second District which ran across the northern part of the state, was 51 percent black in its total population but the voting age population was only 44 percent black. Moreover, whites constituted a majority of the registered voters.

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[10] *National Roster of Black Elected Officials* (Washington, D.C: Metropolitan Applied Research Center, 1969).
[11] *Wesberry v. Sanders*, 366, U.S. 1 (1964).
[12] For a discussion of the politics and motivations behind the changes in the Mississippi congressional plans, see Frank R. Parker, *Black Votes Count* (Chapel Hill: University of North Carolina Press, 1990), pp. 41-51.

Following the 1980 census, the Second District was redrawn to have a 54 percent black population that translated into a 48 percent black voting age population. Estimates placed the share of the registered voters who were African American at 40 percent.[13] Robert Clark, who had broken the color line is the Mississippi House, won the Democratic nomination but lost the open congressional seat in the general election by fewer than 3,000 votes.

After a mid-decade adjustment of congressional boundaries in response to a voting rights challenge, the Second District became blacker with African American constituting 58 percent of the total population and 53 percent of the voting age population. This new configuration sent Mike Espy, the first African American to represent Mississippi since 1883, to Congress with 52 percent of the vote. Espy also became the first African American to represent a predominately rural congressional district in the post-civil rights era. The critical nature of the redistricting is pointed up by Barone and Ujifusa who observe that had Robert Clark competed in the district that Espy won, an African American would have been chosen in 1982.[14]

Espy continued to represent the district until tapped by President Bill Clinton to serve as Secretary of Agriculture. In the special election to replace Espy, Benny Thompson won in a runoff with 55 percent of the vote. Thompson led a field with multiple Democrats including Espy's older brother. In the runoff, Thompson consolidated the African-American vote in what was now a 63 percent black district to defeat primary frontrunner, white Republican Hayes Dent. Unlike Espy, Thompson did not make overtures for white votes in his initial election. Given the smaller proportion black in the district that first elected Espy, for him to ignore white concerns and not to try to expand his support from the white community would have left him in a precarious position. But by the time that Thompson won the special election, the district had been reconfigured to make it substantially blacker. Thompson's initial election fits with the theoretical understanding offered by David Canon[15] who hypothesized that in an election that involves a white opposing multiple blacks in a majority-black district, the black nominee will probably be radical as opposed to moderate. This is because white voters will have rallied to the white candidate. In districts in which only African Americans compete, the white vote will usually fall in behind a moderate so that the more radical candidate is defeated by a biracial coalition.

Thompson, who holds one of only two Democratic seats in the Mississippi congressional delegation, has compiled a liberal voting record. He has consistently voted with the Democratic leadership in the House, a stand that would probably defeat a southerner with a less heavily minority constituency. As an outspoken representative of black concerns,

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[13] Allen Ehrenhalt, editor, *Politics in America, 1984* (Washington, DC: *Congressional Quarterly*, 1983), p. 835.

[14] Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1988* (Washington, DC: *National Journal*, 1987) p. 655.

[15] David T. Canon, *Race, Redistricting and Representation.* (Chicago: University of Chicago Press, 1999), pp. 93-142

Thompson was slow to reach out to white voters and consequently although now in his seventh term, a black Republican nominee has managed more than 40 percent of the vote in each of the last two elections in what is now a 63.2 percent black district.[16]

African American State Legislators

The first African American to benefit from the Civil Rights Movement and enter the Mississippi legislature joined the House in 1967. Eight years passed before a second African American took a House seat. On through the 1970s, as Mississippi conducted a lengthy courtroom battle to maintain its traditional districting practices, black representation remained miniscule.[17] Finally, with the adoption of a racially fairer plan, black representation almost quadrupled to 15 House members as shown in Table 4. During the 1980s, black representation in the House increased gradually and then under a new districting plan drawn to accommodate population shifts during the 1980s the number of African-American House members increased by more than 50 percent to 31. Again, black representatives increased gradually during the 1990s so that by the turn of the new century, African Americans held almost 30 percent of the House seats. This figure almost exactly equals the proportion of the Mississippi voting age population that is African American.

(See Table 4)

The first African American to reach the Senate did so only once the long running legal challenge was resolved. Throughout the 1980s, the 52-member upper chamber had a pair of African-American members. That number rose to ten, as shown in Table 4, with a new districting plan in 1993. As a consequence, African Americans held 19 percent of the seats in the Senate during the 1990s. With the new century and a new redistricting plan, an eleventh African-American senator won office boosting the share of seats held by blacks above 20 percent.

Frank Parker, a civil rights attorney who litigated voting challenges in Mississippi for many years, argued that in order for African Americans to win legislative seats in the Magnolia State, districts needed to be a least 65 percent black. Parker reasoned that this proportion black in total population was needed to offset racial differences in age, registration and turnout rates.[18] Writing a decade after Parker, Orey continued to support the notion that the election of black legislators in Mississippi often requires districts to be almost two-thirds black in total population.[19]

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[16] Michael Barone with Richard E. Cohen, *The Almanac of American Politics*, 2006 (Washington, D.C.: National Journal, 2005), pp. 950-952.
[17] Parker, *op.cit.* in Chapter 4 describes the legal battle that preceded a districting plan that opened the way for the big jump in blacks serving in the House.
[18] *Ibid.*
[19] Byron D'Andra Orey, "Black Legislative Politics in Mississippi," *Journal of Black Studies* 30 (Julyl 2000), p. 802.

Requiring that high a concentration of African Americans indicates an inability of black candidates to attract much of the white vote. If almost two-thirds of a district's population needs to be black for an African American to be elected, it restricts the number of seats which might elect black legislators. If there is indeed a necessity of maintaining such high concentrations of African Americans—and that question is open to debate—then the Mississippi situation is quite unlike that in Georgia where the Legislative Black Caucus willingly reduced black voting age population percentages to near 50 percent in the course of the 2001 redistricting.

African Americans in Statewide Office

No African-American has won a statewide constitutional office in Mississippi. In the 2003 election, two African Americans represented the Democratic Party. Barbara Blackmon was the Democratic nominee for lieutenant governor and Gary Anderson carried the Democratic banner forward in the race for treasurer. Anderson lost by five percentage points as reported in Table 5. Blackmon, who challenged Amy Tuck, the incumbent who had initially been elected lieutenant governor as a Democrat before changing parties, managed only 37 percent of the vote.

(See Table 5)

The 2003 elections were good to the Republican Party as it won half of the eight statewide contests. Democrats did not even put forward a candidate to challenge auditor Phil Bryant. On the other hand, Democrats re-elected the secretary of state, insurance commissioner and agriculture commissioner and won the post of attorney general, taking more than 60 percent of the vote in each of those contests. While Blackmon had the weakest showing for the seven Democratic nominees, Anderson got a slightly larger share of the vote than repudiated incumbent Governor Ronnie Musgrove.

While no African American managed to win election to a state office in 2003, the nomination of two blacks by the Democratic Party marked an advance for black political ambitions. In 1999, the one African American to seek statewide office ran a poor second in the Democratic primary when challenging incumbent Agriculture Commissioner Lester Spell.

Mississippi elects its Supreme Court justices from districts. Currently the nine person Supreme Court has one African-American. The first black to serve on the court, Reuben Anderson, who ascended to the bench in 1985, was the first African-American graduate of the University of Mississippi law school.

Racial Voting Patterns

Mississippi does not maintain registration data by race. Therefore efforts to use statistical techniques to estimate racial voting patterns must match precinct returns with precinct-level data showing the voting age population by race.

Historically, Mississippi elections have been highly polarized. Estimates of voting behavior by race in some heavily black counties such as Bolivar and Madison, show that during the 1970s and until the mid-1980s, only infrequently could a black candidate attract as much as 10 percent of the white vote while getting substantial majorities among African American voters.[20]

While Allan Lichtman provides an extensive racial polarization analysis for selected counties and for numerous judicial contests, the elections of greatest interest to us are two congressional elections and a Supreme Court contest. Table 6 reproduces the results from the ecological regression for those contests contained in a report prepared by Lichtman. For the two congressional elections, the electorate was highly polarized. The Democratic nominees, Robert Clark in 1984 and Mike Espy in 1986, each got almost all of the black vote. The Republican member of Congress Webb Franklin got approximately 90 percent of the white vote in each contest.

(See Table 6)

The primary for the Supreme Court position is one of the few which is not racially polarized. The black candidate Reuben Anderson got an overwhelming share of the black vote but also polled a majority of the white vote. This is one of the few instances in the dozens of contests analyzed by Lichtman in which a black candidate was the choice of most white voters.

Polling data in Table 7 further illustrate the intense party divisions between blacks and whites in Mississippi. In statewide exit polls from 1992 through 2004, the white and black preferences have differed. The black vote is in lock-step for Democrats, ranging from 86 percent to 100 percent of all respondents saying they voted for Democrats. The white vote, meanwhile, is always majority Republican, though the exit poll responses vary from 50.6 percent of white respondents voting Republican for the US House in 1992 to 88.7 percent reporting ballots for incumbent US Senator Thad Cochran in 1996.[21] In the two most recent major statewide contests for which there are exit polls – governor in 2003 and president in 2004 – whites voted 77 percent and 83 percent Republican while blacks voted 94 percent and almost 93 percent Democratic in the respective contests

(See Table 7)

Ordinary least squares regression estimates of black and white support for congressional candidates between 2000 and 2004, as reported in Table 8, reveal racially-structured preferences when candidates run from both major parties. However, white Democratic incumbents derive substantially more of the white vote than other Democratic candidates, regardless of race. In nine of the thirteen congressional races examined, the Republican

[20] Allan J. Lichtman, "Racial Bloc Voting In Mississippi Elections: Methodology and Results," prepared for *Martin v. Allain*, SAJ 84-0708 (W), February 1987.
[21] The 2002 white vote for Sen. Thad Cochran reached 89.2 percent but no Democrat faced him. His sole opponent, who represented the Reform Party, managed only 15.4 percent of the vote.

candidate received at least 78 percent of the white vote. In four cases, which involved white Democratic incumbents Ronnie Shows (MS-4, 2000) and Gene Taylor (MS-5, 2000; MS-4, 2002, 2004), the Democrat received at least 40 percent of the white vote, and Taylor always received over 60 percent of the white vote. Black incumbent Bennie Thompson (MS-2) received an estimated 17.1 percent, 18.3 percent, and 11.4 percent of the white vote in three wining efforts in his majority-black Delta district. Thompson's showing is in line with that of white Democrats who have challenged Republican incumbents. Among Democrats, even incumbent Ronnie Shows got only 10.5 percent of the vote when he had to face fellow incumbent Chip Pickering in 2002 when the two incumbents were thrown together as a result of the state losing a congressional district. Only the eight-termed Gene Taylor with his moderate voting record has managed to attract majority support from white voters in recent years.[22]

(See Table 8)

Black ballots go overwhelmingly for the Democratic candidate, when one appears on the ballot. Roger Wicker (MS-1) in 2002 is the only Republican with a Democratic opponent in Table 8, to attract more than 30 percent of the black vote. In the absence of the party voting cue, however, black congressional voters are less cohesive, In 2004 Wicker pulled 53 percent of the black vote in a reelection bid with only a Reform Party opponent, and in congressional District 3, Chip Pickering secured 47.1 percent of a fractured black vote against two Independents. But, in the presence of two-party competition and in the absence of Democratic incumbents, white and black voters have sharply different congressional preferences.

Recent Mississippi statewide elections exhibit the same stark, racial/party/incumbency structure. Of seven contested statewide offices from 2003 analyzed in Table 9, three exhibited pronounced party preferences by race. Republican candidates for governor, lieutenant governor, and treasurer captured 70.3 percent, 83.6 percent, and 67.7 percent of the estimated white vote, but just 18.8 percent, 18.3 percent, and 17.1 percent of the black vote. All three candidates prevailed, and the candidates for lieutenant governor and treasurer bested black, Democratic opponents. Contests for secretary of state, insurance commissioner, and agriculture commissioner featured white, Democratic incumbents who won the majority of white ballots and most black ballots. The attorney general contest to succeed popular incumbent Mike Moore was won by a white Democrat (Hood) who carried 54 percent of the white vote. Hood's success and Governor Ronnie Musgrove's failure stand in contrast to the general pattern of incumbent/ racial/ party structure.

(See Table 9)

The pattern observed in the three races where Republicans won had previously been evident in the 2000 general election. George Bush and Trent Lott, running for President and US Senator, respectively, commanded similar levels of white and black support as

[22] In 2005, Taylor had the most conservative voting record of any House Democrat and was the only Democrat who voted conservatively more often than liberally. "The Centrists." *National Journal* 38 (February 25, 2006), pp. 28-29.

was observed in 2003 contests for governor, treasurer, and lieutenant-governor. The same pattern is also present in the 2001 state flag referendum, which pitted a flag featuring a Confederate battle flag against a new flag that eliminated St. Andrew's Cross.

Table 10 reports party identification by race for the period 1981 through 2004. These figures come from surveys of Mississippi voters conducted by the polling operation at the Mississippi State University. The figures in Table 10 show a relative consistency in the party identification of black Mississippians. Over the generation of polling results, the range in Democratic Party identifiers among blacks is from 77.2 percent in 2002 to 90.4 percent in 2000. For all but two years, more than 80 percent of the African Americans identify with the Democratic Party. Never did more than 13.4 percent of the African Americans identify themselves as Republicans and in six of the 14 years, fewer than one in ten blacks was a Republican. The drop in Democratic identifiers in 2002 is attributable to a record high incidence of Independents (10.4 percent). This strong African-American loyalty to the Democratic Party is reflected in the exit poll and regression estimates presented in Tables 7-9.

(See Table 10)

In the first two years in Table 10, most whites joined the vast majority of blacks in identifying with the Democratic Party. However after 1990, fewer than 40 percent of white Mississippians thought of themselves as Democrats. In the two most recent polls, Democratic identifiers dropped below 30 percent and in 2004, only 22.2 percent of the white sample identified as Democrats. As the Democratic identifiers have decreased, Republican Party members have risen. In 1982, a third of the whites saw themselves as Republicans but a decade later, the Republicans could claim the loyalty of 56 percent of white Mississippians. For the remainder of that decade, the percentage of Republicans hovered around 55 percent but then in 2002 it leapt to almost two-thirds of the sample where it remained in 2004.

With two-thirds of the whites now identifying with the GOP, it is in good position to win statewide contests. As in most of the South, the white vote began delivering the state to Republicans in presidential elections. Mississippi has cast its Electoral College votes for a Democrat only once since 1956 and that one time came more than a generation ago when it helped elect Jimmy Carter president in 1976. Carter's Mississippi win was his narrowest in the South, a 14,463 vote plurality.

As the Republican strength has grown among white voters, the GOP has added high profile offices to its list of successes. In 1978, Thad Cochran won a Senate seat, the first Republican statewide victory other than a presidential election. A decade later, Republicans took Mississippi's other Senate seat. They scored their first gubernatorial victory in 1991 when Kirk Fordice defeated incumbent Ray Mabus by 51-48 percent margin.

According to Census Bureau estimates, African Americans cast 36 percent of the votes in the 2004 presidential election. If 85 percent of that black vote goes to a Democrat, then

the Republican nominee needs approximately 70 percent of the white vote to win. If 90 percent of the black vote goes to the Democrat a Republican would need at least 72 percent of the white vote for victory and with 95 percent black cohesion, almost three-fourths of the white vote would be needed for a GOP victory.[23] Democratic incumbents, especially those for less visible statewide offices as well as legislative candidates can often secure a sufficient minority of white votes to win. Although we do not have estimates of the vote split in the 1999 gubernatorial election, it demonstrates a situation in which the Democratic nominee eked out barely enough white votes to win.[24] The more common pattern, however, as revealed in Table 7-9, is for the Republican to attract more than three-fourths of the white vote and to claim victory.

Once one removes incumbency, it is difficult to distinguish an election in Mississippi that is structured by a racial issue from an election that is structured by a racial candidate, from an election that is structured by partisanship. White voters are so overwhelmingly Republican, and black voters so overwhelmingly Democratic, that any statewide or congressional election assumes a racial/partisan structure once one controls for incumbency.

Although an analysis of state legislative voting is not part of this report, it is likely that the reason for the continued Democratic control of both chambers hinges at least in part on the power of Democratic incumbents. While Democrats linked to the national party have increasingly been unable to find favor with Mississippi's white voters, enough voters remain satisfied with the Democratic state legislator whom they know and whose policy positions are more in line with those of white voters in the state even if they may be at variance with the policy positions taken by national Democrats. While white congressional Democrats from the state struggle to maintain credibility with both their electorate and their colleagues in the Congress, Democratic state legislators do not face that kind of conflict. White Democrats in the Mississippi legislature can stake out moderate positions like Gene Taylor has done in Congress or position themselves even further to the right without fear of displeasing their party's leadership and by so doing, these local Democrats continue to win elections. Consequently the Mississippi legislature continues to be dominated by a biracial coalition of Democrats. After the 2003 election, the Mississippi House had 36 black Democrats, 40 white Democrats and 46 white Republicans. The state Senate had 11 black Democrats, 18 white Democrats and 23 white Republicans.

Conclusion

[23] A useful table that demonstrates the relative shares of black and white votes needed appears in Earl Black and Merle Black, *The Rise of Southern Republicans* (Cambridge, MA: Belknap Press, 2002), p. 30.

[24] Because of the presence of a third party candidate, Ronnie Musgrove secured a 9,000 vote advantage but failed to win the majority that is required under Mississippi law. As a consequence, the actual decision of who would be the state's new governor was made by the state House, which with its overwhelming Democratic majority, fell in line behind its party nominee. Had the state representatives voted as their districts did, the election would have remained a standoff since Musgrove and the Republican Mike Parker each carried 61 House districts.

Mississippi has had the longest journey from out of the darkness of segregation and racial subjugation. Mississippi started the 1960s with the lowest rates of black voter registration and participation, and the most unabashedly violent and vehement efforts to deny black suffrage.

By the beginning of the 21st century, proportionally more blacks than whites registered to vote in Mississippi, and Mississippi blacks have registered to vote and turned out at rates well-ahead of African Americans outside the South for two decades. Once implementation of the Voting Rights Act knocked down the racial barriers to the ballot, African Americans in Mississippi enthusiastically embraced political activism.[25] White Mississippians often vote at higher rates than blacks, though the difference between the races in terms of self-reported turnout is typically less than five points and in the most recent election, blacks actually voted at higher rates than whites.

Mississippi has the highest proportion black population of the United States, though the number of African-Americans in the state is fewer than in New York City. More blacks hold public office in the Magnolia state (nearly 900), and a black person is more likely to be represented by or to get to vote for a black officeholder in Mississippi than anywhere else in the US. Since 1986, an African-American has been elected from the majority-black Delta 2nd congressional district. Black representation is approaching proportionality in the state House of Representatives, though the black proportion in the state Senate still lags.

Party voting is starkly divided along racial lines, with statewide and congressional elections often featuring 80-20 divisions of both races in opposition to each other's preferences. However, these divisions are affected more by incumbency than by candidate race, and are reflective of the wholesale movement of the respective races into separate parties, and an increasing tendency to vote those party preferences up and down the ticket.

[25]In keeping with the theme introduced earlier in this report that suggested that Mississippi presents the extreme example of "southerness," some of the findings reported by a 1960s study help explain the higher levels of black participation in the Magnolia State. Matthews and Prothro reported that, "If southern Negroes could translate their existing level of political interest in participation in the same fashion as whites do, there would be a 19-20 percentage-point increase in the proportion of Negroes who vote or participate beyond voting!" (pp. 268-269). Moreover, Matthews and Prothro study found that for a third of the African Americans who had registered to vote, an the important motivation was to "be a citizen" or "to be a man." This consideration motivated only 13 percent of the white voters. We would expect that these factors cited by Matthews and Prothro would have a greater impact in Mississippi than elsewhere in the South. Donald R. Matthews and James Prothro, *Negroes in the New Southern Politics* (New York: Harcourt, Brace and World, 1966).

TABLE 1

REPORTED REGISTRATION BY RACE IN MISSISSIPPI AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Mississippi													
Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75.0	75.2	72.2	70.7	72.3
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63.0	58.3	62.0	58.5	61.7	57.0	NA
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	NA
Source:	Various post-election reports by the U.S. Bureau of the Census												

TABLE 2

REPORTED TURNOUT BY RACE IN MISSISSIPPI AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Mississippi													
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9
Non-South													
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	NA
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	44.7	57.5	44.7	NA

Source: Various post-election reports by the U.S. Bureau of the Census.

TABLE 3

NUMBERS OF AFRICAN-AMERICAN ELECTED OFFICIALS
IN MISSISSIPPI, 1969-2001

Year	Total	County	Municipal	School Board
1969	67	4	26	6
1970	81	22	35	5
1971	95	21	33	20
1972	129	27	40	20
1973	152	27	51	31
1974	191	26	91	30
1975	192	29	82	37
1976	210	35	69	46
1977	295	37	138	60
1978	303	38	145	57
1980	387	54	164	67
1981	436	68	188	80
1984	430	64	190	79
1985	444	74	189	79
1987	548	99	230	103
1989	646	123	310	107
1991	691	125	337	112
1993	751	158	337	119
1995	-------- *No report from the Joint Center in 1995* ----------			
1997	803	169	350	134
1999	850	167	408	126
2001	897	191	416	124

Source: Various volumes of the *National Roster of Black Elected Officials* (Washington, D.C.: Joint Center for Political and Economic Studies).

TABLE 4

RACIAL MAKE UP OF THE MISSISSIPPI LEGISLATURE
1965-2005

Year	Senate	% Black in Senate	House	% Black in House
1965	0	0	0	0
1967	0	0	1	0.82
1969	0	0	1	0.82
1971	0	0	1	0.82
1973	0	0	1	0.82
1975	0	0	2	1.64
1977	0	0	4	3.28
1979	0	0	4	3.28
1981	2	3.85	15	12.30
1983	2	3.85	15	12.30
1985	2	3.85	18	14.75
1987	2	3.85	18	14.75
1989	2	3.85	20	16.39
1991	4	7.69	20	16.39
1993	10	19.23	31	25.41
1995	10	19.23	31	25.41
1997	10	19.23	35	28.69
1999	10	19.23	35	28.69
2001	10	19.23	35	28.69
2003	11	21.15	36	29.51
2005	11	21.15	36	29.51

TABLE 5

Results of Mississippi Statewide Elections, 2003

Office	Republican	Vote	percent	Democrat	Vote	percent
Governor	Haley Barbour	470,404	52.6	Ronnie Musgrove*	409,787	45.8
Lt. Governor	Amy Tuck*	542,129	61.0	Barbara Blackmon	329,454	37.1
Secretary of State	Julio Del Castillo	201,765	23.5	Eric Clark*	610,461	71.0
Attorney General	Scott Newton	325,942	37.3	Jim Hood	548,046	62.7
Treasurer	Tate Reeves	447,860	51.8	Gary Anderson	403,307	46.6
Auditor	Phil Bryant*	587,212	76.3	No Candidate		
Insurance Commissioner	Aaron DuPuy	211,859	24.8	George Dale*	610,341	71.4
Agriculture Commissioner	Max Phillips	274,097	32.1	Lester Spell*	564,283	66.1

* Incumbent

Source: Mississippi Secretary of State

TABLE 6

RACIAL VOTING PATTERNS FOR SELECTED RACES

		Candidate Choice of Blacks		Candidate Choice of Whites	
		Black	White	Black	White
2nd Congressional District, General Election					
1984	Franklin v. Clark	95	5	7	93
1986	Franklin v. Espy	97	3	12	88
Supreme Court, Primary					
1986	Anderson v. Barrett	85	15	58	42

Results are for nine judicial circuit districts and not, in the case of the Supreme Court primary, for the entire state.

Source: Allan J. Lichtman, "Racial Bloc Voting in Mississippi Elections: Methodology and Results," prepared for *Martin v. Allain*, CAJ 84-0708 (W), February 1987.

TABLE 7
RACIAL PREFERENCES FROM EXIT POLL DATA FOR MISSISSIPPI, SELECT RACES, 1992-2004

Year	Office	Party	Black	White
2004	President	D	92.9	15.9
		R	6.1	83.3
2003	Governor	D	94.0	23.0
		R	6.0	77.0
2002	US Senate	D	---	1.3
		R	---	89.2
2002	US House	D	---	27.9
		R	---	66.3
2000	President	D	95.7	17.4
		R	3.0	81.3
2000	US Senate	D	86.5	9.0
		R	11.2	87.9
1996	President	D	94.9	23.0
		R	4.4	71.2
1996	US Senate	D	69.2	10.5
		R	25.8	88.7
1996	US House	D	86.4	12.7
		R	13.6	87.3
1994	US Senate	D	98.0	---
		R	2.0	---
1994	US House	D	100.0	---
		R	0.0	---
1992	President	D	92.7	27.7
		R	4.7	58.9
1992	US House	D	88.9	49.4
		R	11.1	50.6

Sources: All sources for exit poll data are the VNS and the National Elections Pool (for after 2002).

TABLE 8
OLS ESTIMATES OF RACIAL PREFERENCES FOR CONGRESS IN MISSISSIPPI, 2000-2004

Year	District	Candidate/Party	Black	White
2000	1	Wicker-R*	18.6	82.9
		Grist-D	81.4	17.1
	2	Thompson-D*	>100.0	17.1
		Caraway-R	<0.0	82.9
	3	Pickering-R*	15.7	95.8
		Thrash-D	84.3	4.2
	4	Shows-D*	>100.0	41.4
		Lampton-R	<0.0	58.6
	5	Taylor-D*	97.5	78.7
		McConnell-R	2.5	21.3
2002	1	Wicker-R*	39.6	83.6
		Weathers-D	60.4	16.4
	2	Thompson-D*	88.5	18.3
		LeSueur-R	11.5	81.7
	3	Pickering-R*	23.2	89.5
		Shows-D*	76.8	10.5
	4	Taylor-D*	80.6	76.7
		Mertz-R	19.4	23.3
2004	1	Wicker-R*	53.0	95.7
		Washer-Ref.	47.0	4.3
	2	Thompson-D*	91.6	11.4
		LeSueur-R	8.4	88.6
	3	Pickering-R*	47.1	96.3
		Giles-I	34.5	3.4
		Magee-I	18.4	0.3
	4	Taylor-D*	71.6	63.1
		Lott-R	28.4	36.9

* Incumbent.

TABLE 9

OLS ESTIMATES OF RACIAL PREFERENCES FOR SELECT STATEWIDE OFFICES IN MISSISSIPPI, 2000-2003, AND CONFEDERATE FLAG EEFERENDUM, 2001

Year	Office	Candidate/Party	Black	White
2000	President	Bush-R	3.7	82.2
		Gore-D	96.3	17.8
2000	US Senate	Lott-R*	15.4	94.4
		Brown-D	84.6	5.6
2001	Flag Referendum	Old Flag	8.5	89.5
		New Flag	91.5	10.5
2003	Governor	Barbour-R	18.8	70.3
		Musgrove-D*	81.2	29.7
	Lt. Governor	Tuck-R*	18.3	83.6
		Blackmon-D	81.7	16.4
	Sec'y State	Clark-D*	87.1	66.2
		Del Castillo-R	5.2	28.4
		Blackburn-I	7.6	5.4
	Att'y General	Hood-D	85.8	54.0
		Newton-R	14.2	46.0
	Treasurer	**Anderson-D**	82.9	32.3
		Reeves-R	17.1	67.7
	Insurance Comm.	Dale-D*	97.7	65.7
		DuPuy-R	2.3	34.3
	Ag. Commissioner	Spell-D*	95.9	56.7
		Phillips-R	4.1	43.3

* Incumbent

TABLE 10
PARTY IDENTIFICATION OF ADULT MISSISSIPPIANS,
WHITE AND BLACKS, 1981-2004

	Whites				Blacks			
Year	Dem	Indep	Rep	N	Dem	Indep	Rep	N
1981	51.0%	9.0%	40.0%	(420)	87.8%	1.2%	11.0%	(164)
1982	53.0	13.3	33.7	(570)	89.0	2.0	8.9	(246)
1984	46.2	14.3	39.4	(398)	82.6	7.6	9.8	(184)
1986	42.4	9.1	48.5	(396)	82.1	6.6	11.2	(196)
1988	43.9	10.5	45.6	(419)	82.2	5.6	12.2	(180)
1990	45.2	5.6	49.2	(394)	84.8	2.9	12.3	(171)
1992	36.9	7.1	56.0	(352)	84.1	2.4	13.4	(164)
1994	29.0	13.4	57.7	(411)	88.4	4.2	7.4	(189)
1996	31.1	11.9	57.0	(386)	82.7	8.4	8.9	(179)
1998	31.0	11.7	57.3	(393)	79.2	8.7	12.0	(183)
1999	34.5	12.5	53.0	(417)	84.2	7.1	8.7	(196)
2000	35.4	8.4	56.1	(367)	90.4	1.7	7.9	(178)
2002	28.1	6.3	65.7	(367)	77.2	10.4	12.4	(193)
2004	22.2	12.9	65.0	(311)	81.8	6.9	11.3	(159)

Source: David A. Breaux, Stephen D. Shaffer and Hilary B. Gresham. "MS: Emergence of a Modern Two Party State," Charles S. Bullock, III and Mark Rozell, editors, *The New Politics of the Old South,* 3rd ed. (Lanham, MD: Rowman and Littlefield, 2006). The authors take their data from the Mississippi Poll Project, Social Science Research Center, Mississippi State University.

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Executive Summary of the Bullock-Gaddie Report
Voting Rights Progress in New York

The 1970 Voting Rights Act made three counties of New York – Bronx, Kings (Brooklyn), and New York (Manhattan) – subject to the preclearance provisions of Section 5. Two of the counties (Bronx and Kings) also tripped the minority language trigger included in the 1975 Act.

Over the last quarter century, Latino registration and participation in New York state has generally tracked with the national trends for Latinos. In contrast, black registration and turnout has compared unfavorably with that in the rest of the nation.

African Americans have substantially increased the share of public offices that they hold since the three boroughs came under the coverage of Section 5. Latino officeholders remain far fewer in number than blacks and Latinos have enjoyed little growth in their numbers of officeholders and have even gone backwards in school board representation. Greater numbers of Blacks and Latinos have joined New York City's

congressional and state legislative delegations. Minorities hold most of the three covered boroughs New York city council seats.

Exit polls conducted among New York City voters reveal that white, black, and Latino voters generally support Democrats in national and statewide elections. In exit polls for mayoral elections, Anglos opposed minority voters in the past but since the late 1990s black and Hispanic voters have cast a sizeable minority of their votes – over 40% -- for white, Republican mayoral candidates. Ecological regression estimates for Bronx, Kings, and New York Counties show that only in Bronx County do white and minority preferences different.

An Assessment of Voting Rights Progress in New York

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An Assessment of Voting Rights Progress in New York

New York is one of the states only partially covered by the Section 5 of the Voting Rights Act. The 1970 version of the legislation extended coverage to three boroughs of New York City (Bronx, Kings, and New York). The trigger mechanism that caught New York picked up jurisdictions that had a prerequisite for voting and in which registration or turnout in the 1968 presidential election fell below 50 percent of the voting age population. New York employed a literacy test until the 1970 Voting Rights Act banned these prerequisites and this was the "test or device" that helped trigger the preclearance requirement. While only three counties are covered, and these do not constitute much of the landmass of New York, but because of their population density they contained 28 percent of the state's population as of 2000.

The 1975 Voting Rights Act trigger mechanism also identified two of the three counties (Bronx and Kings) making them subject to the language minority provision of that statute. This legislation focused on low participation rates among linguistic minorities defined as American Indians, Asian Americans, Alaskan Natives, or people "of Spanish heritage." The 1975 trigger mechanism focused on participation in the 1972 presidential election. If more than five percent of the voting age citizens belonged to a single language minority group as of November 1, 1972, registration and election materials were provided only in English at that election, and fewer than 50 percent of the voting-citizens were registered to vote or voted in that election, then the jurisdiction became subject to the preclearance requirement. The new legislation considered the failure to provide election-related materials in the language of a sizeable component of

the electorate to be the equivalent of a literacy test and thus a test or device that might impede registration or voting.

According to the 2000 census, New York ranked third in the nation among states in terms of the size of its Latino population. New York had 2,867,583 Latinos compared with almost 11 million in California and 6.7 million in Texas. Three-fourths of New York's Latino population lived in New York City. With more than 2.1 million Latinos, New York City places first among municipalities in terms of the size of its Hispanic population with over 400,000 more Latinos than in Los Angeles.

Over time, the Latino population of New York City has become more diverse. As recently as 1970, Puerto Ricans constituted 68 percent of the city's Latino population.[1] While they remained the largest component of the Hispanic population in 2000, and numbered almost 790,000, Puerto Ricans comprised little more than a third of the city's Latino population. Dominicans were the second largest group among Latinos with more than 400,000 in 2000. The third largest group, Mexicans, had slightly less than half the number of Dominicans. All told, the Latino population accounted for 27 percent of the city's population.

The heaviest concentration of Latinos lives in the Bronx where they constituted 48 percent of the 2000 population. Latinos make up 27 percent of the population in New York County and almost 20 percent of the King's County population. The largest number of Latinos, 644,705, live in the Bronx but the second largest number, more than half a million, live in Queens County which is not one of the counties subject to Section 5 of the Voting Rights Act.

[1] "Census 2000: New York City" found at http://www.sscnet.ucla.edu/soc/faculty/ayala/centro/Census2000.

The three counties subject to Section 5 have a total of 1,640,659 African Americans as of the 2000 census. This constituted 54 percent of all blacks living in the state in 2000.

Minority Registration and Turnout

New York, like most states, does not maintain registration or turnout data by race. Consequently the best source for materials on the ethnicity of political participants in the Empire State is the surveys done after each congressional election by the U.S. Bureau of the Census. Since 1980 estimates of registration and turnout by ethnicity have been available for each state. The information on registration and turnout are self-reported and, consequently, tend to overestimate actual levels of participation. Despite some inflation in the participation rates these estimates can be used for comparative purposes across time and across states on the assumption that the inflation is of similar magnitude across time and space. Moreover, these are the kinds of estimates that the Census Bureau used in determining whether low registration or turnout rates made jurisdictions subject to the trigger mechanisms included in the 1970 and 1975 versions of the Voting Rights Act.

Table 1 presents the Census Bureau estimates of registration of racial and ethnic groups in New York state and nationwide. Since all of New York is not subject to Section 5, statewide figures cover many of the state's residents who live in areas not subject to the preclearance requirement. For 1980 and 1982, the Census Bureau reports estimates for the largest 30 metropolitan areas. The estimates for the New York metro area also include territory not in the three boroughs covered by Section 5 but better matches up

with the Section 5 coverage area than do statewide figures. Comparisons of the statewide and metro figures provide an indication of the similarities in participation rates for the two a quarter of a century ago. Perhaps the statewide figures for later years do as well at capturing what is happening in the city and its boroughs covered by Section 5.

The figures for Hispanic registration in New York in Table 1 show relatively little variation over time. At the outset of the time period, 35.5 percent of the voting age Latinos, compared with 62.4 percent of the whites of voting age, had registered to vote. A quarter of a century later, the registration rate among Latinos stood at 38.2 percent compared with a 64 percent registration rate for whites. The registration figures for blacks were 46.5 percent in 1980 and 49.7 percent in 2004. With two exceptions (1984 and 1986) between 31.1 percent and 38.3 percent of the voting-age Latinos reported registering. Among whites, the range is also narrow going from a low of 59.5 percent of those of voting age in 1982 to 66.3 percent of the age eligible in 1984 who claimed to have registered. Among blacks, the lower end of the range is 45.2 percent of the age eligible reporting being registered in 1982. At the upper end, 54.7 percent of the age eligible claimed to be registered in 1984.

(See Table 1)

For purposes of comparison, nationwide figures on registration appear in the bottom half of Table 1. As with the figures for New York, the national figures show relatively little variation for any of the three groups. Also, as with the New York state data, Latinos nationwide are substantially less likely to register to vote than are whites or blacks.

The national figures show a much smaller difference in the registration rates of whites and blacks. While in New York whites always report registering at higher rates than do African Americans with recent difference frequently being well about 12 percentage points, national differences are typically much less. In 2000, the national figures show whites registering at a rate only two percentage points greater than do blacks. The most pronounced difference nationwide came in 1980 when 68.4 percent of the Anglos compared with 60 percent of the African Americans reported having registered.

In the 1980s, the rate of registration for Latinos nationwide exceeded that in New York with the exception of 1984 when the Latino registration of 45.1 percent in New York is an outlier. (Given the much lower reported rates of Hispanic registration in New York before and after 1984, the figures for that year may be the result of sampling problems.) Beginning with 1990, the registration rates for Latinos in New York exceed those nationwide except in 1994 when the estimates for the two groups are essentially identical. Even in the years when Hispanics report higher rates of registration in New York than nationwide, the differences are small with the largest occurring in 1992 (3.3 percentage points) and 2004 (3.9 percentage points).

The only slightly higher rates of reported registration among New York's Hispanics than those nationwide is somewhat surprising since the New York Latino community is more heavily Puerto Rican than is the Latino population of the nation as a whole. Puerto Ricans make up 36.6 percent of the New York state Latino population compared with only 9.6 percent of the Latino population nationwide. Since Puerto Ricans have American citizenship, they are eligible to register once they meet local

residency requirements. For that reason, one might anticipate higher rates of participation in the New York Hispanic community than elsewhere.

While the registration rate among New York Latinos exceeds that for Latinos nationwide, the same cannot be said for African Americans. Throughout the quarter century chronicled in Table 1, the rate of registration for African Americans nationwide exceeds that for New York and often by sizable amounts. The differences always exceed ten percentage points except in 2002 and occasionally reach 15 percentage points. With the exception of 2002, there is little to indicate that the gap between New Yorkers and the rest of the nation is being reduced.

Latino and African-American registration figures in the early 1980s in the New York City metropolitan area are quite similar to those for the entire state. White registration in the metro area ran several percentage points below that for the state.

Table 2 reports turnout rates by ethnic group for the state of New York and nationwide. The see-saw pattern that is frequently observed with higher turnout in presidential years than for mid-term elections is readily apparent for all three ethnic groups in New York. Despite this variation, Latinos vote at lower rates than do the other two groups throughout the period. The highest rates of Hispanic voting come in the presidential years of 1984, 1992 and 2004 when turnout exceeded 30 percent. At the other extreme, just under 20 percent of the Latino adults reported participating in the mid-term elections of 1986, 1994 and 2002.

(See Table 2)

Throughout the period, whites reported voting at rates at least 20 percentage points greater than did Latinos although in no year did the difference exceed 30

percentage points. Whites also voted at higher rates than blacks with the extent of the difference narrowing towards the end of the period. For 1998-2002, white turnout exceeded black turnout by about 10 percentage points. In several earlier years such as the presidential years of 1980, 1988 and 1992, whites voted at rates more than 15 percentage points greater than did blacks.

Black voting rates have not increased over the last quarter century. In mid-term elections, the range in black turnout is quite narrow extending from 32.5 percent in 2002 to 37.3 percent in 1982. In presidential years, the highest black turnout came in 1984 when 47.3 percent of the African Americans went to the polls. The lowest level of participation came in 1980 when 40.4 percent of the state's African Americans voted. In the most recent presidential election, 43.6 percent of the potential black electorate cast ballots.

The lower half of Table 2 provides national participation rates. During the 1980s, New York Latinos voted at lower rates than those nationwide except for 1984. Beginning in 1990, New York Latinos have voted at higher rates than Latinos nationwide except in 1994. The most recent data from the 2004 election show one of the largest differences with the turnout rate for New York Latinos being 31 percent compared with the national figure of 28 percent.

Throughout the quarter century, African Americans have higher turnout rates nationally than in New York. The differences in presidential years are typically 8 - 10 percentage points although in 2004, the difference reached 12.5 percentage points. In the mid-term elections, the national rates come closer to approximating those for New York

although black turnout in the Empire State continues to run as much as seven percentage points below the national figure.

Minority Officeholding

For three decades, the Joint Center for Political and Economic Studies did regular surveys to determine the numbers and identity of African American elected officials. Table 3 shows that from 1970 through 2001, the year of the most recent survey, the numbers of African-Americans holding office in New York has more than quadrupled from 75 to 325. The number almost doubles from 1970 to 1971 as a result of a tripling in the number of black school board members. By 1980, the Empire State had 200 African Americans holding office and that number increased by half again as of 1993.

(See Table 3)

The number of blacks holding county office has grown gradually from four to twenty during the course of the three decades. Municipal officeholding by African Americans has increased five fold during the period from 12 to 63. During the 1970s, most of the black officeholders served on school boards. While service on a board of education remains a popular position for African Americans the share of the officials holding that kind of post had declined to less than 40 percent of all black officeholders as of 2001.

The growth of Hispanic elected officials has come far slower than the growth in African American office holders. According to data collected by NALEO and reported in Table 4, the number of Latino officeholders in New York state increased from 65 in 1984 to 73 in 2000, after peaking at 91 in 1992. County officials have remained very few,

while municipal officials increased from 3 to 14. Very few Latinos serve in county offices with most sitting on school boards. However, school board seats held by Hispanics fell by 40 percent, from a high of 55 in 1992 to just 33 by 2000.

(See Table 4)

Minorities in Congress

As World War II was coming to a close and Franklin Roosevelt won his fourth term as president, the black electorate in Harlem chose one of its own to represent it in Congress. Adam Clayton Powell became the second African American in Congress as he joined William Dawson who represented a predominately black district on the Southside of Chicago. Powell rose in the ranks of the Democratic Party and ultimately chaired the Education and Labor Committee at the time that it approved President Lyndon Johnson's War on Poverty.

Although continuously re-elected, Powell was denied a seat in the 90th Congress as a result of corruption allegations. The seat was declared vacant; Powell ran and won it again. He did not take his seat in the 90th Congress but did win yet another term and served in the 91st Congress. By this time, Powell had lost interest in Congress' day-to-day activities and spent most of the time on his boat in the Bahamas. This neglect of his responsibilities resulted in four challengers emerging in the Democratic primary. Against this large field, Powell came up 150 votes short and was replaced by Charles Rangel a member of the State Assembly. As shown in Table 5, Rangel continues to hold that seat and has now become one of the most senior members of the House. Should Democrats win control of the House, the 18-term Rangel would likely chair the powerful Ways and Means Committee.

(See Table 5)

When Rangel first arrived in Congress, he found himself the delegation's junior African American. Two years before Rangel's first election, Shirley Chisholm had become the first African-American woman to serve in Congress. In 1972, Chisholm mounted a bid for the presidency that won her a handful of delegates. On her retirement from Congress in 1982, Chisholm was succeeded by Major Owens, who continues to hold the seat in the 109th Congress.

The nearby 11th District has also had an African-American member of the House with continuous service beginning in 1983. The fourth New York congressional district that has been represented by an African American since 1986 is the 6th District. Unlike the other three, it is not in one of the counties subject to Section 5 of the Voting Rights Act. The 6th District lies just to the east of the area covered by the VRA and is in Queens. For the last four Congresses it has been represented by Gregory Meeks.

In 1970, Herman Badillo, who had served as president of the Bronx borough and run unsuccessfully for mayor of New York City in 1969, became the first Puerto Rican elected to Congress. As shown in Table 6 he held the 21st district, which when redrawn after the 1970 census, was 44 percent Spanish-origin. After another unsuccessful bid for mayor in 1977, Badillo resigned from Congress to become one of the chief assistants to Mayor Ed Koch, whom Badillo had endorsed when his own candidacy came up short.

(See Table 6)

In the special election to fill the vacancy created by Badillo's resignation, Robert Garcia won the seat while running as a Republican. Garcia ran on the Republican label

after he lost the Democratic nomination to a fellow Latino, Louis Velez. Although elected as a Republican Garcia caucused with the Democrats.

The 1980 census showed the 21st district to be 54 percent Hispanic-origin, but it also showed that as a result of a massive exodus from the district, it was the least populated in the nation having lost half of its population during the decade. The changes needed to bring the district population in line with the one-person, one-vote requirement resulted in the share of the population of Spanish-origin dropping to 51 percent in the new district renumbered as the 18th.

In 1990, the Latino seat passed to Jose Serrano, who, like his predecessor, had previously served in the state Assembly. Like Badillo, but unlike Garcia, Serrano was born in Puerto Rico. By 1990, the 18th district had become 60 percent Hispanic-origin.

After redistricting, Serrano represented the 16th district which had a 57 percent Hispanic-origin in population. In 1993 he was joined by a second Puerto Rican native when Nydia Velazquez won in the 12th district which was 57 percent Latino.

Velazquez triumphed in a district gerrymandered in order to achieve an Hispanic majority. The district tied together Latino concentrations in Brooklyn, Queens and Manhattan. Some referred to the district as the "Bullwinkle District" because of its resemblance to the cartoon character. *Politics in America, 1998* describes the creation of the 12th district represented by Velazquez as follows.

> Unlike blacks, who live in geographic concentrations, Hispanic immigrants settled in disparate low and middle-income communities scattered across the city's five boroughs. Mapmakers had to go block-by-block to build a district that could reasonably ensure an Hispanic's election. The result was the 12th, one of

the most unusually shaped House districts in the nation's history. It follows a widely meandering path through parts of three New York City boroughs, Queens, Brooklyn, and Manhattan.[2]

A successful challenge was brought against the Velazquez district charging that it violated the Equal Protection Clause of the 14th Amendment because considerations of race and ethnicity predominated in its creation. The new district drawn in time for the 1998 election reduced the Hispanic concentration to slightly below half (48.5 percent). The district remained Democratic and Velazquez had no trouble winning reelection.

As of 2006, Latinos continue to hold two New York congressional seats. Nydia Velazquez has acquired sufficient seniority that should Democrats take control of the 110th Congress, she would be in line to chair the Small Business Committee. Her colleague, Jose Serrano, has worked his way up the seniority roster on the powerful Appropriations Committee and in a Democrat – controlled House would likely chair one of its subcommittees.

A third New York district has a Latino plurality. The 15th District, represented by Charles Rangel since 1970, is 48 percent Hispanic origin, the same level of concentration as found in the Velazquez district. The most serious challenge that Rangel has faced came from Adam Clayton Powell, IV, whose father had previously represented the district for almost 30 years. The younger Powell was raised in Puerto Rico and is black. Should Powell succeed Rangel, he would become the third member of the delegation with Puerto Rican roots.

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[2] Philip D. Duncan and Christine C. Lawrence, *Politics in America, 1998* (Washington, DC: CQ Press, 1997), p. 996.

The 7th District which is east of the 12th, 15th and 16th districts also has a substantial Latino population. In this district Latinos constituted almost 40 percent of the 2000 population. The redistricting necessitated by the invalidation of the Velazquez district resulted in the 7th District becoming more of a Bronx district and less a Queens district. Continuing demographic trends perhaps augmented by membership turnover and/or redistricting are likely to result in additional districts that elect Latinos to Congress from New York.

Minority Legislators

At the end of the 1960s, 13 African Americans served in the New York legislature. While not all of these came from the boroughs subject to Section 5 of the Voting Rights Act, most did. Table 7 shows that over the next three decades the number of African Americans serving in the legislature has more than doubled in each chamber. Growth in the black membership in the Senate has been slow but consistent. In the House, the large increases have come immediately after redistricting. In the first House seated immediately after the 1983 redistricting, the number of African Americans increased from 11 to 15. A decade later, with another new plan in place, the number of Black representatives jumped from 17 to 21. By 2001, African Americans held 11.5 percent of the Senate seats almost 15 percent of the House seats.

(See Table 7)

Two residents from New York City are the first Puerto Rican women to serve in state legislature. In 1978 Olga Mendez became the first Puerto Rican to be elected to a state senate and in a 1994 special election, Carmen Arroyo, became the first Puerto Rican

women elected to the lower chamber of a state legislature. Overall Hispanic representation has been slowly growing, and is mainly located in the three Section 5 counties. The number of Hispanic senators, set at two in 1985, grew to five by 2003, while the number of Hispanic assemblymen increased from five to ten over the same period (see Table 8). For the years for which we could obtain data, there was never more than one Hispanic legislator in the New York Senate or Assembly, respectively, elected from outside Bronx, Kings, and New York Counties.

(See Table 8)

New York City Elections

The nation's largest city has had an African-American mayor, David Dinkins, elected in 1989 but defeated in his reelection bid by Rudy Giuliani. In 2005 Latino, Fernando Ferrer, won the Democratic mayoral nomination without a runoff. In winning the nomination, Ferrer succeeded where an earlier Latino, Herman Badillo (a former member of Congress), had failed repeatedly more than a generation earlier. Ferrer fared poorly however, in the general election against incumbent Republican mayor Michael Bloomberg. Ferrer had previously served as the Bronx borough president.

The current Bronx borough president Aldopho Carrion, Jr., is of Puerto Rican descent, and is the only current minority borough president in the three Section 5 counties. Below the borough level, minority candidates are currently very successful in winning election. Of the 34 city council seats elected from the Bronx, Brooklyn, and Manhattan in 2005, nineteen are held by black, Hispanic, or multiethnic representatives, including six of eight in the Bronx (three black, three Hispanic), nine of sixteen in

Brooklyn (seven black, two Hispanic), and four of ten from Manhattan (two black, three Hispanic – one of whom is bi-ethnic).

Racial Voting Patterns

This section presents data from two sources: exit polls from local and national contests for New York City; and ecological regression estimates of racial group preferences for the 2000 general elections for national and state legislative offices.

Exit poll data indicate that white and minority preferences are usually distinct and different, both within the Democratic primary and in general elections for city office, but generally the same in general elections for major national and statewide offices. Table 9 presents exit poll data for four local contests – Democratic primaries for mayor and council president in 1989, which featured black and Hispanic candidates, respectively, and the 1989 and 1993 mayoral general elections between black Democrat David Dinkins and white Republican Rudolph Giuliani. In all three mayoral contests, most whites did not vote for the black candidate. Two-thirds of whites voted against Dinkins in the 1989 primary, and 60 percent opposed him in the general election. In 1993 Dinkins' white share fell nearly 10 points, from 37.2 percent of the white vote in 1989 to just 27.4 percent. Black support for Dinkins holds constant across the three contests. His support from Hispanics is greater in the 1993 general than in the 1989 Democratic primary.

(See Table 9)

The 1989 primary for city council president experienced substantial voter rolloff from the mayoral primary, but the vote for the incumbent split along ethnic lines. The

Hispanic challenger polled a plurality of the Hispanic vote, while the incumbent was the most popular candidate with white, black and other voters.

Exit poll data collected in 1997 and 2001 – but not reported in Table 9 because we could not locate breakouts or the raw data – registered further erosion in Hispanic support for Democratic mayoral nominees. In 1997, according to the exit poll, Rudolph Giuliani held Democratic nominee Ruth Messenger to 57 percent of the Hispanic vote. Four years later, Republican Michael Bloomberg pulled 43 percent of the Hispanic vote in an open seat contest.[3] The black vote has also shifted toward Republican mayoral candidates. Exit poll data were not collected for the 2005 mayoral race in New York City, but homogenous precinct analysis by John H. Mollenkopf, director of the Center for Urban Research at the City University of New York Graduate Center, estimated that Michael Bloomberg attracted half of the black vote,[4] compared to just 28 percent of the black vote four years earlier, and a paltry 4.3 percent for Giuliani in 1993. The white vote lined up solidly behind Republican candidates in all mayoral elections since 1989.

Recent national election polls within New York City reflect the perception of New York as a Democratic counterweight to Republican, upstate New York. For six statewide contests since 1998, in only one – George Pataki's 1998 reelection bid for governor – does the white vote stand in opposition to the minority vote in Gotham. As reported in Table 9, the white vote for other Democrats ranges from just 51 percent for Hillary Clinton in 2000 to 74.4 percent for Charles Schumer in 2004. The lowest black support for any Democrat is 78.4 percent for governor in 1998 – the one contest where

[3] Mirta Ojita, "City's Hispanics Shift, Moving Toward G.O.P." *New York Times,* November 8 2001, Page D-5.
[4] Sam Roberts, "Mayor Crossed Ethnic Barriers For Big Victory," *New York Times,* November 10 2005, Page A-1.

the Democrat gets less than 90 percent of the black vote. The lowest Hispanic Democratic vote is also in 1998, when 75 percent of the Hispanics favored Pataki's Democratic opponent Peter Vallone. Whites always give less support to Democratic nominees than do other ethnic groups with and they average 33.3 percentage points below black support for statewide Democrats. Nonetheless most New York City whites support Democrats in statewide exit polls.

Ecological regression analysis using precinct data for 2000 gathered by David Lublin and Steven Voss,[5] shows Anglos and minorities generally voting together in two of the three covered boroughs (see Table 10). In Kings County (Brooklyn) and New York County (Manhattan), minority and Anglo voters had the same majority preferences for every office except US Senator in Kings, where two-thirds of the whites opposed Hillary Clinton. In the Bronx, Anglo and Hispanic preferences were highly polarized, and no realistic black estimates could be derived. As a caution, we should note that the precinct-level analyses were conducted borough-wide. No indicators of district assignment were included in the Lublin/Voss data for the congressional and assembly races, so district-specific contextual effects may be masked.

(See Table 10)

Conclusion

Section 5 of the Voting Rights Act has covered three New York counties – Bronx, Kings (Brooklyn), and New York (Manhattan) –the 1970. Bronx and Kings also tripped the minority language provision of the 1975 Act. Latino registration and participation in

[5] David Lublin and D. Stephen Voss. 2001. "Federal Elections Project." American University, Washington, DC and the University of Kentucky, Lexington, KY.

the state generally tracks with national trends for Latinos, while black registration and turnout in New York lags that exhibited by African Americans in the rest of the nation.

The numbers of African Americans holding public office have increased substantially through the three decades of VRA coverage. Latinos have registered very few gains and have even lost ground in school board representation. New York City's congressional and state legislative delegations have witnessed increases in the numbers of seats held by Blacks and Latinos. Minorities hold most of the New York city council seats from the three covered boroughs.

Exit polls conducted with city voters show that whites, blacks, and Latinos generally prefer Democrats in presidential and statewide contests. Ecological regression estimates for Bronx, Kings, and New York Counties show that only in the Bronx do white and minority preferences different. Exit polling for mayoral elections reveal that Anglos once usually opposed the preferences of other racial and ethnic groups, but that by the end of the 1990s and in the most recent decade black and Hispanic voters have cast a sizeable minority of their votes – over 40% -- for white, Republican mayoral candidates.

Notable progress has been made in minority officeholding and white and minority voters have shown flexibility in their voting preferences, with a general tendency to vote together as Democrats in most partisan elections. Differences in the degree of support have not impeded the election of minority officeholders, though most minority officeholders represent minority constituencies. A continuing problem in New York is the persistent lag in the registration of Latinos and the participation of Latinos and blacks

in voting. Black and Latino registration lag states such as Georgia and Texas, respectively, while Latino participation is on par with that observed in Texas.

TABLE 1

REPORTED REGISTRATION BY RACE IN NEW YORK, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
NEW YORK													
Latino	35.5	33.0	45.1	28.8	32.6	34.1	38.3	31.1	37.8	35.2	35.3	35.5	38.2
White	62.4	59.5	66.3	60.0	63.5	60.0	66.1	61.7	65.1	61.3	63.2	62.5	64.0
Black	46.5	45.2	54.7	48.5	49.5	48.7	49.7	45.9	52.5	48.3	51.9	50.4	49.7
NATIONAL													
Latino	36.3	35.3	40.1	35.9	35.5	32.3	35.0	31.3	35.7	33.7	34.9	32.6	34.3
White	68.4	65.6	69.6	65.3	67.9	63.8	70.1	64.6	67.7	63.9	65.6	63.1	67.9
Black	60.0	59.1	66.3	64.0	64.5	58.8	63.9	58.5	63.5	60.2	63.6	58.5	64.3
New York City													
Latino	34.4	34.3		Not Reported after 1982									
White	58.5	56.3		Not Reported after 1982									
Black	46.4	45.2		Not Reported after 1982									

Source: Various post-election reports of the U.S. Bureau of the Census

TABLE 2

REPORTED TURNOUT BY RACE IN NEW YORK, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
NEW YORK													
Latino	27.8	23.4	37.5	19.8	28.4	23.3	32.6	19.8	28.6	23.4	29.4	19.5	31.0
White	57.8	50.9	60.8	46.0	57.2	44.1	61.1	48.9	55.1	44.8	55.1	41.5	57.4
Black	40.4	37.3	47.3	35.8	41.3	33.2	43.4	34.7	42.4	34.6	45.7	32.5	43.6
NATIONAL													
Latino	29.9	25.3	32.6	24.2	28.8	21.0	28.9	20.2	26.7	20.0	27.5	18.9	28.0
White	60.9	49.9	61.4	47.0	59.1	46.7	63.6	47.3	56.0	43.3	56.4	44.1	60.3
Black	50.5	43.0	55.8	43.2	51.5	39.2	54.0	37.1	50.6	39.6	53.5	39.7	56.1
New York City													
Latino	26.0	24.1		Not Reported after 1982									
White	53.1	47.3		Not Reported after 1982									
Black	40.3	38.3		Not Reported after 1982									

Source: Various post-election reports of the U.S. Bureau of the Census

TABLE 3

NUMBER OF AFRICAN-AMERICANS ELECTED OFFICIALS IN NEW YORK 1970-2001

Year	Total	County	Municipal	School Board
1970	75	4	12	25
1971	142	4	16	84
1972	163	6	16	103
1973	164	6	15	101
1974	174	9	18	105
1976	171	9	20	94
1977	186	9	24	106
1978	183	8	23	107
1980	200	7	30	106
1981	197	7	31	104
1984	240	8	30	137
1985	246	8	35	135
1987	250	11	40	126
1989	252	13	37	127
1991	277	14	37	134
1993	299	16	47	136
1995	-------*No Report from Joint Center for 1995*------			
1997	311	17	58	126
1999	305	17	56	125
2001	325	20	63	125

Source: Various volumes of the *National Roster of Black Elected Officials* (Washington, D.C.: Joint Center for Political Studies).

TABLE 4

NUMBER OF HISPANIC ELECTED OFFICIALS
IN NEW YORK, 1984-2000 (SELECT YEARS)

Year	Total	County	Municipal	School Board
1984	65	1	3	51
1986	65	1	4	51
1989	71	2	4	51
1991	76	2	5	49
1992	91	2	13	55
1999	78	1	14	39
2000	73	2	14	33

Source: Various volumes of *The National Directory of Latino Elected Officials* (Los Angeles: NALEO Educational Fund).

TABLE 5

AFRICAN AMERICANS SERVING IN CONGRESS FROM NEW YORK, 1969-2005

	Congressional Districts			
	12th	18th	11th	6th
1969	Shirley Chisholm	Adam Clayton Powell		
1971	Shirley Chisholm	Charles Rangel		
1973	Shirley Chisholm	Charles Rangel		
1975	Shirley Chisholm	Charles Rangel		
1977	Shirley Chisholm	Charles Rangel		
1979	Shirley Chisholm	Charles Rangel		
1981	Shirley Chisholm	Charles Rangel		
		16th		
1983	Major Owens	Charles Rangel	Edolphus Towns	
1985	Major Owens	Charles Rangel	Edolphus Towns	Alton Waldon*
1987	Major Owens	Charles Rangel	Edolphus Towns	Floyd Flake
1989	Major Owens	Charles Rangel	Edolphus Towns	Floyd Flake
1991	Major Owens	Charles Rangel	Edolphus Towns	Floyd Flake
	11th	15th	10th	
1993	Major Owens	Charles Rangel	Edolphus Towns	Floyd Flake
1995	Major Owens	Charles Rangel	Edolphus Towns	Floyd Flake
1997	Major Owens	Charles Rangel	Edolphus Towns	Floyd Flake
1999	Major Owens	Charles Rangel	Edlophus Towns	Gregory Meeks
2001	Major Owens	Charles Rangel	Edolphus Towns	Gregory Meeks
2003	Major Owens	Charles Rangel	Edolphus Towns	Gregory Meeks
2005	Major Owens	Charles Rangel	Edolphus Towns	Gregory Meeks

* Won a special election in 1986.

TABLE 6

LATINO MEMBERS OF CONGRESS FROM NEW YORK

	21st	
1971	Badillo – 30%*	
1973	Badillo-44%	
1975	Badillo	
1977	Badillo	
1979	Garcia	
1981	Garcia – 54%	
	18th	
1983	Garcia-51%	
1985	Garcia	
1987	Garcia	
1989	Garcia	
1991	Serrano – 60%	
	16th	12th
1993	Serrano-59%	Velazaquez-57%
1995	Serrano	Velazquez
1997	Serrano	Velazquez
1999	Serrano	Velazquez – 49%
2001	Serrano – 63%	Velazquez
2003	Serrano – 63%	Velazquez – 49%
2005	Serrano	Velazquez

Percentages indicate the share of the district's population that is of Hispanic-origin.

*This is the percent Puerto Rican and not for the percent of the population that is of Hispanic origin. Michael Barone, Grant Ujifusa and Douglas Matthews, the *Almanac of American Politics, 1972* (Gambit, 1972), p. 549.

TABLE 7

AFRICAN-AMERICANS IN THE NEW YORK LEGISLATURE, 1969-2001

	Senate		Assembly	
Year	Number	Percent	Number	Percent
1969	3	4.92	10	6.67
1971	3	4.92	9	6.00
1973	3	4.92	11	7.33
1975	4	6.56	10	6.67
1977	4	6.56	10	6.67
1979	4	6.56	12	8.00
1981	4	6.56	11	7.33
1983	4	6.56	15	10.00
1985	4	6.56	16	10.67
1987	4	6.56	16	10.67
1989	5	8.20	16	10.67
1991	5	8.20	17	11.33
1993	5	8.20	21	14.00
1995	5	8.20	21	14.00
1997	6	9.84	21	14.00
1999	6	9.84	21	14.00
2001	7	11.48	22	14.67

Source: Various editions of the *National Roster of Black Elected Officials* (Washington, DC: Joint Center for Political and Economic Studies).

TABLE 8

NUMBER OF HISPANIC STATE LEGISLATORS
IN NEW YORK AND SECTION 5-COVERED COUNTIES, 1985-2003, SELECT YEARS

	New York State		Covered Counties	
Year	**Senate**	**Assembly**	**Senate**	**Assembly**
1985	2	5	2	5
1987	2	6	2	5
1989	1	5	1	5
1991	2	5	2	5
1993	4	7	2	6
1999	4	8	3	8
2003	5	10	N/A	N/A

TABLE 9

RACIAL PREFERENCES IN NEW YORK CITY EXIT POLLS

	Party	White	Black	Hispanic	Others
1989 Mayoral Democratic Pmy.					
Koch (W)	Dem (I)	**66.7**	3.4	38.8	33.3
Dinkins (B)	Dem	25.9	**94.2**	**57.5**	**63.0**
Others	Dem	7.1	1.4	3.7	3.7
1989 Council President Dem. Pmy.					
Mendez (H)	Dem	10.0	23.4	**40.9**	28.8
Stein (W)	Dem (I)	**73.0**	**43.9**	32.7	**64.4**
1989 Mayoral General					
Giuliani (R, W)	Rep	**59.5**	1.4		22.5*
Dinkins (D, B)	Dem	37.2	**98.2**		**74.0***
Others		3.3	0.6		3.5*
	**"Other" includes Hispanics in 1989 gen. elec. Poll*				
1993 Mayoral General					
Giuliani (R, W)	Rep.	**70.9**	4.3	32.6	47.5
Dinkins (D, B)	Dem (I)	27.4	**95.4**	**66.1**	**50.1**
Others		1.7	0.3	1.3	2.4
1998 General Election					
Governor	Dem	44.3	**78.4**	**75.0**	**51.3**
	Rep (I)	**46.6**	10.8	20.8	35.9
	Others	9.0	10.8	4.2	12.8
US Senate	Dem	**64.8**	**92.3**	**88.8**	**81.4**
	Rep (I)	35.2	7.1	10.2	18.6
	Others	0.0	0.5	1.0	0.0
2000 General Election					
President	Dem	**63.8**	**96.4**	**87.0**	**72.1**
	Rep	29.0	2.4	11.6	18.6
	Others	7.2	1.2	1.4	9.3
US Senate	Dem	**51.0**	**94.0**	**91.3**	**80.5**
	Rep	45.2	5.4	8.7	14.6
	Others	3.8	0.6	0.0	4.9
2004 General Election					
President	Dem	**57.7**	**92.0**	**86.7**	**78.7**
	Rep	39.7	6.0	11.2	19.7
	Others	2.6	2.0	2.3	1.6
US Senate	Dem (I)	**74.4**	**91.9**	**87.6**	**83.1**
	Rep	17.5	5.4	6.2	10.1
	Others	5.8	0.0	3.1	6.8

TABLE 10

OLS ESTIMATES OF SUPPORT FOR DEMOCRATS AT DIFFERENT LEVELS OF OFFICE, BRONX COUNTY, KINGS COUNTY, AND NEW YORK COUNTY, 2000

County/ Office	White	Black	Hispanic
Bronx County			
President	<0.0	---	100.0
US Senate	<0.0	---	100.0
US House	<0.0	---	99.9
State Senate	<0.0	---	100.0
State Assembly	<0.0	---	95.4
Kings County			
President	55.8	99.1	100.0
US Senate	32.2	99.7	100.0
US House	55.7	100.0	100.0
State Senate	76.4	98.0	100.0
State Assembly	69.4	100.0	100.0
New York County			
President	83.5	92.4	---
US Senate	37.0	---	---
US House	86.1	94.6	---
State Senate	89.8	97.7	---
State Assembly	93.6	99.1	---

Note: Blank cells returned unrealistic (negative) turnout and vote estimates.

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Executive Summary of the Bullock-Gaddie Report
Voting Rights Progress in Tennessee

By Edward Blum

Tennessee was not covered by the original Voting Rights Act trigger, and has not subsequently fallen under preclearance. Relatively high rates of registration and participation in the state followed the elimination of the poll tax in the early 1950s, and by the early 1960s Tennessee had participation in elections more typical of a border south or midwestern state. But by 1980, the Tennessee advantage had been eliminated. For instance, black voter registration in Mississippi for the last quarter century exceeds that in Tennessee in every year except 1994 when the Tennessee advantage is an insignificant 0.1 percentage points.

The state had a high degree of black voter participation in the early 1960s, but the advantage the state enjoyed over most of the rest of the South in black voter participation during the 1970s and 1980s have been lost. Tennessee ranks behind Mississippi and the median southern state among the seven originally subject to section 5 in terms of black voter participation. There is progress in the election of black officials, though the state Senate lags the state House in approaching proportionality for black representation. Most gains in black office holding since the 1980s have been in municipal government. Race structures vote choice under some circumstances. In both the most-heavily black urban county and the most-heavily black rural county, white voter preferences for Republicans up-ticket is pronounced. However incumbent Democrats do well among white voters especially when they have ties to the local community.

An Assessment of Voting Rights Progress in Tennessee

Prepared for the Project on Fair Representation
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An Assessment of Voting Rights Progress in Tennessee

Tennessee is one of only two states of the former Confederacy that has never been subject to Section 5 of the Voting Rights Act. While the state did secede and some of the counties in the southwestern portion of the state were part of the Black Belt, Tennessee differs from its southern neighbors in terms of its political history. In 1920, Tennessee became the first southern state to cast its Electoral College votes for a Republican in the 20th century. Eight years later Tennessee joined with Texas, Virginia, Florida and North Carolina in voting for Herbert Hoover. Tennessee's Republicanism, rooted in the Smokey Mountains in the eastern part of the state, also provided the basis for a competitive Republican party long after the GOP had died out in most of the rest of the South. Republicans won the Tennessee governorship in 1894, 1910 and 1920, a time when Democrats dominated the chief executive's office in the rest of the South. Indeed, when Tennessee was occasionally electing Republican governors in the first two decades

of the 20th century, in much of the South, Republicans had ceased to even offer candidates for their state's top office.

Tennessee did join the rest of the South in imposing a poll tax. This obstacle to participation, was adopted in 1890, but was not joined by other requirements such as a literacy test, good character test or understanding requirement - - all items popular with a number of other southern states.[1] While the literacy test was never adopted statewide, Kousser reports that it was used in a few towns.[2] The absence of the interlocking panoply of obstacles to black participation resulted in African Americans in Tennessee being more likely to vote earlier than in other southern states. V.O. Key reports that African Americans provided some of the votes for the Crump Machine that ruled Memphis for many years.[3]

Tennessee escaped coverage by Section 5 of the Voting Rights Act because it set off neither of the components of the trigger mechanism included in Section 4 of that legislation. The trigger mechanism was set to identify states that had tests or devices as prerequisites to voting and in which less than half of the voting age population had registered or voted in the 1964 presidential election. Figures compiled by the U.S. Commission on Civil Rights estimate that 72 percent of Tennessee's 1960 voting age population had registered to vote by 1964.[4] In the presidential election, the turnout rate equaled 54.7 percent of the 1960 voting age population. Moreover Tennessee did not

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[1] J. Morgan Kousser, *The Shaping of Southern Politics* (New Haven: Yale University Press, 1974), p. 239.
[2] *Ibid.* p. 118.
[3] V.O. Key, Jr., *Southern Politics* (New York: Alfred A. Knopf, 1949): pp. 74-75. The Crump Machine sought to register and control the sizeable black vote of Memphis in an effort to dominate statewide elections; see also David M. Tucker, *Memphis Since Crump* (Knoxville, TN: University of Tennessee Press, 1980).
[4] U.S. Commission on Civil Rights, *Political Participation* (Washington, DC: U.S. Government Printing Office, 1965), pp. 222-223.

employ any of the tests or devices earmarked by the 1965 legislation since federal legislation did not focus on the poll tax until later.[5]

Not only did a majority of the Tennessee voting age population register to vote, the Commission on Civil Rights figures indicate that most non-whites had registered. Indeed, the estimates are that 69.9 percent of non-whites compared with 72.9 percent of whites had registered to vote prior to the passage of the 1965 legislation. The share of the non-white adult population estimated to have registered in Tennessee was 18 percentage points higher than in any other southern state.

Like occurred in states subject to Section 5, registration rates increased in Tennessee after the passage of the act. Within a couple of years, 71.7 percent of the non-whites and 80.6 percent of the whites of voting age had registered to vote in the Volunteer State.

Black Registration and Turnout

Tennessee does not maintain registration or turnout records by race. However, after every general election, the U.S. Bureau of the Census conducts a large-scale survey to determine the rates at which the voting age population has registered and voted. Beginning with 1980, these figures are available by state for blacks and whites. These figures are self-reported and therefore tend to overestimate levels of participation. Nonetheless they are the most reliable figures in most states and can be used to make comparisons over time and across jurisdictions on the assumption that the inflation in

[5] Tennessee's poll tax was implemented in an arbitrary fashion. Estimates of the impact of the poll tax on voter participation from 1870 to 1940 indicate that a black adult was three times more likely than a white adult to be denied access to the ballot because of the use of the poll tax; see Ronald Keith Gaddie, "Testing Some Key Hypotheses of Voter Turnout," presented at the annual meeting of the Southern Political Science Association, Atlanta, GA, November 2000.

participation rates is of similar magnitude across time and space. Furthermore, these surveys provide the basis for the estimates that the Census Bureau used in determining whether registration or turnout rates for jurisdictions were so low as to subject them to the trigger mechanisms included in the 1965, 1970 or 1975 Voting Rights Acts.

Table 1 provides the Census Bureau estimates for registration in Tennessee. Since most Tennesseeians were registered to vote in the early 1960s, it is not surprising that the bulk of the voting age population continues to be on the registration lists. Since 1980, the lowest incidence of registration among blacks came in 2002 when 54.1 percent reported being registered. The 2002 figure is approximately ten percentage points lower than any other figure and one must question the reliability of the sample that generated it. Except for this one year, black registration has always been at least 63.9 percent of the voting age population and has ranged as high 78.5 percent. Among whites, the nadir in registration comes in 2000 when 61.9 percent claimed to have registered to vote. That figure is in line with white registration rates that since 1990 exceeded 63.9 percent only once.

(Table 1 goes here)

In contrast with the figures from the 1960s reported by the Commission on Civil Rights that showed higher proportions of the white than the black adults registering to vote, for much of the period in Table 1, black registration rates exceed those for whites. The greatest differences come in 1992 when 77.4 percent of African Americans compared with 63.4 percent of whites claimed to have registered. During the latter part of the 1980s, black registration rates ran at least eight points above those for whites. Beginning with 1996, the registration rates for the two racial groups have been more

alike. In three of the five most recent elections, blacks report registering to vote at slightly higher rates than whites. The only sizeable disparity came in 2002 when 62.3 percent of whites but a suspiciously low 54.1 percent of African Americans reported having registered. The figure for blacks may be an aberration since it is approximately 10 percentage points lower than any other figure and is bracketed by approximately 64 percent black registration in 2000 and 2004.

For comparative purposes, registration rates for the non-South are included in Table 1. Black registration in Tennessee exceeds that in the non-South for every year except 2002. Up through 1994, the registration rate for Tennessee African Americans is often ten points above that for blacks outside of the South with the greatest difference coming in 1992 when 77.4 percent of Tennessee's blacks compared with 63.0 percent of blacks in the rest of the nation report being registered.

The third set of figures in Table 1 show registration rates for Mississippi. These figures are included since prior to the passage of the 1965 Voting Rights Act, Tennessee and Mississippi were polar opposites in terms of the non-white registration rate. As noted above, 69.5 percent of Tennessee's adult blacks had registered before passage of the Voting Rights Act compared with only 6.7 percent of Mississippi's black adults. Even in the immediate aftermath of the voting rights legislation, black registration in Tennessee continued to be approximately a dozen percentage points higher than in Mississippi.[6] By 1980, the Tennessee advantage had been eliminated. Black registration in Mississippi exceeds that in Tennessee in every year except 1994 when the Tennessee advantage is an insignificant 0.1 percentage points. In 1982 and 1984 the black registration rate in Mississippi was approximately seven percentage points higher than in

[6] U. S. Commission on Civil Rights, *op. cit.*, pp. 223.

Tennessee. The disparity narrows during the late 1980s and through much of the 1990s before widening again. In 1998, African Americans are 6.5 percentage points more likely to register in Mississippi than Tennessee. That disparity expands until in 2002 and 2004, it reaches approximately 12 percentage points to Mississippi's advantage.

At the very bottom of Table 1 are figures showing black and white registration figures for the median state among the seven states that were initially made subject to Section 5 by the 1965 Voting Rights Act.[7] Up through 1996, the share of the adult black population in Tennessee that had registered to vote exceeded the median for the seven states. For the first eight elections, differences frequently exceeded ten percentage points and reached more than 16 points in 1984 when 78.5 percent of the black adults in Tennessee compared with 62.2 percent in the median state had registered. For the last decade, however, the registration rates tend to have been greater for the median state than for Tennessee. After reaching parity in 1996 at just under two-thirds of the adult African Americans registered both in Tennessee and the median state, the figure for the median state moved ahead of Tennessee. In 2002, more than two-thirds of the black adults in the median state were registered compared with 54.1 percent in Tennessee. In the most recent election, the median black registration figure for the seven states is 71.1 percent compared with 63.9 percent in Tennessee.

The Census Bureau estimates for turnout appear in Table 2. In all but two election years, reported turnout among African Americans exceeds that among Tennessee whites. In some years the difference is trivial as in 1980 and 2000 but in other years it would be statistically significant. In 1984, 1988, and 1992, black adults voted at rates

[7] The seven states are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia.

seven to eight percentage points greater than whites. Whites reported voting at higher rates than African Americans in 1994 and then again a decade later.

For both races, the turnout rates generally show a seesaw pattern with larger shares of the voting age population going to the polls in presidential than in mid-term elections. For both races, turnout rates exceed 50 percent in presidential years yet only in 1982 did either racial group (in this case, blacks) achieve majority turnout in a mid-term election. The figures in Table 2 indicate that were the trigger mechanism to be recalibrated to focus on whether a majority of the voting age population currently votes in presidential elections, Tennessee would be found to be acceptable.

(Table 2 goes here)

Comparable turnout figures for the non-South appear in Table 2. Generally the turnout rate among adult African Americans is higher in Tennessee than in the non-South. The greatest difference occurs in 1992 when the turnout rates among black Tennesseans was nine points higher than for African Americans outside the South. In two other years, black voters in Tennessee turnout at rates at least five percentage points above those for the non-South. While non-South blacks report voting at higher rates than do black Tennesseans in four election years, the largest difference, 3.1 percentage points, comes in 1990.

The third set of figures in Table 2 present turnout rates for Mississippi, the state which had the smallest proportion of its African-American population registered to vote prior to enactment of the 1965 legislation. Mississippi African Americans voted at higher rates than Tennesseans in five of seven presidential years. The two exceptions come in 1992 when the turnout rate for Tennessee blacks is one point higher than in Mississippi

and in 1996 when the Tennessee rate is 7.2 of the points higher. Otherwise, presidential elections bring Mississippi blacks to the polls at higher rates than in Tennessee with the largest difference occurring in the most recent presidential election when two-thirds of Mississippi's African Americans but barely a majority of Tennessee's blacks cast ballots.

In three mid-year elections Tennessee has higher black turnout than does Mississippi. In 1982 the two state's African Americans voted at identical rates. In 1994 and 1998 blacks went to the polls more frequently in Mississippi than Tennessee. The explanation for more African Americans often voting in Tennessee than Mississippi mid-term elections is that the Magnolia State chooses its constitutional officers and state legislators in odd number years. Tennessee like most southern states elects its governor in the presidential mid-term and also elects it legislators in even numbered years.

At the bottom of Table 2 are figures from the median among the seven southern states made subject to Section 5 when the Voting Right Act passed in 1965. Until recently, black turnout tended to be higher in Tennessee than for the median state. Prior to 1998, the only year in which black turnout was greater in the median state than Tennessee came in 1990. For three of the elections in 1980s, African-American turnout ran approximately ten percentage points higher in Tennessee than the median Section 5 state. For three of the four most recent election years, however, black turnout has been higher in the median state than in Tennessee. The largest difference occurs in 2004 when 62.1 percent of the African Americans in the median state voted compared with 51.3 percent in Tennessee. The trend for the comparison between the median Section 5 state and Tennessee blacks is for Tennessee African Americans to vote at higher rates in the earlier period but for that advantage to decline beginning in the 1990s and then around

the turn of the new century, the relationship reverses and black participation in the median state outpaces that in Tennessee.

African American Officeholding

When record keeping on the numbers of African-American officeholders began, Tennessee had 31 as reported in Table 3. Seven years later, the total number had grown to over 100. The next 25 years saw a gradual increase from 106 to 180. At the beginning of the 21st century, Tennessee had fewer African American officeholders than any other southern state.

(Table 3 goes here)

In the late 1970s, almost half of the black officeholders in Tennessee served at the county level. Over the next 25 years, the number of black county officials declined from 56 to 47. The number of black school board members gradually increased and, in 2001, 27 served in that capacity. Only at the municipal level has there been a fairly constant growth in the number of black officeholder and by 2001, a third of all Tennessee's African-American officials were elected to city offices.

African Americans in Congress

In 1974, Tennessee became the third southern state to send an African American to Congress in the 20th century. In that year, Harold Ford defeated Republican incumbent Dan Kuykendall by a razor-thin majority of 744 votes. The authors of the authoritative *Almanac of American Politics 1978* speculate that but for the reaction against

Republicans spawned by the Watergate scandal, Kuykendall might have survived.[8] A redistricting carried out during his first term strengthened Ford's position by making the Ninth District slightly more Democratic.

Ford, like Georgia's Andrew Young and Texan Barbara Jordan, both of whom had initially been elected in 1972, won in a district that was not majority black. Ford's Memphis district was 47 percent black in total population. Ford, part of a political family dynasty, won office before his 30th birthday.

Ford remained in Congress until 1996 with his victory margins holding comfortably above 60 percent until the 1990s. When he stepped aside after eleven terms he did so in favor of his son and namesake, Harold E. Ford, Jr.. The son, like the father, came to Congress when very young. Indeed the son was three years younger than his father had been when initially elected.

The ambitious younger Ford is now compiling a moderate voting record. In 2005, he was more liberal than 58.3 percent of the House members but more conservative than 41.7 percent of the membership.[9] Only 20 House Democrats had more conservative records than did Ford who was the most conservative member of the Congressional Black Caucus. Earlier in his career the younger Ford had been more liberal although he was never on the far left of his party. Ford's tacking to the right has been prompted by his desire for higher office. In 2006 Ford is the leading candidate for the Democratic

[8] Michael Barone, Grant Ujifusa and Douglas Matthews. *The Almanac of American Politics 1978* (New York: E.P. Dutton, 1977), p. 806.
[9] Richard E. Cohen, "Down the Middle," *National Journal* 38 (February 25, 2006), p. 60.

nomination for the Senate seat being vacated by current Majority Leader, Republican Bill Frist.[10]

Should Harold Ford, Jr., leave the House, the Ninth District, which was 59.5 percent black according to the 2000 census, would almost certainly replace him with another African American. The district cast 70 percent of its votes for John Kerry in 2004 and so is safely Democratic.

African American State Legislators

The first African Americans to enter the Tennessee House arrived in 1967. Two African-American senators joined the six representatives in 1969. The ranks of black senators have increased only to three, a number achieved with the implementation of a new redistricting plan at the 1982 election. That number which constitutes nine percent of the Senate has held constant now for a generation.

As Table 4 shows, the number of black representatives has grown. With a new redistricting plan in1972, a seventh African American won a seat in the House and at the beginning of the next decade, the number of African Americans rose to ten. After the redistricting in the early 1990s the number of black representatives increased to a dozen. With yet another adjustment to population shifts the number of black representatives grew to 15 following the 2002 election. With African Americans now holding 15.2 percent of the House seats they are almost proportionally represented vis-à-vis their share of the total population that stood at 16.3 percent in the 2000 census.

(Table 4 goes here)

[10] Polling as of late March shows Ford trailing both potential Republican nominees by double-digits. According to DC-based pollster Scott Rasmussen, one in eight poll respondents indicated that they knew someone who would vote against Ford because of his race.

African Americans in Statewide Office

Unlike a number of southern states that elect their judges and multiple constitutional officers statewide, the only official elected statewide in Tennessee is the governor. Even the presiding officer of the Senate, is not a lieutenant governor but rather is chosen by the membership. This individual John Wilder has served as Senate speaker since 1971. His bipartisan approach has allowed him to survive changes in party control of that chamber.

While no African American has won the single statewide elective office, the state's Supreme Court does have a black justice. Justices on the Tennessee high court are appointed by the governor and under a Missouri plan, serve eight years and then face the electorate with an up or down vote.

Racial Voting Patterns

Memphis is Tennessee's most populous city and one of the largest in the South. Like a number of other major cities in the region, Memphis has an African-American mayor. The city has had a black majority since 1986 and elected its first black mayor in 1991.[11]

The first African American elected mayor of Memphis, W.W. Herenton, won a 172-vote victory over the incumbent Richard Hackett in 1991. In this hotly contested election, the races were extremely polarized with Herenton getting 95.2 percent of the black vote while Hackett got a comparable share of the white vote.[12]

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[11] Sharon D. Wright, *Race, Power and Political Emergence in Memphis* (New York: Garland Publishing, 2000), p. 109.
[12] *Ibid.*, p. 166.

The polarization evident in the 1991 election was nothing new in Memphis. Sharon Wright's analysis of racial voting patterns in Memphis shows white and black voters supporting opposing candidates as far back as 1975 when all of the serious competitors where white. Even after a term in office Herenton failed to attract the bulk of the white vote in his first reelection bid. In 1995, Herenton received 97 percent of the black vote but almost 60 percent of the white vote went to his challenger.

The near unanimity in black support registered for Herenton replicated the experience of Harold Ford, Sr. In his eleven congressional campaigns, he never got less than 92.5 percent of the black vote in the primary and in general elections, he always attracted at least 93 percent of the African-American vote.[13] This pattern continues with his son, who in his 2002 reelection bid garnered nearly all of the black vote, according to ecological regression estimates of precinct data in Shelby County. Ford shows greater crossover appeal than his controversial father, and garnered an estimated 61.8 percent of the white vote in his 2002 reelection bid. That estimate is some 30 points ahead of what Tennessee native Al Gore could attract from Shelby County whites (see Table 5).

(Table 5 goes here)

Table 6 provides OLS estimates of white voter support for President in 2000, the US House in 2000, and Governor in 2002. Democrats ran better statewide than in Shelby County, with Gore garnering 43.6 percent of the white vote while Phil Bredesen took a majority of the white vote in his bid for the open gubernatorial seat. In contests for the US House, incumbency clearly played a role, as Democratic incumbents dominated the white vote in the four districts where they won, while no Democrat broke 33.5 percent of the white vote when challenging a Republican incumbent.

[13] *Ibid.*, p. 91.

(Table 6 goes here)

How much play is there in the white vote? The case of Tennessee's only remaining black majority county, Haywood, is informative. As indicated in Table 7, in 2000 Haywood County whites cast just 30.4 percent of their ballots for Al Gore for President, yet gave moderate, incumbent Democratic US Rep. John Tanner 69.6 percent of their votes. In 2002, Phil Bredesen, running for the open gubernatorial seat, garnered just an estimated 38.0 percent of the white vote in Haywood County (compared to an estimated majority in the rest of the state), while Congressman Tanner took nearly three-quarters of white ballots. Incumbent Democratic legislators Rep. Jimmy Naifeh and Sen. John Wilder (presiding officers of the respective chambers) garnered majority support from local whites in Haywood County.

In the absence of a Democratic incumbent with local ties, the white vote appears to melt away from Democrats. Democrats from other parts of the state – Gore claimed Carthage in middle Tennessee as home while Bredesen, a former Nashville mayor, moved to the state from Massachusetts after graduating from Harvard – have less appeal for west Tennessee whites. However, in congressional contests, race of incumbent does not seem to structure congressional voting preferences. The willingness to support Democratic incumbents down ticket is evident in Tennessee.

Conclusion

Tennessee has, in many ways, sat still in terms of voting rights progress. The state had a high degree of black voter participation prior to1964, but the distinctiveness of having high rates of black participation that pre-dated the Voting Right Act and persisted

into the 1970s and 1980s have been lost. Tennessee currently ranks behind Mississippi and the median for the original Section 5 states in the South in terms of black voter participation. There is progress in the election of black officials, though the state Senate lags the state House in approaching proportionality for black representation. Most gains in black office holding since the 1980s have come at the municipal level. Race structures vote choice, but whites continue to vote heavily for incumbent Democrats. However, in both the most-heavily black urban county and the most-heavily black rural county, white voter preferences for Republicans up-ticket is more pronounced.

TABLE 1

REPORTED REGISTRATION BY RACE IN TENNESSEE AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
TENNESSEE													
Black	69.4	67.1	78.5	73.0	74.0	68.5	77.4	70.0	65.7	64.8	64.9	54.1	63.9
White	66.9	68.5	70.2	65.0	64.4	63.3	63.4	63.9	66.3	63.9	61.9	62.3	62.6
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63.0	58.3	62.0	58.5	61.7	57.0	NA
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63.0	NA
MISSISSIPPI													
Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75.0	75.2	72.2	70.7	72.3
Seven-State Median													
Black	61.4	53.6	62.2	66.5	63.8	61.9	64.5	59.0	65.5	68.0	68.6	67.6	71.1
White	67.0	62.5	67.0	65.8	68.5	63.6	70.8	63.9	70.4	67.9	68.2	66.2	72.3

Source: Various post-election reports by the U.S. Bureau of the Census

TABLE 2

REPORTED TURNOUT BY RACE IN TENNESSEE AND OUTSIDE THE SOUTH, 1980-2004

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
TENNESSEE													
Black	56.9	50.8	64.7	46.0	57.9	35.3	62.9	38.5	56.0	39.0	52.6	45.8	51.3
White	56.7	46.6	56.7	43.8	50.7	29.7	54.8	44.5	52.8	35.8	52.3	39.8	53.5
Non-South													
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	NA
White	62.4	53.1	63.0	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	NA
MISSISSIPPI													
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9
Seven State Median													
Black	48.9	38.9	54.8	42.0	47.7	44.6	58.1	33.8	49.9	40.4	57.2	42.2	62.1
White	58.3	41.7	59.1	45.8	58.4	42.6	63.4	46.2	56.4	40.5	60.4	44.8	62.2

Source: Various post-election reports by the U. S. Bureau of the Census

TABLE 3

NUMBERS OF AFRICAN-AMERICAN ELECTED OFFICIALS
IN TENNESSEE, 1969-2001

Year	Total	County	Municipal	School Board
1969	31	5	8	2
1970	38	0	9	4
1971	42	0	11	4
1972	48	4	17	6
1973	71	25	21	13
1974	87	29	27	14
1975	96	43	27	8
1976	106	47	26	12
1977	117	56	31	10
1978	117	56	31	10
1980	112	44	34	14
1981	123	53	29	17
1984	133	47	33	22
1985	138	48	36	22
1987	143	47	40	23
1989	146	48	43	25
1991	166	48	43	25
1993	168	49	55	24
1995	No Report from the Joint Center in 1995			
1997	174	49	59	23
1999	172	47	58	25
2001	180	47	61	27

Source: Various volumes of the *National Roster of Black Elected Officials* (Washington,D.C.: Joint Center for Political and Economic Studies).

TABLE 4

RACIAL MAKE UP OF THE TENNESSEE GENERAL ASSEMBLY, 1965-2005

	Senate		House	
Year	**Number**	**%**	**Number**	**%**
1965	0	0	0	0
1967	0	0	6	6.06
1969	2	6.06	6	6.06
1971	2	6.06	6	6.06
1973	2	6.06	7	7.07
1975	2	6.06	9	9.09
1977	2	6.06	9	9.09
1979	2	6.06	9	9.09
1981	2	6.06	9	9.09
1983	3	9.09	10	10.10
1985	3	9.09	10	10.10
1987	3	9.09	10	10.10
1989	3	9.09	10	10.10
1991	3	9.09	10	10.10
1993	3	9.09	12	12.12
1995	3	9.09	13	13.13
1997	3	9.09	13	13.13
1999	3	9.09	13	13.13
2001	3	9.09	14	14.14
2003	3	9.09	15	15.15
2005	3	9.09	15	15.15

TABLE 5

ESTIMATED WHITE VOTER SUPPORT FOR DEMOCRATS FOR PRESIDENT IN 2000 AND US HOUSE IN 2002, SHELBY COUNTY

Year	Contest	Incumbency	White%	Dem. Win?
2000	President	Open	30.8	56.5%
2002	CD9	D*	61.8	Yes

TABLE 6

ESTIMATED WHITE VOTER SUPPORT FOR DEMOCRATS FOR PRESIDENT AND US HOUSE IN 2000, AND GOVERNOR IN 2002

Year	Contest	Incumbency	White%	Dem. Win?
2000	President	Open	43.6	No
	CD1	R	---	No
	CD2	R	---	No
	CD3	R	33.5	No
	CD4	R	32.0	No
	CD5	D	70.9	Yes
	CD6	D	70.4	Yes
	CD7	R	29.5	No
	CD8	D	73.9	Yes
	CD9	D	---	Yes
2002	Governor	Open	51.6	Yes

TABLE 7

WHITE VOTER PREFERENCES IN HAYWOOD COUNTY, 2000 AND 2002

Year	Contest	Incumbency	White%	Dem. Win?
2000	President	Open	30.4	60.0%
	CD8	D	69.6	Yes
2002	CD8	D	73.3	Yes
	Governor	Open	38.0	Yes
	State House 81	D	58.9	Yes
	State Senate 26	D	54.2	Yes

PREPARED STATEMENT OF THE HONORABLE J.C. WATTS, JR.

Testimony Before the House Judiciary Committee
Subcommittee on the Constitution

"A Bill to Reauthorize and Amend the Voting Rights Act of 1965: Part I"

Submitted for the hearing record by
The Honorable J.C. Watts, Jr.

May 9, 2006

Chairman Chabot, Ranking Member Nadler, and members of the Subcommittee:

I welcome this opportunity to submit this statement in support of the H.R. 9./S. 2703 the "Fannie Lou Hamer, Rosa Parks and Coretta Scott King Reauthorization and Amendments Act of 2006." This bill would renew the critical sections of the Voting Rights Act that are set to expire in 2007.

I want to begin by congratulating my former House colleagues on this subcommittee, Chairman Chabot and Representatives Watt and Conyers for their leadership in supporting this legislation. Their commitment to a meaningful Voting Rights Act (VRA) means that millions more U.S. citizens will be able to exercise their fundamental right to vote. I also want to applaud Chairman Sensenbrenner for his tireless efforts in supporting the VRA. He led the fight for reauthorization in 1982, and it is a testament to his ongoing leadership that today's bill is both bicameral and overwhelmingly bipartisan in its support. There have been ten extremely comprehensive hearings in the House on the continuing need for this Act, and those hearings have amassed thousands of pages of evidence that clearly support the language of the bill we are here to discuss today.

There is precedent for this overwhelming bipartisan support of the VRA. When the VRA was first passed in 1965, the vast majority of both Republicans and Democrats alike were on the record supporting its critical importance. Although at that time Republicans were a minority in Congress, on the House side 82% of Republicans supported the Act's passage, as did 78% of the Democrats. Moreover, 93% of the Senate Republican caucus and 73% of the Senate Democrats voted for final passage.[1] In enacting the law, on March 15, 1965, President Lyndon Johnson addressed a special joint session of Congress before a national television audience saying:

> I speak today for the dignity of man and the destiny of democracy.... At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.... Every device of which human

[1] Bob Dole, *GOP Must Expand Opportunities for All*, THE WICHITA EAGLE, Aug. 9, 2005, at A3.

> ingenuity is capable has been used to deny this right.... Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books...can ensure the right to vote when local officials are determined to deny it.... This time, on this issue, there must be no delay, no hesitation and no compromise with our purpose.... We have already waited a hundred years and more, and the time for waiting is gone.[2]

And when the VRA came up for reauthorization in 1982, President Reagan noted that the right to vote is the "crown jewel in American liberties."[3] In that sense, nothing has changed. Recently, President George W. Bush stated that "many active citizens struggled hard to convince Congress to pass civil rights legislation that ensured the rights of all – including the right to vote. That victory was a milestone in the history of civil rights."[4]

I cannot agree more with this sentiment.

At a time when we are promoting democracy abroad, I am pleased to see that we are united in protecting it at home. The right to vote is fundamental to our democracy, and Congress must do everything in its power to ensure that every American can participate fully in the political process.

Prior to the Act's passage, African Americans had been denied resources and opportunities for many years; their issues were often ignored and discounted. The VRA has made a tremendous difference in providing representation for previously disfranchised communities. Before the VRA was signed into law, there were only approximately 300 African Americans in public office, including just three in Congress. Today, there are over 9,000 African American elected officials nationwide, with 43 in Congress.[5]

What makes H.R. 9 so critically important is that, although significant progress has been made as a result of the passage of the VRA, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language continue to deny many Americans their basic democratic rights. In fact, since the Act was last reauthorized in 1982, the Justice Department and disfranchised voters have brought hundreds of lawsuits on intentional voter discrimination - many within the last five years.[6]

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[2] President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), *in* 107 Pub. Papers 281, 281-84.

[3] Dole, *supra* note 1.

[4] President George W. Bush, President Celebrates African American History Month at the White House (Feb. 22, 2006) (transcript available at http://www.whitehouse.gov/news/releases/2006/02/20060222-6.html).

[5] Written Testimony of Mark H. Morial, National Urban League, *Oversight Hearing on the Voting Rights Act: To Examine the Impact and Effectiveness of the Act Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1 (Oct. 18, 2005), *available at* http://judiciary.house.gov/OversightTestimony.aspx?ID=475.

[6] *See, e.g., also* The NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 4 (2006) [hereinafter PROTECTING MINORITY VOTERS];

It is in this context that H.R. 9 accomplishes a number of vital goals. First, it renews for the expiring sections of the VRA that have been so effective in thwarting voting discrimination: Section 5, which requires jurisdictions with significant histories of discrimination in voting to get federal approval of any new voting practices or procedures; Section 203, which ensures that certain voters with limited English proficiency get the assistance they need at the polls; and the federal observer provisions, which authorize the Attorney General to appoint federal election monitors where there is evidence of attempts to intimidate minority voters at the polls.

Second, I am pleased to see that H.R. 9 restores the vitality of the VRA. The bill clarifies the original intent of Congress by addressing two recent Supreme Court decisions that have eroded the effectiveness of the Act. This includes making certain that intentionally discriminatory voting changes can be blocked by the Justice Department under Section 5. The legislation also restores the "ability to elect" standard so that minority voters have the opportunity to elect representatives who share their values, interests and concerns rather than just an "opportunity to influence" who might represent them.

SECTION 5: PRECLEARANCE REQUIREMENTS

In extending Section 5 for 25 more years, H.R. 9 stands as a testament to Congress' desire that Section 5's preclearance requirements be a powerful tool for deterring specific state and local governments from adopting discriminatory election procedures, and preventing discriminatory practices that have been adopted from being enforced.

The genius of Section 5 is that, not only does it provide a remedy for changes that deprive minority communities of the opportunity to elect representatives of their choice, it also acts as a deterrent to jurisdictions that might otherwise enact discriminatory voting changes, before minority voters are disfranchised. Without H.R. 9, Section 5 would expire, and there would be little to prevent covered jurisdictions from imposing new barriers to minority participation.

Certainly, preclearance must continue in order to protect voters from discriminatory voting schemes, like the last-minute cancellation of a municipal election in Kilmichael, Mississippi, by the all-white town council. During the 2001 local elections, an unprecedented number of African Americans candidates were running for office. Three weeks before the election, however, the town's mayor and the all white five-member Board of Aldermen canceled the election.[7] In objecting to this change under Section 5, the Justice Department found that the cancellation occurred after Census data revealed that African Americans had become a majority in the town.[8] The town did not reschedule the election, so DOJ forced it to hold one. In that election, Kilmichael elected its first

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Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612 (2005).

[7] Melanie Eversley, *For a Mississippi Town, Voting Rights Act Made a Change*, USA TODAY (Aug. 5, 2005) [hereinafter *For a Mississippi Town*].

[8] Stuart Comstock-Gay, Executive Director, National Voting Rights Institute, *Ballot Box Equality* (August 5, 2005), *available at* http://www.tompaine.com/articles/2005/08/05/ballot_box_equality.php.

African American mayor, along with three African American aldermen.[9] The episode is a reminder to all of us that the VRA's protections are still needed to ensure racial equality in voting.

In addition to renewing Section 5, importantly, H.R. 9 also addresses the recent Supreme Court cases that have significantly narrowed Section 5's effectiveness. First, the bill makes clear that Congress rejects the Supreme Court's holding in *Reno v. Bossier Parish School Board* (*Bossier II*).[10] In that case, because the Bossier Parish school board in Louisiana had no majority African American districts before 1990, the Court held that despite changes in racial demographics, the enactment of a new plan preserving the all-white school board could not violate Section 5 because African American voters were not worse off with the new plan. The Court held so, regardless of the fact that there was blatant evidence that the plan was motivated by racial discrimination.[11]

Critically, H.R. 9 corrects this problematic decision by establishing that a voting rule change motivated by *any* discriminatory purpose cannot be precleared. The bill's language restores the original intent of Congress by guaranteeing that jurisdictions can no longer intentionally discriminate against voters.

Second, the bill rejects a troubling holding in the Supreme Court's decision in *Georgia v. Ashcroft*.[12] This case reversed the long-standing intent of the VRA to protect the minority community's ability to elect their preferred candidates of choice.

Essentially, the Court in *Ashcroft* allowed states to make minorities into second-class voters, who can "influence" the election of white candidates, but who cannot amass the political power necessary to elect a candidate of their choice.[13] Under this standard, even if the effect of a voting change is an overall reduction in the election of candidates of choice by minority constituencies, the Court will likely find it permissible as long as there is an increase in the "number of representatives [assumed] sympathetic to the interests of minority voters."[14] This is a particularly problematic standard because it allows states with a history of discrimination to trade in majority-minority districts for those where minority voters wield less influence.

Therefore, I applaud this bill's clarification of Section 5 by providing that any voting change that would leave minority voters with less opportunity to elect preferred

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[9] *For a Mississippi Town*, *supra* note 7.
[10] 528 U.S. 320 (2000).
[11] *See id.*
[12] 539 U.S. 461 (2003).
[13] Written Testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, Found., *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1-2 (Nov. 9, 2005), *available at* http://judiciary.house.gov/media/pdfs/mcdonald110905.pdf.
[14] *See Ashcroft*, 539 U.S. at 483 (citing *Thornburg*, 478 U.S. at 87-89, 99 (O'Connor, J., concurring in judgment)).

candidates than they had before the change would violate Section 5. This clarification shows Congress' commitment to protecting all citizens' voting power.

SECTION 203: LANGUAGE MINORITY ASSISTANCE

It is crucial that every citizen in our democracy have the right to vote. Yet having that right is meaningless if certain groups of people are unable to accurately cast their ballot at the polls. As Senator Orrin Hatch observed during VRA hearings in 1992, "[t]he right to vote is one of the most fundamental of human rights. Unless government assures access to the ballot box, citizenship is just an empty promise. Section 203 of the Voting Rights Act, containing language assistance election requirements, is an integral part of our government's assurance that Americans do have such access."[15]

Emphasizing a commitment to this sentiment, H.R. 9 extends the language assistance provisions of the VRA for 25 years. Section 203 provides for written and oral voting assistance for U.S. citizens in certain jurisdictions in the applicable covered language groups – Spanish heritage, Asian American, Native American, and Native Alaskan.[16]

Voters may be well informed about the issues and candidates, but to make sure their vote is accurately cast, language assistance is necessary in certain jurisdictions with concentrated populations of limited English proficient voters. In my home state of Oklahoma, the VRA has been a critical tool in allowing citizens to vote. Section 203 covers two of our counties for Spanish language assistance. Among limited English proficient Latino voting-age citizens, the average illiteracy rate in just these two counties is nearly eighteen times the national illiteracy rate.[17]

Section 203 has enabled increasing numbers of minority language citizens to register and cast ballots. For example, when the VRA was enacted, about 2.5 million Latinos were registered to vote. Today, there are 9.3 million Latinos registered to vote, and in the past three decades, participation has tripled.[18] This has translated into tremendous gains for these communities, and both political parties have been the beneficiaries of these higher registration and participation rates. Section 203 has also been instrumental in adding to the number of federal, state, and local elected officials of Latino, Asian American, and Native American descent. But the need for federal oversight on minority language assistance continues. Since 2001, DOJ has filed more minority language cases than in the

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[15] H.R. REP. NO. 104-728, at 25-26 (1996) (quoting *Voting Rights Act Language Assistance Amendments of 1992: Hearings on S. 2236 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, S. Hrg. 102-1066, 102d Cong., 2d Sess., at 134 (1992) (statement of Sen. Hatch)).

[16] *See* 42 U.S.C. § 1973aa-1a(c); U.S. Department of Justice, Civil Rights Division, Voting Section, *Minority Language Citizens: Section 203 of the Voting Rights Act*, http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm.

[17] Leadership Conference on Civil Rights, Oklahoma VRA Fact Sheet (Apr. 2006).

[18] *Congresswoman Linda Sánchez Speaks Out in Favor of Strengthening the Voting Rights Act* (Oct. 18, 2005), AMERICAN CHRONICLE, Oct. 18, 2005, available at http://www.americanchronicle.com/articles/viewArticle.asp?articleID=3040.

entire previous 26 years in which these provisions have been applicable.[19] H.R. 9 continues these protections and guarantees that U.S. citizens will not be turned away from the ballot box because of their language status.

FEDERAL OBSERVER PROVISIONS

Finally, I should note that another critical part of this bill also extends the U.S. Attorney General's ability to assign federal observers to jurisdictions where discrimination in voting is suspected.

Polling place observers play a vital role in DOJ's enforcement efforts. Since passage of the VRA, DOJ has regularly sent observers around the country to protect election-related civil rights. Since just the last reauthorization, from July 1982 through December 2005, DOJ has used observers approximately 600 times in elections.[20] The presence of polling place observers deters election officials and others from engaging in discrimination and harassment and allows for the remedying of any discrimination that does occur.

Evidence collected by observers has served a useful role in covered jurisdictions and I applaud the fact that H.R. 9 provides for the continued availability of observers in order to ensure fair and equal participation for all voters at the polling places.

CONCLUSION

The Voting Rights Act is one of the most effective civil rights statutes ever enacted to prevent discrimination. It has expanded access to basic democratic rights to millions of U.S. citizens. H.R. 9 represents a tremendous bipartisan commitment to the continuation of that goal. The bill, which renews and restores the VRA, ensures an effective and robust Act for the next generation of American voters. I urge Congress to pass H.R. 9 in order to keep the promise of democracy to all citizens. Indeed, at a time when Americans are witness to the growing promise of freedom as those around the world vote for the first time, we must ensure nothing less for all American citizens. By renewing and strengthening the expiring provisions for another 25 years, this Congress can ensure that the VRA remains strong and effective in protecting the right to vote for all Americans.

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[19] Written Testimony of Bradley J. Schlozman, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Nov. 8, 2005), *available at* http://judiciary.house.gov/media/pdfs/schlozman110805.pdf.

[20] PROTECTING MINORITY VOTERS, *supra* note 6 at 4, 61.

PREPARED STATEMENT OF JAN TYLER, FORMER DENVER ELECTION COMMISSIONER

This statement is to convey my opposition to the renewal of Section 203 and Section 4(f)(4), the language provisions of the Voting Rights Act of 1965, as amended.

INTRODUCTION

My name is Jan Tyler. I was elected twice as a City and County of Denver Election Commissioner in l995 and l999. The Commission was established in 1904 with the Denver City Charter and is comprised of two elected Commissioners and the Clerk and Recorder, who is appointed by the Mayor.

I was certified as a Certified Elections Registration Administrator in 2001 through a professional organization, The Election Center, which is affiliated with Auburn University. I renewed my certification in 2004. My career as an election administrator has always been an avocation, which I have continued as a volunteer election observer in Montenegro, Serbia, Ukraine and most recently last fall a two month stay in Kazakhstan.

For the purposes of understanding opposition to the renewal of the VRA, I believe it is essential to respect the professional objectivity of the election administrator.

MY EXPERIENCE WITH THE VRA

Justice Department officials first contacted the Denver Election Commission in 2002 to inform us that Denver County had been added to the list of jurisdictions covered under Sec. 203.

We were told the Commission had to implement an extensive program to print ballots in Spanish, distribute voting materials in Spanish, and design outreach programs in Spanish.

This seemed fundamentally un-American to me. At the time I was a member of the National Society of Daughters of the American Revolution, and I was familiar with the NSDAR's involvement in the naturalization ceremonies for new citizens.

I thought new citizens were supposed to speak English as a requirement of citizenship.

My own grandfather, a Polish immigrant, naturalized on August 29, l918. I completely empathize with the immigrant—before my parents changed my name, I was born Jan Zawistowski. This was my identity, and I was proud to be born his first grandchild on August 29, 1950, the same day my grandfather's naturalization took place many years before.

But my grandfather would have been appalled if the government decided to print his American ballots in Polish, even if l0,000 of his closest Polish friends did live in Atlanta.

Although I am certain the intentions behind the bilingual voting assistance requirements of the VRA were good, its effect has been to discourage new immigrants from assimilating and learning English. These provisions have also imposed significant costs on covered jurisdictions, including Denver County. I estimated at the time that Spanish assistance could add up to $80,000 to the more than $500,000 it costs to conduct an election in Denver County.

The cost estimates were accurate and about $80,000 has been spent every year since 2002 to comply.

NO JUDICIAL REVIEW

The VRA commands that there be no judicial review of coverage determinations under Sec. 203, which are made by the U.S. Census.

This is not good government. Coverage determinations should be subject to scrutiny by the courts.

One of the most significant problems with the way the Census makes coverage determinations today has to due with way the Bureau defines limited English proficiency (LEP).

Specifically, Sec. 203 states: "the term "limited-English proficient" means unable to speak or understand English adequately enough to participate in the electoral process."

The Census Bureau is interpreting this definition of LEP to include persons who self-identify themselves as speaking English "not at all", "not well", or "well." Those who identify themselves as speaking English "well" should not be counted as "limited English proficient" for the purpose of making coverage determinations under Sec. 203.

The Census Bureau's overly broad definition of LEP has resulted in many counties being covered under Sec. 203 that should not be.

I doubt that the truly limited English proficient population of Denver County meets the 10,000 or 5% threshold required to trigger coverage under the law. But since the Bureau's coverage determinations, including the definition of LEP used to make such determinations, "shall not be subject to review in any court" there is no remedy for Denver County or other covered jurisdictions.

I also encountered problems with the DOJ on the enforcement side of the Sec. 203 requirements.

Given my duty as an Election Commissioner to uphold the law, I decided to encourage full compliance. But when I asked DOJ officials for written and customized instructions for complying, I was told "We do not tell you specifically what to do." Although there are some general, written guidelines, we were told that "voter complaints" would be used by DOJ officials to judge whether we were complying with the law. As anyone with any election administration experience knows, this is a poor way to judge compliance. There are many complaints even after the most well run election.

One DOJ official went so far as to tell me "we'll know you've complied when we see it."

SURNAME ANALYSIS

The DOJ uses a form of ethnic profiling called "surname analysis" to identify locations for bilingual polling districts in covered jurisdictions. The Justice Department also compels covered jurisdictions to conduct voter outreach efforts (e.g. mass mailings) targeting limited English proficient voters based on analysis of the surnames of voters living in covered jurisdictions.

This is a highly inaccurate way to target LEP voters. Many people with Hispanic or Asian surnames speak English "very well." Women whose native language is English, but who marry and take on Hispanic, Asian, or surnames of other covered language minority groups, do not need bilingual ballots.

Surname analysis is also insulting to immigrants who have naturalized and learned English in order to vote. This is why some jurisdictions get furious responses from both Spanish and, of course, English speakers who are outraged that they have been singled out just because of a Spanish sounding surname.

The DOJ should be barred from using surname analysis. It should also be prohibited from requiring covered jurisdictions to use surname analysis for the purpose of implementing Sec. 203. Instead, Census data should be used to target only those voters who identify themselves as speaking English "not at all" or "not well."

CONCLUSION

Members of the Committee, I care about how we administer our elections. There is a difference, and will always be a difference, between the perspective of an Election Administration professional, whether elected or serving as a career appointee, and those who are political activists.

As an Election Administrator, I urge you to decline to renew Section 203 and Section 4(f)(4) of the Voting Rights Act.

CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW

Voting Rights Act Reauthorization: Research-Based Recommendations to Improve Voting Access

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We would also like to thank Professor Kathryn Abrams of Boalt Hall for her many contributions to this initiative from the very inception of the project. We also thank Albert Kauffman, Senior Legal Associate with the Warren Institute, and Manoj Mate, a doctoral candidate and our graduate research assistant for the voting rights initiative. We thank the Warren Institute's Coordinator, Marilyn Byrne, as well as Elaine Mui and Aimee Tabor for their careful proofreading and all their administrative support for the Warren Institute.

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This report can be obtained from the Warren Institute website at:
http://www.law.berkeley.edu/centers/ewi/research/index.html#votingrights

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I. Summary of Policy Recommendations

1. Restore discriminatory intent as a rationale for objecting to a voting change pursuant to Section 5

2. Disallow substituting "ability to elect" districts with "influence districts" in Section 5 review

3. Establish a Commission to Study Revising the Section 5 Coverage Formula

4. Ensure that partisan block voting does not mask racial block voting in Section 5 and Section 2 analyses

5. Adjust Section 203 coverage formula – 1. cover jurisdictions with 7,500 or more limited English proficient voting age citizens of the same language & 2. exempt jurisdictions with fewer than 25 LEP voting age citizens of the same language group

6. Require covered jurisdictions to submit bilingual plans to DOJ for review.

7. Assist Section 203 compliance by providing funding and assistance.

8. Expand federal observer jurisdiction to Section 203 covered jurisdictions.

9. Clarify that Section 208 applies to voters with limited English language abilities.

10. Bring parity to fines for violations.

11. Authorize the Attorney General to collect civil penalties for non-compliance.

12. Make expert witness fees recoverable.

II. Introduction

The passage of the Voting Rights Act of 1965 provided the single greatest legislative victory in the African-American struggle for political equality and democratic voice. The statute marked the beginning of an extended federal campaign to give effect to the rights contained in the Fifteenth Amendment and to make America live up to its promises of political liberty and freedom. In 1975, the Act was amended to extend protection and guarantee voting rights to language minorities – Latinos, Asian Americans, Native Americans, and Alaska Natives. Forty years and several reauthorizations later, the Act continues to embrace protections for both racial and language minority groups. It remains one of the nation's premier vehicles for advancing the cause of racial fairness in the electoral arena.

While portions of the Voting Rights Act ("the Act") are permanent, the "special" or temporary provisions of the Act are set to expire in 2007. These include those sections that require certain jurisdictions to obtain preclearance, or permission, before instituting changes to their voting practices ("Section 5"), require certain jurisdictions to provide all election related information and assistance in certain languages other than English ("Section 203"), and allow the Federal government to send Federal Observers and Examiners to observe election day activities and participate in registering voters ("federal observer provisions").

In 2005, the Chief Justice Earl Warren Institute for Race, Ethnicity, and Diversity at Boalt Hall School of Law commissioned several studies pertaining to the temporary provisions of the Voting Rights Act to help inform the reauthorization debate with scholarly research. The result of this effort was the production of nearly twenty studies,

including both quantitative and legal analyses, pertaining to various aspects of the expiring provisions. Based on the results of these studies, as well as research conducted by Warren Institute staff, the Institute has formulated several policy recommendations that Congress should consider during the reauthorization debate. This paper sets forth a summary of the research commissioned and conducted,[1] policy recommendations informed by that research, and model modifications to the current text of the Voting Rights Act that will effectuate the policy recommendations discussed.

III. SYNTHESIS OF RESEARCH:

A. Summary of Section 5 Research

1. Continuing Need for Section 5 preclearance requirements

Several studies addressed the continuing need for Voting Rights Act protections in general, and Section 5 protections, in particular. Studies analyze evidence of continuing discrimination, both from the first hand experience of advocates and community leaders and from cases regarding voting discrimination. Two studies address current administration of the Act to gauge its effectiveness and the reasonableness of its continuation.

One study examined voting discrimination cases brought under Section 2 of the Act since 1982 to determine the extent to which the discrimination Section 5 seeks to remedy and prevent persists.[2] Section 2 cases are germane to reauthorization because they provide both direct evidence of constitutional violations of the right to vote as well as reasoned judicial determinations that discriminatory voting practices continue,

[1] Drafts of several of the papers commissioned are available on the Warren Institute's website (www.law.berkeley.edu/centers/ewi/research/index.html#votingrights) and will be produced in a print volume.
[2] Ellen D. Katz, "The Senate Report in Court: A Comprehensive Portrait of Section 2 Decisions since 1982."

including in Section 5 covered jurisdictions subject to such litigation. Evidence in Section 2 cases reveal that four decades after the enactment of the Voting Rights Act, racial discrimination in voting is far from over. Federal judges adjudicating Section 2 cases over the last twenty-three years have documented an extensive record of conduct by state and local officials that they have found intentionally racially discriminatory.[3] Such evidence supports and justifies reauthorization of Section 5, which was designed to prohibit the application of discriminatory voting changes as well as remove the onus on private individuals to challenge such practices after they were applied.

The study identified 322 Section 2 cases with published resolutions filed since 1982.[4] Plaintiffs prevailed in 117 (36.3%) cases, with more successful cases in Section 5 covered jurisdictions than non-covered jurisdictions. The most commonly challenged practice was at-large elections (138 cases), nearly half of which were held to violate Section 2. The second most common lawsuits were challenges to redistricting (106 lawsuits), of which 42 ended with a favorable outcome for the plaintiffs.[5] Plaintiffs seeking to prevent dilution of influence districts (where the minority population

[3] A short list of examples of recent findings of intentional voting discrimination: 2004's Shirt v. Hazeltine, 336 F.Supp.2d 976 (D.S.D. 2004), opinion documents how county officials in South Dakota purposely blocked Native Americans from registering to vote and casting ballots; United States v. Charleston County, SC, 365 F.3d 341 (4th Cir. 2004), reveals deliberate and systematic efforts by County officials to harass and intimidate African American residents seeking to vote; Dillard v. Town of North Johns, 717 F.Supp. 1471 (M.D. Ala. 1989), describes the town mayor's refusal to provide black candidates state law mandated registration forms; Harris v. Graddick, 593 F.Supp. 128 (M.D.Ala. 1984), sets forth the county's refusal to hire black poll workers for white precincts; a Philadelphia case, Marks v. Stinson, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994), describes deliberate and collusive efforts by party officials and City election commissioners to trick Latino voters into casting illegitimate absentee ballots that would never be counted; and United States v. Town of Cicero, 2000 WL 34342276 (N.D. Ill. Mar. 15, 2000), documents an 18 month residency requirement designed to stymie Hispanic candidacies.

[4] The actual number of Section 2 cases is likely much larger since many cases are resolved without published opinions; the study estimates that more than 1,600 Section 2 cases were filed since 1982.

[5] Other cases identified included: 30 challenging election procedures (e.g. voter registration or residency requirements, polling place action by election officials), 13 of which ended with a favorable outcome for the plaintiff; 11 challenging majority-vote requirements (e.g., run-off requirement, anti-single shot provisions, or numbered-place system), six of which were held the practice to violate Section 2; and 32 challenging annexations, felon disfranchisement rules, and appointment practices, none of which ended with a favorable outcome for the plaintiff.

constituted less than a majority and did not demonstrate an ability to elect a candidate of choice) pursuant to Section 2 did not prevail. On the other hand, partisan politics play a role in adjudication of Section 2 claims: courts that determined that partisan preference explained white voters' failure to vote for minority candidates also ruled in favor of defendants.

Another study regarding the continuing need for "the Act" in Texas highlighted live testimony from community leaders, advocates, and expert witnesses and found that discrimination against Latino and black voters in Texas persists.[6] Based on this testimony, the authors conclude that minorities' voting rights would take a dramatic turn for the worse if Section 5 and other Voting Rights Act protections were abandoned. Indeed, they contend that the findings support the argument that "the Act" plays an important role in protecting minority voting rights in Texas, both as a tool to remedy discriminatory practices and as a deterrent to possible violations. For example, the authors note that Texas has been subject to more Department of Justice ("DOJ") objections to voting changes than any other state covered by Section 5. In particular, witnesses cited the objection to Texas's 2001 reapportionment of the Texas House of Representatives, which they characterized as a gerrymander against Hispanic voters that would have eliminated three Hispanic districts despite large growth in Hispanic population in the state between 1990 and 2000. In addition, witnesses complained that in the Fifth Circuit, racial impacts on districts are ignored if defendants offer a partisan rationale for redistricting decisions.

[6] Richard Gambiatta, George Korbel, & Rodolfo Rosales, "A Day Without the Voting Rights Act."

Updating some evidence Congress considered when passing and renewing the temporary provisions of the Act, witnesses noted that socio-economic disparities between Latinos and African Americans and the Anglo population in Texas persist, including significantly lower levels of educational attainment and income for Latino and black Texans. In addition, witnesses noted that Latinos and African Americans are underrepresented in elected bodies in Texas on the statewide, county, and local level.

Another study gauged Section 5's effectiveness by analyzing how the Department of Justice acted upon election changes submitted from Section 5 covered jurisdictions from 1990 to 2005[7], focusing on the issuance of more information requests ("MIRs") – a formal letter requesting the submitting jurisdiction provide additional information about the proposed change – rather than solely on objections to changes. Issuing an MIR can prevent implementation of a discriminatory voting change because upon receiving an MIR, a covered jurisdiction may choose whether or not to respond, but still cannot implement the proposed voting change without receiving preclearance.

In this first-ever analysis of MIRs, the authors find that MIRs play a significant and more far-reaching role than objections in two ways. First, more MIRs are issued than objections. While the number of both objections and MIRs issued has declined dramatically since 1995, the number of MIRs issued (6,717) between 1990 and 2005 exceeds the number of objections by a factor of eight. Second, MIRs are issued regarding a larger variety of proposed election changes than objections. While method of

[7] Luis Fraga & Maria Lizet Ocampo, "The Deterrent Effect of Section 5 of the Voting Rights Act: The role of More Information Letters." The study finds that 261,390 changes were submitted to DOJ for review during that time. The largest number of changes, 59,002 (22.6%) were submitted for approval to modify polling places, followed by annexations at 54,760 (20.9%), precincts at 36,253 (13.9%), and voter registration procedures at 22,002 (8.4%), combined accounting for a total of 65.8% of all changes submitted.

election, redistricting, and annexations accounted for nearly all (82.3%) objections issued, these topics only comprised 49.5% of MIRs issued. A substantial portion of MIRs was also issued for submissions regarding polling place changes, precincts, and voter registration.

Analysis of the final outcome of changes receiving MIRs shows their preventive effect. Between 1990 and 2005, 365 submissions receiving MIRs were ultimately resolved with an objection to the proposed change (of 792 total objections). Moreover, an additional 855 submissions receiving MIRs ended with withdrawals, superseded changes, and no responses, effectively invalidating these proposed changes and increasing the impact of the DOJ on submitted changes by 110% more than objections alone.

Another study reviewed the function of the bailout provisions of Section 5 since last amended and how the provisions might be improved during reauthorization.[8] This study posits that bailout is not overly burdensome, in terms of expense or time, despite the low number of jurisdictions that have taken advantage of the option. The author, who has represented jurisdictions that have applied for bailout, estimates that the process costs approximately $5,000 in legal fees. He opines that the standards for bailout are not too onerous, as they closely mirror Section 5 requirements,[9] and points out that all jurisdictions that have applied for bailout since the 1982 reauthorization have been successful. Moreover, he contends that the option of bailing out of Section 5 coverage and the fact that the bailout procedure is not overly burdensome demonstrate that Section

[8] J. Gerald Hebert, "The Voting Rights Act: Is it Time to Bailout?"
[9] He suggests that the requirement to show Section 5 compliance, which some have suggested is too onerous, should be retained because compliance is not difficult to prove and jurisdictions are not penalized for inadvertent failure to submit and are allowed the chance to submit late, even after applying for bailout in fact.

5 is narrowly tailored because jurisdictions that should not be covered can be exempted from coverage.

To improve Section 5's bailout procedures, the author suggests allowing political subjurisdictions within covered counties to pursue bailout even if the county as a whole has not yet been bailed out of coverage. Currently, counties within covered states may pursue bailout independently of the states, but political subjurisdictions, such as cities or special districts, may only pursue bailout after the county in which they are located has successfully obtained bail out from coverage. Allowing political subdivisions to act independently of counties would increase options for covered political subjurisdictions.

2. Electoral Representation and Standard of Review: Measuring Participation, Representation, and Influence

Several studies analyzed issues of electoral representation, influence, and participation. These issues are particularly germane to reauthorization in light of 2003's Georgia v. Ashcroft decision, in which the Supreme Court introduced a new standard of review for redistricting plans submitted for Section 5 review by introducing the idea of "influence districts" possibly compensating for lost "majority minority" districts. The commissioned studies analyzed various aspects of minority access and influence, including: identifying obstacles to minority participation, the demographic requirements for minority voters to elect their candidates of choice, which districts provide "influence" to minority voters, how to define "influence," and the proper standard for review in redistricting plans submitted for pre-clearance. Commissioned quantitative research found that descriptive representation – being represented by a representative of one's own racial/ethnic background – was most likely to indicate successful substantive representation, or protection/advocacy for voters' interests.

a. Access and Participation

One study assessed the relationship between electoral structures, the political participation of blacks, Latinos, and Asian Americans, and the ensuing representation, or lack thereof, of these groups in the context of city council elections.[10] It notes that despite gains in minority representation since "the Act" passage, minority political representation still lags behind that of non-minority. Indeed, although blacks, Latinos, and Asian Americans combined constitute more than 25% of the US population, they constitute only 5% of elected officials nation wide. Latino citizens are the most under-represented.[11]

After analyzing several possible election-related causes for this underepresentation, the authors identified two. First, electoral representation for blacks is adversely affected by institutional aspects of elections,[12] such as type of election (at-large vs. district), timing of election, form of government, etc. Changing city council elections to fall on the same day as national elections and changing the method of election from at-large to districts would increase black representation on city councils by just over 6 percent, all else equal.[13] Second, Latino and Asian American representation was

[10] Zoltan L Hajnal and Jessica Trounstine, "Transforming Votes into Victories, Turnout, Institutional Context, and Minority Interests in Local Politics."
[11] In cities where they represent five percent or more of the population, Latino representation averages 13 percent below parity. Asian Americans average 9 points below parity and African American council representation averages 8 points below parity.
[12] The study focused on six sets of institutions that prior research identified as potentially related to minority representation: at-large vs. district elections, election timing, candidates' party affiliation, term limits, city council size, and current form of government (mayor council form vs. council manager).
[13] None of the other proposed institutional solutions such as term limits, partisan elections, larger council size, or the mayor-council form of government is significantly related to African American city council representation.

adversely affected by low voter participation. Also, for Latinos and Asian Americans, underrepresentation greatly increases as the population of each group grows.[14]

Another study analyzed the extent to which a district's racial composition affects turnout of minority voters with an eye to what levels of Latino population are needed to secure Latino voters' ability to elect their candidate of choice.[15] The study analyzes voter turnout information for general elections from 1996 to 2002 in assembly districts in Southern California and New York City. Based on their analyses, the authors conclude that the demographic composition necessary for Latinos to elect candidates of choice varies from district to district and may not necessarily be determined by a numerical majority of Latinos in a district. For example, they find that the actual proportion of Latino voters needed in a district to produce more than 50% Latino turnout is higher in New York than it is in California. Thus, they advocate abandoning a mechanical reliance on whether a district is majority Latino in favor of district by district analysis of a variety of factors that affect Latino voters' ability to elect a representative of their choice, such as population, citizenship, registration, turnout, etc. Their analysis informs the "influence" district debate because they found that Latino voter participation was highest in districts with higher Latino populations and lower when Latino population was lower. Moreover, the relationship between Latino population and turnout was not linear, so one cannot assume that a given level of Latino population will consistently lead to a corresponding level of Latino turnout or influence.

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[14] In cities where they represent at least a quarter of the population, Latinos are 25 points below parity and Asian Americans are 22 points below parity.

[15] Gary Segura and Nathan Woods, "Majority-minority Districts, Co-ethnic Legislators, and Mobilization Effects Among African-American and Latino Registered Voters."

One study analyzed the election of County Supervisors in Mississippi to test the frequently proffered idea that the creation of majority-minority districts has harmed minority representation by concentrating black voters in fewer districts, leaving more districts dominated by white conservative voters, who are more likely to elect Republicans, and leading to a net loss of Democratic elected officials.[16] This study found that at the county government level in Mississippi this theory does not hold – the creation and/or maintenance of majority black County Supervisor districts in Mississippi has not led to the election of greater numbers of Republican Supervisors. Moreover, the study finds that the maintenance of majority black districts is vital to maintaining the ability to elect black representatives and that black voters are well represented by black elected officials.

Another study analyzed racial block voting in elections in Los Angeles County, California involving Latino candidates and ballot initiatives of concern.[17] The study conducted four types of statistical analyses on elections between 1994 and 2003 involving Latino candidates or propositions that affected Latinos. The study found that in Los Angeles County, Latinos vote overwhelmingly for Latino candidates while non-Latinos generally vote against Latino candidates.

Another study explored how the racial composition of districts and the race of Congressional representatives affect responsiveness to black constituents by analyzing the provision of economic opportunities, in the form of federal project allocation or

[16] David Lublin & Cheryl Lampkin, "Racial Redistricting and the Election of African American County Supervisors in Mississippi."

[17] Yishaiya Absoch, Matt Barreto & Nathan Woods, "An Assessment of Racially Polarized Voting For and Against Latino Candidates." The ballot initiatives included Propositions 187 (restricting undocumented immigrants' access to public services), 209 (outlawing affirmative action in State run institutions), and 227 (prohibiting bilingual education as an instruction method for English language learners).

"pork," to predominantly black counties (and thus black constituents) within a district. [18] The author found that since civil rights policy outcomes in the U.S. House have changed little between the 1970s and 1990s, studying distributive policy decisions such as federal project allocation to assess responsiveness to black constituents is a better measure of responsiveness than analyzing how representatives vote on civil rights legislation.

The study finds that black representatives provide goods and services to black constituents at a higher rate than white representatives, regardless of the racial composition of the representative's district. In fact, a county with a black representative will receive 22.5 more projects than a similar county represented by a white legislator. Thus, being represented by a black official (descriptive representation) leads to more advantageous outcomes for black voters (substantive representation). The "best" district for achieving substantive representation of African-American voters is a district over 40% black where a black legislator is able to achieve victory. Thus, any county in a black legislator's district with a significant black population ($\geq$ 40 percent) is likely to receive a larger number of projects.[19] For white representatives, the black population of their districts appears to have little effect on the number of projects allocated to black constituents.[20]

One legal study analyzed the Section 5 standard of review for redistricting in light of the Supreme Court's decision in Georgia v. Ashcroft and concludes that the standard

[18] Christian R. Grose, "Black-Majority Districts or Black Influence Districts? Evaluating the Effect of Descriptive Representation on the Substantive Representation of African-Americans in Black-Majority and Black Influence Districts"

[19] Other factors that have an effect on the number of projects allocated include: county population, the percent over age 65, the presence of a state capital; and the three congressional variables that affect increased project allocations are the previous general election margin of the House representative, the presence of a Senator on the Appropriations committee, and the combined seniority of Senators. Party, however, was not significant.

[20] Only one black-majority district during this time period is represented by a white representative (Pennsylvania's 1st district). This district's population is 52 percent black.

set forth in Ashcroft should be abandoned.[21] The author notes that Section 5 review prior to Ashcoft included a broad ranging analysis of multiple factors and was not limited to a simplistic comparison of minority population levels pre and post redistricting. In addition, coalitional districts, where minority voters constitute less than a majority of a district's population but are able to elect their candidate of choice, were maintained. He proposes that the standard not be merely a numerical analysis of the proportion of voting age bodies in a district – indeed he advocates abandoning the term "majority minority district" – but whether voters have the ability to elect a representative of choice, which he calls an "ability to elect" district.

He further justifies abandoning the Ashcroft standard because the Supreme Court's influence district argument is both difficult to administer and was proven false in Georgia. He states that influence is hard to quantify, but may best be measured by the somewhat burdensome two-prong standard DOJ proffered in the Ashcroft litigation on remand: (1) expert testimony regarding past election results, including incidence of racial block voting, in districts purported to be influence districts and (2) testimony from experts and lay witnesses about the extent to which legislators from alleged influence districts consider the interests of the minority community. In addition, the author notes that assuming that a small minority population can influence white elected officials is undermined by evidence from Georgia, where in the highly-publicized 2003 vote to remove the Confederate battle emblem from the Georgia state flag, twelve of the nineteen white senators elected from districts with more than 25 percent black voting age population voted *against* removing the emblem.

[21] David J. Becker, "Administration of Section 5 of the Voting Rights Act Before, During, and After Georgia v. Ashcroft – A Response to Professor Samuel Issacharoff and Others Who Question The Continued Viability of Section 5 Post-Ashcroft"

B. Summary of Section 203 Research

Several commissioned studies addressed issues related to Section 203. Two studies analyzed covered jurisdictions' compliance with the Act, one through a survey of jurisdictions about their compliance and the other through information gathered through site visits to election administrators in several covered jurisdictions. Other studies focused on how Section 203 could be revamped through reauthorization to be more responsive to limited English proficient ("LEP") citizens. These included an analysis of how changing the coverage formula would affect LEP citizens, a study that investigates extending coverage to Arabic language, and another that assesses whether and how changing the language assistance provisions is constitutionally possible. A final paper addresses the continuing need for bilingual assistance with an eye to providing evidence needed for reauthorization.

To gain a snap-shot of current Section 203 compliance, one study analyzed responses to a survey about compliance sent to covered jurisdictions.[22] On the positive side, responses indicated that election officials in covered jurisdictions generally support continuing Section 203 requirements, that providing language assistance does not require a great deal of a jurisdiction's election related costs, and that many jurisdictions are providing assistance. However, responses also indicate that a large number of responding jurisdictions do not provide any assistance and relatively few covered jurisdictions provide the most helpful kinds of assistance, such as hiring a bilingual individual to coordinate administration of the jurisdiction's bilingual assistance program.

[22] Rodolfo Espino and James Tucker, "Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act"

Another study regarding Section 203 compliance analyzed information gathered during field visits to voting officials/offices in 63 Section 203 covered jurisdictions in 15 states to assess the extent to which Spanish language materials and information were available.[23] These on-the-spot checks for Spanish language registration and voting materials and availability of Spanish-speaking staff showed that the actual provision of assistance is lacking. The study found that one in seven jurisdictions could offer translated registration forms upon request, that one in four jurisdictions had no employees who could provide Spanish assistance, and that levels of compliance varied widely from state to state, with the states with larger Latino populations generally providing better assistance than those with smaller Latino populations.

Another study analyzed how changing the formulas under which jurisdictions become subject to Section 203's language assistance requirements would affect language minority citizens.[24] It found that reducing the percentage threshold of LEP citizen voting age population below 5% would benefit Spanish speaking LEP voters, and to a lesser degree LEP citizens who speak Asian languages, by increasing the number and geographical dispersion of covered jurisdictions. Reducing the numerical trigger threshold would increase assistance for Asian languages but would not substantially affect coverage for Spanish language. Specifically, lowering the numerical threshold from 10,000 LEP voting age citizens of a single language minority group to 7,500 such citizens would have a large effect, for example expanding coverage to Asian Indians and Cambodians, language minority groups currently not triggering coverage. On the other

[23] Michael Jones-Correa, Israel Waismel-Manor, "The Implementation of Section 203 of the Voting Rights Act: A Proposal"
[24] Daniel K. Ichinose, "Reauthorization of Section 203 of the Voting Rights Act"

hand, eliminating the literacy requirement would not significantly increase the number of jurisdictions covered under Section 203.

Another study considered evidence proffered in support of language assistance for limited English proficient Latinos, Asian Americans, American Indians and Alaskan Natives and questioned whether Arab Americans should be brought within Section 203 coverage.[25] Based on census data and reports, this piece sets forth parallels between language ability, educational attainment, voting participation and experiences of discrimination among Arab Americans and the information cited to justify inclusion of currently covered language minorities. The study notes that including Arab Americans in the definition of language minorities under the Act would require no more than six jurisdictions to provide Arabic language materials and information.

Another study analyzed the language provisions of the Act in the larger context of various civil rights statute models.[26] The author believes that current structures in the Act to protect language minorities are at once under and over-inclusive in that they include some members of groups who do not need assistance but exclude many language groups despite the presence of limited English proficient citizens within those groups. Some of this might be addressed by including "national origin" within the protected bases under the Act. However, Congress must take great care in making any changes to the Act given current Supreme Court Fourteenth Amendment jurisprudence.

Another study reviews information that supports the continuing need for the bilingual assistance provisions and addresses some arguments proffered against such

[25] Jocelyn Benson, "Language Protections for All? The Viability of Extending the Language Protections of the Voting Rights Act to Arab American Citizens"
[26] Angelo Ancheta, "Remediation and Accommodation in Federal Voting Rights Law"

assistance.[27] It notes that Section 203 requirements were established to remedy the history of discrimination against Latinos, Native Americans, Alaska Natives, and Asian Americans and to address education inequities suffered by native born language minorities that proved to be a barrier to political participation. Analysis of census data shows that, nationwide, language minorities still obtain lower levels of education and thus suffer from higher rates of illiteracy than both the national average and non-language minority citizens, as defined by the Act. Census data is buttressed by education research finding that language minorities experience higher drop out rates and perform more poorly on skills testing than do non-language minorities.

IV. Policy Recommendations

Based on the research commissioned, as well as research conducted by Warren Institute staff, we conclude that the special provisions of "the Act" should all be renewed for an additional ten years. The research conducted demonstrates that the protections guaranteed in the special provisions of the Act are important tools to guarantee the right to vote is not abridged because of race, color, or membership in a language minority group. These provisions are still necessary because discriminatory practices that disenfranchise minority voters persist and interfere with such voters' rights under the Fourteenth and Fifteenth Amendments to the Constitution.

Section 5's preclearance provisions both protect minority voters from potentially discriminatory voting changes and place the onus for effectuating such changes on the jurisdictions seeking to implement them rather than on individual voters to defend against them. Section 203's language assistance provisions provide vital mechanisms for LEP citizens to understand, access, and participate in our democratic system of government.

[27] Ana Henderson, "The Continuing Need for Sec.203."

Without such language assistance, many LEP citizens would be denied their right to vote because they would not fully understand and be able to cast a meaningful ballot. Finally, the federal observer provisions of the Act provide an important mechanism to observe elections and safeguard against potential voting rights violations by sending in neutral officers to witness procedures in the polls and the counting of ballots. These special provisions of the Act should be maintained.

In addition, we suggest the following changes to specific provisions of the Act:

A. Section 5 Policy Recommendations

* Restore discriminatory intent as a rationale for objecting to a voting change

Congress should specify that voting changes made with discriminatory or retrogressive intent are just as infirm as those having only retrogressive effects. Currently a voting change made for overtly discriminatory or retrogressive reasons can survive Section 5 review as long as it does not have a retrogressive effect on voters' ability to exercise their right to vote. This state of affairs turns the intent of "the Act" on its head and allows officials to make decisions based on prohibited characteristics and with the purpose of disadvantaging voters based on race and language minority status as long as their actions do not have that effect. Congress should reverse this standard and mandate that Section 5 review invalidate any voting change either made with discriminatory or retrogressive purpose or having a discriminatory or retrogressive effect.

* Disallow substituting "ability to elect" districts with "influence districts"

Congress should specify that "influence districts" cannot replace "ability to elect" districts in redistricting plans.[28] We define "influence district" as a district with less than

[28] If not an outright rejection of "influence districts" in the Section 5 analysis, Congress must define what elements should be considered when analyzing a purported "influence district." This is not to suggest a

majority minority population in which the minority voters are not able to elect the candidate of their choice. A district with less than majority minority population in which minority voters are able to elect their candidate of choice, as well as a district in which minority voters constitute more than half of the population and are able to elect their candidate of choice, is an "ability to elect district."

* Establish a Commission to Study Revising the Section 5 Coverage Formula

Congress should appoint a legislative study Commission to report back on whether a better formula to determine which jurisdictions are subject to Section 5 requirements can be devised. The Commission's analysis should be informed by social science analysis of current patterns of discrimination and voting participation behavior, and that analysis should be conducted by the National Research Council of the National Academies of Science to ensure that it is non-partisan and meets the highest academic standards. The current formula rests on practices and voter participation as they stood in 1964, 1968, or 1972. As such, it almost certainly covers some jurisdictions that may no longer need Section 5 review to protect minority voters and almost certainly leaves uncovered some jurisdictions that, based on their history of discrimination and minority voter participation since the last reauthorization of the Act, should be covered. Thus, the current trigger leads Section 5 to be both over- and under-inclusive. This problem of "fit" is less problematic on Constitutional grounds if Congress considers the evidence and the alternatives yet concludes that the legislative balance of burdens, benefits and feasibility is appropriate.

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rigid percentage based formula, since our research demonstrated that there is no magic number at which minority voters gain the ability to influence elected officials that are not their candidates of choice, but a list of factors or criteria that must be satisfied for a district to qualify as an "influence district" in Section 5 analysis.

The Commission should consider alternative methods to revamp the trigger to address both the over- and under-inclusiveness. The Commission may want to consider, for example, the following two-pronged approach:

1. To address over-inclusiveness, the Commission could consider allowing a one-time exemption opportunity for currently covered jurisdictions to prove they no longer need to be covered. This test should be less onerous than the current bailout requirements, but should address key issues, such as whether any voting change has been objected to, whether federal observers, including DOJ staff, have been certified or sent to observe elections, whether any changes submitted to DOJ or for declaratory judgment were withdrawn after DOJ or court action short of an objection (such as more information letters, etc.), any findings of liability in cases brought to enforce voting rights, any Section 5 enforcement actions leading to voting changes, whether the minority voting age population is small (10% or less), and whether the jurisdiction has complied with Section 5 requirements thus far. Affected voters or DOJ could challenge the granting of the objection for a period of 10 years and seek its termination should any of the proven factors change. This exemption process would be a formal administrative adjudication conducted by an Administrative Law Judge acting as hearing officer, with final agency action by the Attorney General, subject to conventional judicial review.

2. To address the trigger's current under-inclusiveness, the Commission could consider extending coverage to jurisdictions that have been found to violate voting rights since 1982, have been subject to federal observer requirements pursuant to a court order, or have been required to submit voting changes for preclearance pursuant to a court order should become subject to Section 5 coverage. In addition, the Commission could

consider extending coverage to jurisdictions in which minority voter registration and/or participation is significantly lower than that of non-minority voters (based on the average registration or participation in the 2000 and 2004 November elections) and other evidence of decreased voting opportunities for minority voters.

* Ensure that partisan block voting does not mask racial block voting in Section 5 and Section 2 analyses

Several studies noted that the intersection between partisan politics and racial voting behavior can make analyzing voting rights claims difficult. In the best case, this requires a more searching review to tease out voting rights issues, such as racial block voting, from partisan issues. In the worst case, partisan politics defenses are perceived to trump voting rights claims.

Congress should direct that Section 5 review, and also adjudication of Section 2 cases, must go beyond claims of partisan politics. For example, where partisan politics make it difficult to perceive racial voting patterns in general elections, courts and the DOJ should assess primary elections for evidence of such voting patterns. Judges and DOJ must analyze all aspects of elections to ensure that race, color, or language minority status does not play a role.

B. Section 203

* Adjust Section 203 coverage formula

The numerical trigger for Section 203 coverage should be lowered from the currently required 10,000 LEP voting age citizens of the same language group to 7,500 LEP voting age citizens of the same language group. In addition the Attorney General should be given regulatory authority to further reduce the numerical or percentage

thresholds for Section 203 coverage through regulation in light of, for example, changes in voting technology. Lowering the numerical threshold this relatively minor amount will provide a significant increase in language access, particularly to Asian American voters. This reduction is also equitable because it brings greater parity to LEP voters who live in areas with large populations and thus need significant numbers in order to constitute 5% of the population, while LEP citizens living in rural jurisdictions can trigger coverage under the 5% rule with comparatively low numbers.

In addition, the formula should include a floor under which intensive assistance is not required. A quirk of the current percent-based formula, in particular the Indian reservation trigger, is that some jurisdictions with very small and in some cases no population become officially covered because there is reservation land located within the jurisdiction. The law should specify that counties with very few, perhaps less than 25, or no LEP voting age citizens should not have to provide intensive assistance. This will help tailor the coverage more narrowly.

* Require covered jurisdictions to submit bilingual plans for review

The two studies regarding Section 203 compliance noted that many jurisdictions do not comply with the law's requirements. One way to ensure compliance is to require Section 203 covered jurisdictions to submit their bilingual plans to the DOJ for review. Such reviews would aid compliance in two ways: first, it would require covered jurisdictions to develop plans to comply with the law knowing that such plans would be reviewed by an enforcement agency, and second, it would provide a more efficient mechanism than the current jurisdiction-by-jurisdiction investigation method for DOJ

staff to ascertain which jurisdictions were acting sufficiently to comply with the law and which were not.

* Assist compliance by providing funding and assistance

Some jurisdictions and Section 203 opponents claim that Section 203 is a costly unfunded mandate. Congress could assuage some of these concerns by providing funding for translating materials and other bilingual assistance. In addition, Congress could mandate the translation of federal forms and election related information into the most commonly spoken covered languages, which in turn could be shared with covered jurisdictions and any other interested jurisdiction thus lowering the cost of translations. The Election Assistance Commission could coordinate this effort. Finally, the Attorney General should be authorized to require state election officials, in states with multiple counties covered for the same language(s), to coordinate translations of statewide ballot measures and forms and provide those translations to county election officials. State-produced translations would aid financially strapped counties who now shoulder the burden of translating materials. They would also have the added benefit of reaching LEP voters who live in counties not covered independently.

C. Federal observer provisions

* Expand federal observer jurisdiction to Section 203 covered jurisdictions

The federal observer program is an excellent way for federal officials to gauge compliance with "the Act" requirements and to discourage problems at the polls on Election Day. This is especially true for language assistance where oral assistance provided at the polls is so important to successful voting for LEP citizens. Unfortunately, under the current structure of the Act, federal observers can only be dispatched to a

jurisdiction covered under Section 5 or subject to federal observer coverage subsequent to a Voting Rights Act lawsuit. Many Section 203 covered jurisdictions are not subject to Section 5 and thus not eligible for federal observer coverage. In fact, in the history of the Act, just 148 jurisdictions have been certified for federal observers, only 26 of which are covered by Section 203.

The federal observer provisions should be expanded to include all Section 203 covered jurisdictions. In addition, the conditions under which the Attorney General can certify a county for federal observer coverage should be revamped to include a jurisdiction's failure to provide language assistance as required under Section 203 or 4(f)(4).

D. Additional provisions

* Clarify Section 208's application to English language abilities

Section 208 allows voters who have disabilities, are blind, or are unable to read or write to receive assistance from a person of their choice, with certain limitations. While this provision is often interpreted to apply to LEP voters, it would assist compliance if limited English proficiency were specified as a basis for assistance under Section 208. In addition, Section 208 should specify that it applies to aspects of the voting process other than assistance in the polls, in particular to absentee or by mail voting. Some jurisdictions presently restrict the number of voters any individual may assist. This conflicts with Section 208's proposition that a qualified voter may be assisted by the person of his or her choice.

* Bring parity to fines for violations

An alteration to the Act that would increase fairness and perhaps compliance is to bring parity to the punishment provisions of the Act. Currently, the Act allows higher monetary penalties for voter fraud ($10,000) than for individual acts or conspiracy to deprive or attempt to deprive individual voters of rights secured by the Act ($5,000).[29] Congress should amend these provisions so that violations of voting rights are punished at least as severely as voter fraud.

* Institute civil penalties for non-compliance

A modification that might increase compliance is to allow the Attorney General to recover civil penalties from non-complying jurisdictions. Current non-compliance, noted in the studies, is enabled, in part, by the fact that the Act provides no monetary damages against jurisdictions that do not comply while simultaneously requiring jurisdictions to expend resources on complying with the law. As such, the Act presents a perverse incentive not to comply with the law. Instituting civil penalties not exceeding $55,000 for the first violation and not exceeding $110,000 for any subsequent violation of the Act, will pose a limited risk to jurisdictions for non-compliance which may induce compliance.[30] The civil penalties provision does not open jurisdictions to jury awards to

[29] *Compare* 42 USC § 1973j(a) & (c) (allowing fines of up to $5,000 and/or imprisonment of not more than five years for individual acts or conspiracy to deprive voters of their rights enumerated by the Act) and § 1973j(b) (allowing fines of up to $5,000 and/or imprisonment of not more than five years for destroying or altering the marking of a paper ballot or altering any official record of voting in any jurisdiction in which a federal examiner has been appointed) *with* 42 USC § 1973i(c) (permitting fines up to $10,000 and/or imprisonment of not more than five years for individual acts or conspiracy to register or vote illegally in a general, primary, or special election where the ballot contains federal offices); § 1973i(e) (permitting fines up to $10,000 and/or imprisonment for not more than five years for voting more than once in a federal election) and § 1973i(d) (providing false testimony or information in any matter within the jurisdiction of a federal examiner).

[30] The identical terms are present in the Fair Housing Act. *See* 42 U.S.C. § 3614(d)(1)(C).

compensate victims of voting discrimination, but does offer a "stick" to induce jurisdictions to comply.

* Make expert witness fees recoverable

Several commentators have stated that a large portion of the costs of bringing a voting rights lawsuit is the cost of expert witnesses. Voting rights cases are extremely technical, and bringing suit without an expert witness is often impossible. Especially since the Act does not provide for damages that could defray some of the costs of litigation, Congress should consider making expert witness fees recoverable along with attorney's fees and costs.

V. MODEL AMENDMENTS

A. Section 5-related

1. Sec. 1973c Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court (Section 5)

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title 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, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title 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, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title 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, 1972, 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~~ ***or*** ~~will not have~~ the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, 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, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor 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. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. 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 and any appeal shall lie to the Supreme Court.

Jurisdictions may not dilute voting strength by substituting districts where voters are able to elect a representative of their choice with districts where voters are not able to elect a representative of their choice.

2. Section 4 (Section 5 trigger)

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

The provisions of subsection (a) of this section 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 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this

section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A Commission on Section 5 shall be convened to research and report to Congress regarding whether any alternations to the methods, set forth in the previous three sentences, through which any state or political subdivision of a state is determined to be subject to subsection (a) of this section are necessary. Such Commission shall base its recommendations on social science research of current patterns of discrimination and voting behavior which shall be conducted by the National Academy of Science.

B. Language related issues

1. Section 203:

Sec. 1973aa-1a Bilingual election requirements (Section 203)

(a) Congressional findings and declaration of policy

The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

(b) Bilingual voting materials requirement

(1) Generally

Before ~~August 6, 2007~~ ***[Month Day] 2016***, no covered State or political subdivision shall provide voting materials only in the English language.

(2) Covered States and political subdivisions

(A) Generally

A State or political subdivision is a covered State or political subdivision for the purposes of this subsection if the Director of the Census determines, based on census data, that -

(i)(I) more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient;

(II) more than ~~10,000~~ ***7,500*** of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or

(III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

(B) Exception

(i) The prohibitions of this subsection do not apply in any political subdivision that has less than 5 percent voting age limited-English proficient citizens of each language minority which comprises over 5 percent of the statewide limited-English proficient population of voting age citizens, unless the political subdivision is a covered political subdivision independently from its State.

(ii) The prohibitions of this subsection do not apply in any political subdivision where the Census Bureau identifies fewer than 25 citizens of voting age who are members of a single language minority and are limited-English proficient, even if such quantity constitutes more than five percent of the total population.

(3) Definitions

As used in this section -

(A) the term "voting materials" means registration or voting notices, forms, instructions, assistance, or other materials or information, ***provided in auditory, oral, paper, or electronic form,*** relating to the electoral process, including ballots;

(B) the term "limited-English proficient" means unable to speak or understand English adequately enough to participate in the electoral process;

(C) the term "Indian reservation" means any area that is an American Indian or Alaska Native area, as defined by the Census Bureau for the purposes of the 1990 decennial census;

(D) the term "citizens" means citizens of the United States; and

(E) the term "illiteracy" means the failure to complete the 5th primary grade.

(4) Special rule

The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

(c) Requirement of voting notices, forms, instructions, assistance, or other materials and ballots in minority language

Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language:

Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

(d) Action for declaratory judgment permitting English-only materials

Any State or political subdivision subject to the prohibition of subsection (b) of this section, which seeks to provide English-only registration or voting materials or information, including ballots, may file an action against the United States in the United States District Court for a declaratory judgment permitting such provision. The court shall grant the requested relief if it determines that the illiteracy rate of the applicable language minority group within the State or political subdivision is equal to or less than the national illiteracy rate.

(e) Definitions

For purposes of this section, the term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.

2. Section 208

Any voter who requires assistance to vote by reason of blindness, disability, or inability ***or limited ability*** to read or write ***English*** may be given assistance***, including assistance in languages other than English,*** by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union. ***This applies to all aspects of the voting process, including registration and absentee or by mail voting.***

C. Roll of federal observers:

Sec. 1973a Proceeding to enforce the right to vote

(a) Authorization by court for appointment of Federal examiners

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the Director of the Office of Personnel Management in accordance with section 1973d of this title to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or 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, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title (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.

Section 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) ***or section 203*** 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, or in contravention of the guarantees set forth in section 4(f)(2), 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 reasonably attributable to violations of the fourteenth or fifteenth amendment, ***whether the jurisdiction persists in implementing English-only elections in contravention of Sections 203 or 4(f)(4)***, or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fourteenth and fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment, …

Section 8:
Whenever an examiner is serving under subchapters I–A to I–C of this title in any political subdivision, the Director of the Office of Personnel Management 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 1973a (a) of this title, to the court.

D. Enforcement/Compliance issues

1. Penalties:

Section 12:
(a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, 10, ***201, 202, or 203*** or shall violate section 11(a), shall be fined not more than ~~$5,000~~ ***$10,000***, 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 or ***paper record of an electronic 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~~ ***$10,000***, 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) shall be fined not more than ~~$5,000~~ ***$10,000***, 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 Sates, 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 Sate or local election officials to require them to (1) permit persons listed under this act to vote and (2) to count such votes. ***In such an action, a court:***
(1) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order as is necessary to assure the full enjoyment of the rights granted by this title; and
(2) may, to vindicate the public interest, assess a civil penalty against the respondent--(i) in an amount not exceeding $55,000, for a first violation; and (ii) in an amount not exceeding $110,000, for any subsequent violation.

Section 205
~~Whoever shall deprive or attempt to deprive any person of any right secured by section 201, 202, or 203 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.~~ [consolidate with Section 12 so that all penalty provisions are in same section of the act]

Costs/fees:
42 USC 1973l(e):
In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee ***and a reasonable expert witness fee*** as part of the costs.

Funding:
42 USC 1973o
There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act. ***This shall include funding for translation of materials and provision of language assistance pursuant to Sections 4(f)(4) and 203.***