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THE CONTINUING NEED FOR SECTION 5 PRE-CLEARANCE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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THE CONTINUING NEED FOR SECTION 5 PRE-CLEARANCE

TUESDAY, MAY 16, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:32 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy and Feingold.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. The Committee will come to order.

If you are seeing a Democrat up here, you may be in disbelief, but it is the real thing.

[Laughter.]

Senator KENNEDY. I had forgotten what it feels like, but it is beginning to feel pretty good. Eternally hopeful in terms of the future.

Our Chairman, Senator Specter, had a previous meeting at 8:30 this morning on our immigration bill, and we have a judge that is going to be voted on at 10 o'clock, so he is necessarily detained over on the floor, as I imagine, in dealing with that Ninth Circuit. So we will move ahead with this morning's hearing. It is enormously important, and we are very grateful—I am—for him to have this hearing today. I will make a brief opening comment. I will include his statement in the record, introduce the witnesses, and then we will get started.

I commend our Chairman for calling this hearing on the key question of whether Section 5 is still needed today. President Johnson said these words in his message to Congress in the 1965 voting rights bill: "In our system, the first right and the most vital of all of our rights is the right to vote." Jefferson described the elective franchise as "the ark of our safety. Unless the right to vote be secured and undenied, all other rights are insecure and subject to denial for all of our citizens."

Section 5 of the Voting Rights Act has been one of the most effective defenses of that right. For over 40 years, this provision has helped to sustain the progress that was made by those who risked their lives and livelihoods in the civil rights movement. It is an essential protection against back-sliding by jurisdictions with a history of discrimination in voting. It prevents these jurisdictions from

changing their voting rules without first showing that the proposed changes have neither a discriminatory purpose nor effect.

As the Supreme Court stated in upholding Section 5 in *South Carolina* v. *Katzenbach*, "After enduring nearly a century of systematic resistance to the 15th Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evils to its victims."

The issue of whether Section 5 is still needed today has come up many times in these hearings, and although we bring different perspectives to this issue, each member, the Committee wants to ensure that any legislation passed in this area gets it right. We are mindful that the Supreme Court will carefully review the legislation we are considering under the standards it has applied in reviewing other civil rights laws in the past. In recent years, the Court struck down a key part of the AIDS discrimination in employment because it found the Congressional Record insufficient, *Board of Regents of Florida* v. *Kimel*. It also struck down one part of the Americans with Disabilities Act, *University of Alabama* v. *Garrett*. The Court based its decision in both these cases on the sufficiency of evidence in the hearing record. Both of those legislations were out of my Committee, the Human Resource Committee, and we thought we had met the standard in terms of the record in both of those areas. But this we want to make sure we are going to meet that requirement.

Congress has a special role in enforcing the 15th Amendment that prohibits racial and ethnic discrimination in voting. As the Supreme Court has noted, we have broader leeway in this area than in others because of the close link of the need to prevent discrimination in voting and the special goals of the 14th and 15th Amendments. In 1999, in *Lopez* v. *Monterey*, which was decided after the Court made clear the need for a specific record to support legislation under the 14th and 15th Amendments, the Court acknowledged that the Voting Rights Act by its nature intrudes on State sovereignty but noted that the 15th Amendment permits this intrusion to remedy discrimination in voting.

Despite having greater latitude in this area than in others, there is no question we must make a clear record on any legislation to extend the expiring provisions of the Act. So I thank the panel in advance for their help in evaluating this.

We have a very distinguished panel, and we want to thank them. This is enormously important. These are very distinguished individuals who have spent an enormous amount of time in this area and developed a great expertise, and we are very grateful to them for being with us today: Anita Earls is the Director of Advocacy, University of North Carolina Center for Civil Rights, Chapel Hill; Pamela Karlan, the Kenneth and Harle Montgomery Professor of Public Interest Law and Associate Dean for Research and Academics, Stanford School of Law; Keith Gaddie, Professor, Department of Political Science, University of Oklahoma; Theodore Arrington, Chair, Department of Political Science, University of North Carolina; and Richard Pildes, the Sudler Family Professor of Law at NYU.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

So, we thank all of you. We will start in that order. We would prefer if you can keep your remarks to 5 minutes so we can get some questions in before the break for the vote on the floor. Thank you.

STATEMENT OF ANITA S. EARLS, DIRECTOR OF ADVOCACY, UNIVERSITY OF NORTH CAROLINA LAW SCHOOL CENTER FOR CIVIL RIGHTS, CHAPEL HILL, NORTH CAROLINA

Ms. EARLS. Thank you, Mr. Chairman. I am honored to have this opportunity to testify concerning the continuing need for Section 5 pre-clearance. Throughout the Section 5 covered jurisdictions, minority voters continue to face intentional and unconstitutional barriers to full and equal participation in the political process. There are at least five main sources of evidence documenting continued intentional discrimination in voting in the covered jurisdictions. I will list these sources and then summarize what they show.

The sources of evidence are: one, Section 5 objection letters; two, unsuccessful Section 5 declaratory judgment actions; three, reported opinions in Section 2 litigation; four, Section 2 cases resolved by consent decrees or unreported opinions; and, five, Section 5 submissions that are withdrawn by the submitting jurisdiction.

First, Section 5 objections since 1982 demonstrate that purposeful discrimination continues to occur in matters affecting voting. In the nine States that are substantially covered, there were a total of 682 objections from 1982 to 2004. Many of these objections included evidence that the change was motivated by a discriminatory purpose. One study of these objections reports that in the 1990's, fully 151 objections were based on purpose alone; another 67 objections relied on a combination of purpose and retrogression; and 41 on both purpose and the need to comply with Section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade.

The numerous objection letters from every covered jurisdiction document an extensive record of local officials seeking to change dates of election, change election district boundaries, change city boundaries, and make other changes in election procedures out of a desire to suppress, diminish, or negate the effect of minority voters.

The first appendix to my testimony summarizes the number of objection letters issued by the Department of Justice from the nine States since 1982, and the second appendix summarizes the legal grounds for those objections. It is important to note that many of the objections since 1982 have been to statewide changes, essentially affecting all of the voters in the State.

Second, declaratory judgment actions where jurisdictions were denied pre-clearance are evidence of discriminatory voting laws. Since 1982, there have been a total of 25 cases in which a three-judge panel considered the proposed change on the merits and denied pre-clearance.

Third are judicial findings of intentional discrimination in litigation brought under Section 2. Unfortunately, many of these findings are in unreported decisions. Indeed, the discrepancy between the number of reported opinions finding Section 2 violations and the total number of successful Section 2 cases is huge. In the nine

States that are substantially covered by Section 5, since 1982 there have been 66 reported cases finding a violation of Section 2 and 587 unreported cases. Thus, any review of reported cases along seriously understates the findings.

Nevertheless, while limited to only reported cases of published opinions, Katz's study concluded that 24 lawsuits since 1982 identified more than 100 instances of intentionally discriminatory conduct in voting. Eight of these 24 lawsuits were in jurisdictions covered by Section 5; 14 were in non-covered jurisdictions.

Many cases involving allegations of unconstitutional discrimination are resolved on the more narrow statutory grounds because courts always avoid constitutional questions if at all possible. Similarly, frequently there are allegations of unconstitutional conduct in litigation under Section 2 that is resolved by a consent decree. While defendants in such cases often must admit liability, typically they are not willing to admit to unconstitutional conduct. Thus, the fact that there have been so many Section 2 cases resolved in favor of plaintiffs is also relevant evidence that unconstitutional discrimination has occurred.

Fifth, Section 5 submissions withdrawn by the submitting jurisdiction before the Department of Justice has had a chance to issue its determination are further evidence of discrimination. From 1982 to 2004, 501 proposed changes affecting voting were withdrawn by jurisdictions after receipt of a "more information" letter. In these instances Section 5 review resulted in the abandonment of potentially discriminatory changes. Section 5 has opened the door for minority political participation, but the gains are recent and fragile.

Levels of registration of minority voters do not begin to tell the complete story. Congress and the Supreme Court have long recognized that the Voting Rights Act is intended to guarantee that minority voters get a ballot and have that ballot counted equally. Renewal of Section 5 is essential to protect that guarantee.

[The prepared statement of Ms. Earls appears as a submission for the record.]

Senator KENNEDY. Thank you very much.

Professor Karlan?

STATEMENT OF PAMELA S. KARLAN, KENNETH AND HARLE MONTGOMERY PROFESSOR OF PUBLIC INTEREST LAW, AND ASSOCIATE DEAN FOR RESEARCH AND ACADEMICS, STANFORD UNIVERSITY SCHOOL OF LAW, STANFORD, CALIFORNIA

Ms. KARLAN. Thank you very much, Mr. Chairman, and thank you for the opportunity to testify today. You have my written remarks, and I want to highlight in my oral testimony today three points that come out of them.

The first is I know that you have heard from lots of witnesses about the *Boerne* line of cases, and as I explained in my written testimony, I think that the most relevant cases for our purposes here are *Tennessee* v. *Lane* and *Nevada* v. *Hibbs* because they recognize that Congress's power is at its apogee when it is dealing with fundamental rights or where it is dealing with suspect or semi-suspect classifications, and both of those are true of the Voting Rights Act. The Supreme Court has recognized that voting is

a fundamental right, and it has recognized that race discrimination is subject to the highest form of scrutiny.

What I think people have not discussed with you perhaps as much as they ought to is the two other sources that come out of the Constitution and the Supreme Court's recent cases that suggest that your power is at its apogee in dealing with the Voting Rights Act. The first of these is the Elections Clause—Article I, Section 4 of the Constitution—which the Supreme Court has recognized in post-Boerne cases, including *Cook* v. *Gralike* and *U.S. Term Limits* v. *Thornton*, as giving Congress absolutely plenary power over any election in which Federal officials are selected. And the Court has made clear in *Foster* v. *Love* that this includes protecting the right to register, protecting the right to vote, protecting the methods of election and the like.

And so when you are dealing with elections at which Federal officials are being selected or registration practices that deal with where Federal officials are being selected, Congress has more power and there is no federalism concern on the other side. The Supreme Court has rejected the idea that the Tenth Amendment has any role to play there.

Finally, in *Vieth* v. *Jubelier*—

Senator KENNEDY. Just on that point, I guess in your statement you talk about a mixed election, too. Could you just—

Ms. KARLAN. Yes, any election at which any Federal officials is covered. It does not matter that there are also State officials on the ballot, and I talk there a little bit about the criminal prosecution cases as ones where an uncontested House race is on the ballot and someone is prosecuted for vote fraud connected with a sheriff's race or the like.

Finally, on this point, in *Vieth* v. *Jubelier*, Justice Scalia, writing for a plurality of the Court, recognized that there are cases where there is a 14th Amendment violation that the courts cannot alone deal with because there is not a manageable judicial standard. And he points to figuring out what a fair and effective process of representation is there as something that Article I, Section 4, gives you the power to deal with even if the Court can't. And I think that is quite relevant to the *Georgia* v. *Ashcroft* fix.

My second point—so my first point is your power is at its apogee here. My second point is this case, unlike all of the previous *Boerne* line of cases that have come before the Court, deals with a renewal of an act that is already in place, and this has important consequences of two kinds. Let me give an analogy and then let me talk about the consequences.

The analogy is if you have a really bad infection and you go to the doctor, they give you a bunch of pills, and they tell you, "Do not stop taking these pills the minute you feel better. Go through the entire course of treatment because, otherwise, the disease will come back in a more resistant form." And the Voting Rights Act is strong medicine, but it needs to finish its course of treatment, and that has not yet happened for reasons that you have heard from other witnesses.

Now, some people have pointed to the fact that the number of objections has gone down over time, and they say, well, this shows that there is no necessity for the Act. To the contrary. If the Act

worked perfectly, there would be no objections, because if the Act worked perfectly, local- and State-level officials would be deterred from proposing changes that they cannot show have neither a discriminatory purpose nor a discriminatory effect.

I know from my own experience doing compliance in California, dealing with covered jurisdictions there, that the Voting Rights Act has a huge deterrent effect, and it has a huge effect in telling jurisdictions that the concerns of racial minorities should not be at the bottom of the list.

The third point I want to point to is about the evidentiary record in front of you. Some people have said that effects test cases are irrelevant to what is going on here. I want to give you two reasons why that is untrue.

The first comes out of the hearings and the legislative history of the 1982 amendments in which Congress explained one of the reasons for the results test in Section 2 is to avoid the difficult problem of having to call people racists in order to solve the exclusionary of minorities from the political process. So when courts decide cases on effects test reasons, they don't reach the question whether there is also a discriminatory purpose. But let me tell you from my own experience that if we had to show discriminatory purpose in lots of these cases, we could do it. But it would be damaging to the political system for minority voters who are seeking inclusion to call the officials they are then going to have to deal with racists in the future. And, therefore, I think the effects evidence is quite relevant to you.

I thank you very much for listening and look forward to questions.

[The prepared statement of Ms. Karlan appears as a submission for the record.]

Senator KENNEDY. Professor Gaddie?

STATEMENT OF RONALD KEITH GADDIE, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF OKLAHOMA, NORMAN, OKLAHOMA

Mr. GADDIE. Mr. Chairman, my thanks for the invitation to appear today. My written testimony deals mainly with the summary of analysis performed by myself and my colleague, Charles Bullock, at the University of Georgia funded by the American Enterprise Institute. This set of studies is an effort to document progress, or lack of progress, in voting rights in States covered by Section 5 of the Voting Rights Act.

To that end, in my oral statement what I would like to do is illuminate and highlight in summary fashion the findings of those reports and also point out some areas of concern with regard to what a renewed Section 5 should look like. No one can deny that there is a continuing need for Section 5 of the Voting Rights Act. The question that arises is: In what form should Section 5 appear? What should it be applied? To that end, what I hope to do is to illuminate these questions a bit further.

We have seen dramatic changes in American politics over the past 40 years. Minority voter participation has increased substantially. Descriptive representation of racial and ethnic minorities has never been so widespread. Southern blacks register and vote

at rates as high or higher than African-American and white voters in the rest of the Nation.

There is a two-party system in the South which fosters black political empowerment and office holding, but this empowerment is realized as the party of choice for most African-Americans, the Democratic Party, has been relegated to minority status in legislatures in five Section 5 States of the South.

When we look at the Section 5 States in the South and we consider them in the context of two other Southern States, Arkansas and Tennessee, what progress do we see in terms of minority participation in office holding? Well, first, Southern blacks have made dramatic gains at both the mass and the elite level. However, if the objective of the Voting Rights Act is proportional representation, that is an elusive goal, more easily achieved through voting than through elite participation.

In 2004, African-Americans registered at higher rates than whites in three Section 5 States and voted at higher rates in four Section 5 States. Of all the Southern States except Virginia, African-Americans registered and voted at rates at least 80 percent of that of white voters in the same States.

Overall, in terms of success in voter participation and also elite office holding, Alabama and Mississippi emerge as States in which African-Americans have been more successful politically, followed by North Carolina, and then Georgia, Louisiana, and South Carolina—all of which cluster closely together. Mississippi ranks first in black registration and turnout and for the proportionality of black mayors. Alabama ranks first in terms of African-American elected officials in general and in electing African-Americans to county commissions, city councils, and school boards. Mississippi ranks second in elected officials and city council members. On no dimension does Mississippi place worse than eighth among the 11 Southern States. Alabama, which scored second in terms of registration, State House members, and Senators, fares very poorly in terms of African-American representation in statewide offices, including statewide judicial offices.

The top six States in terms of overall progress are the ones that were caught by the initial trigger mechanism of the Voting Rights Act. The two States brought in later, Florida and Texas, place seventh and ninth in an 11-State South, respectively, in terms of voting rights progress.

The States never required to comply with Section 5, Arkansas and Tennessee, rank last and eighth, respectively. Of the States covered by pre-clearance since 1965, Virginia has the poorest performance, placing tenth on the composite scale.

Now, with regard to Section 5, what other questions do I have of concern as an empirical social scientist?

One, after two generations of implementation, are the goals of the Voting Rights Act achieved? The answer is variable by State. The progress of some States makes one wonder why the State continues to be covered in toto by Section 5.

Two, has Section 5 been altered by politics and the tool with which to advance party causes? Certainly political motives for the implementation of the Voting Rights Act are evident in the record of behavior of national and State actors and the implementation of

Section 5, especially in the redistricting process. There are partisan political consequences that arise from these political motivations.

Third, have the efforts to satisfy political goals and also the goals of the Voting Rights Act led to problematic or even illegal representative maps? Yes.

Fourth, has the standard for satisfying retrogression been altered by practice and the interpretation of the Supreme Court to possibly result in unintended consequences? Again, the answer is yes. The *Ashcroft* decision presents to me as a testifying expert and a political scientist a particular empirical challenge when making assessments of retrogression.

Thank you.

[The prepared statement of Mr. Gaddie appears as a submission for the record.]

Senator KENNEDY. Thank you.

Professor Arrington?

STATEMENT OF THEODORE S. ARRINGTON, CHAIR, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF NORTH CAROLINA-CHARLOTTE, CHARLOTTE, NORTH CAROLINA

Mr. ARRINGTON. Thank you, Mr. Chairman, for this invitation to speak before the Committee. Let me begin by stating that the Voting Rights Act is still needed and, therefore, should be reauthorized with some clarifications made necessary by the Supreme Court decisions in *Georgia* v. *Ashcroft* and *Bossier Parish II*. I will focus my comments on *Georgia* v. *Ashcroft* and the continuing impact of racially polarized voting on minority participation.

There is no question that we have come a long way since 1965. The Voting Rights Act, National Voter Registration Act, and other statutes have removed many barriers to voter registration by minorities. However, we still have a long way to go. Substantial disparities in both registration and turnout remain for many minorities, particularly Asian and Hispanic voting-age citizens. Even where those disparities may not be present, such as African-American voters in some areas, minority vote dilution is still a problem. It is still a problem because voting throughout the country is still strongly racially and ethnically polarized, as I have discovered in my expert testimony in voting rights cases throughout the country. When the candidates chosen by minority voters and those chosen by a majority group differ, election systems and arrangements must be able to provide equal opportunity for the minority voters to elect representatives of their choice. Section 5 of the Voting Rights Act requires covered jurisdictions to consider whether minority voters have such an equal opportunity. Section 2 of the Voting Rights Act provides a mechanism for assuring such equal opportunity throughout America. Both parts of the Voting Rights Act are still needed because seemingly racially neutral election procedures such as at-large voting, major vote requirements, and anti-single-shot provisions may combine with racially polarized voting to erect effective barriers to the ability of minority voters to have an equal opportunity to participate in the political process and an equal opportunity to elect representatives of their choice.

Georgia v. *Ashcroft* is an unworkable standard that undermines the ability of minority voters to have an opportunity to elect rep-

resentatives of their choice. In that case, a narrow 5–4 majority of the U.S. Supreme Court concluded that a jurisdiction could satisfy Section 5—and perhaps, by implication, Section 2—by substituting what are called influence district to provide substantive representation instead of creating or maintaining districts in which minority voters have a reasonable opportunity to elect representatives of their choice.

There are a number of problems with this. There are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in *Shaw* v. *Reno* and its progeny, we are left with no clear guidelines for drawing districts. There is no way to know how to comply with the Court's mandate. This is quite unlike the one-person/one-vote standard, which can be mathematically determined as the districts are being drawn.

At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide influence? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district to provide equal participation? The right to vote is not based on substantive representation, but an equal and meaningful right to participate and elect representatives of choice as the Congress has recognized in Section 2 of the Voting Rights Act.

Expert witnesses in voting rights cases are an essential part of the process because litigation involving Section 2 and the pre-clearance process of Section 5 are fact-intensive efforts. In the *Gingles* case, the United States Supreme Court specifically authorized the use of bivariate ecological regression analysis to measure the extent of racially polarized voting. The Court authorized this technique and the plurality opinion specifically rejected what is called "multivariate analysis" because the probative questions in voting rights litigation involve the extent to which minority and majority voters differ in their choice of candidates to represent them.

Racially polarized voting continues to be a pervasive feature of American politics. Race, ethnicity, and partisanship are inextricably intertwined, as every student in an introductory American politics course knows. Some experts for defendants in voting rights cases argue that partisanship or some other variable related to race or ethnicity is the "true cause," but the truth cause can always be traced back to race or ethnicity. The reauthorization of the Voting Rights Act should make it clear that influence districts and substantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Arrington appears as a submission for the record.]

Senator KENNEDY. Thank you very much.

Professor Pildes?

STATEMENT OF RICHARD H. PILDES, SUDLER FAMILY PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. PILDES. Thank you very much, Mr. Chairman. I consider it a great honor and a great responsibility to testify on renewal of the Voting Rights Act. I also consider it a somewhat painful moment for me because I have three concerns in particular I want to raise here.

First, I am concerned that the evidence in the record does not address an essential issue to the constitutionality of the proposed bill, and I am not aware that this concern, though I think it may be essential, has been addressed in the House hearings or in the previous hearings before this Committee.

The assumption so far of all of the evidence I have seen, or most of the evidence at least, is that it is sufficient to document continuing instances of problems in the area of race and voting rights in the covered jurisdictions. But I am very concerned that under the congruence and proportionality test that the Court now applies in this area, the Court is going to insist that there be some account of systematic differences between the covered and the non-covered areas of the United States.

There is very little evidence in the record on this, and, in fact, the evidence that is in the record suggests that there is more similarity than difference. For example, Professor Arrington has discussed racially polarized voting findings. The National Commission on the Voting Rights Act Report, which is an essential study and is part of this record, documents 23 cases from 16 States, since 1982, of polarized voting in statewide redistricting cases. Half are from covered States. Half are from non-covered States. So the racial polarization problem is not unique to the covered areas of the South, at least in this set of cases.

The Report also quotes judges making findings in various cases on discriminatory voting practices, but the language, which is very identical in these cases, comes from States like Maryland and Massachusetts and Florida, as well as the covered States. In fact, there are 24 cases reporting findings of intentional discrimination since 1982, 13 in non-covered States, 11 in covered States.

Now, I want to be clear about why I raise this point. It is not to assert that the bill as proposed is unconstitutional. But I look at this record as a lawyer concerned about how the courts will respond to it, trying to determine how best to ensure the constitutionality of a renewed Section 5, and I think this is an essential issue that has been neglected until now.

The second point I want to make is related to this issue. For the most part, national legislation in the voting rights area since the 1980's, in fact, has been a broad, uniform national type of legislation, whether in the Help America Vote Act or in the National Voter Registration Act, as two examples. And though not widely recognized, these statutes are very different models of how to protect voting rights through national legislation than is reflected in Section 5.

Section 5 has never protected the right to vote as such, and I think we tend to forget that. Section 5 is narrowly targeted in two

respects: it is geographically targeted, and it is targeted to the problem of racial discrimination in voting.

The more recent models of legislation from Congress, such as HAVA or the NVRA, are not selectively targeted in either of these ways. These statutes provide an alternative model that ought to be part of the discussion when we think about voting rights policy going forward in the important context provided by this renewal discussion and debate.

And the third point I want to make is about *Georgia* v. *Ashcroft* and the comments Professor Arrington mentioned about that case. The bill proposes to overrule *Georgia* v. *Ashcroft*. I consider that to be a mistake, one that will harm the long-term interests of minority voters, frustrate the formation of interracial political coalitions in the South, and be damaging to American democracy. And let me just remind the Committee of the facts of this case, which also powerfully illustrate and concretely demonstrate the changes even since 1982 in the Voting Rights Act in the South.

At the time of the Georgia redistricting at issue there, 20 percent of the State legislators were black, and with their virtually unanimous support, a coalition of white and black Democrats sought to unpack slightly three safe minority districts that the Act had been thought to require in the 1990's.

This was done because of the rise of robust two-party competition in the south, which was not present in 1982. This coalition of white and black Democrat legislators agreed that to maximize the possibility that the Democrats would retain control of the Senate in Georgia, a few seats would be put marginally more at risk for the prospect of minority legislators and Democratic legislators having Committee chairmanships and the like, and the power to effectively represent their constituents' interests.

The DOJ argued that the plan violated the Voting Rights Act. The Supreme Court, had it not rejected that view, would have, in my view, adopted or endorsed a policy that would have inverted the basic purposes of the Voting Rights Act. After all, here were black and white legislators willing to make their seats more dependent upon interracial voting coalitions. Here was a large contingent of black legislators, having entered the halls of legislative power, who now determined that they and their constituents would have more effective power as part of a Democratic Senate. Here was Congressman John Lewis, his life risked in the Selma march to help get the VRA enacted, his seat not at stake, testifying that this plan was in the interest of minority voters. And here were black legislators taking risks, cutting deals and exercising political agency to forge a winning coalition.

Yet the Act, under the interpretation of the Justice Department, would have denied these political actors the autonomy and the agency to make the hard choices at issue—and they were hard choices—even with partisan control of a major institution of State government in the south at stake.

The Court's decision permitting this deal instead recognizes room in the statewide redistricting context for some modest flexibility in Section 5, given the changes between 1982 and today. Indeed, the Georgia plan involved a modest amount of flexibility in a circumstance about as compelling as one can envision. If Congress

overturns *Georgia* v. *Ashcroft*, it will make even this limited amount of flexibility illegal.

More generally, I hope that debate over Section 5 does not remain locked within the models of the past. I suggest that much of the work of the Voting Rights Act that began in 1965 is most effectively taken up today by building on the models of HAVA and the National Voter Registration Act, and protection of the right to vote as such.

Thank you very much.

[The prepared statement of Mr. Pildes appears as a submission for the record.]

Senator KENNEDY. Thank you very much. Let me ask you just what is your response to the fact that the test is rather vague in the *Georgia* v. *Ashcroft*?

Mr. PILDES. I think I would have three things I would say in response to that, Senator. First, the decision is only from 2003. It has never been applied, as far as I am aware, in any court case or in any DOJ objection. It is simply too early to know how the courts or the Justice Department will apply it on a case-by-case basis, No. 1.

No. 2, remember, Section 2 is always present, so the worst-case scenarios that people describe or worry about will be protected against by virtue of Section 2. It is not possible to go back to a situation of 30 percent minority voters spread across every district in Alabama, given section 2 of the Act.

And third, the standard proposed in the bill to overturn *Georgia*, no "diminished ability to elect" itself has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters' interests. I don't know under a "no diminished ability to elect" standard if dropping the minority population from 60 percent to 55 percent is a violated, dropping it from 55 to 50 percent is a violation, or dropping it from 50 to 45 is. No "diminished ability to elect" is, in my view, a very rigid and very extreme overreaction to a decision which I believe is right on the facts, in *Georgia* v. *Ashcroft*. I am not sure if everybody agrees with me about that on this panel.

Senator KENNEDY. We are going to find out.

[Laughter.]

Mr. PILDES. But one question is whether *Georgia* is right on the facts, and a second and separate question is, whether the standard in the case is a troublesome standard and what to do in light of that?

Senator KENNEDY. And you do not believe that the pre-*Georgia* rule has the sufficient kind of flexibility to be able to deal with some of those issues?

Mr. PILDES. Well, if it did not permit the black-white legislative coalition and districting plan in Georgia, apparently not. And the Justice Department, remember, objected to that plan.

Senator KENNEDY. Professor Karlan?

Ms. KARLAN. Well, I think it is worth remembering one critical fact about *Georgia* v. *Ashcroft*, which is the Department of Justice got it right, because after the plan was put into effect, not only did one of the black legislators lose his seat, but a number of the black voters who were moved into districts where they were supposed to

have influence did in fact elect white Democrats, who turned around in the 2-weeks between the election and inauguration and became Republicans. Now, I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts.

The question about whether you can reduce the percentage of black or Latino voters in a district and still meet the retrogression standard is a red herring. Districts that were 80 percent after the 1970 round of redistricting are now 55 percent, and they are precleared consistently by the Department of Justice. So the ability-to-elect standard has always been a standard that works. And this idea of being locked in a model of the past, you know, to quote Faulkner, "The past is not dead, it's not even past." There are still people in the Georgia legislature who were found to have engaged in racist behavior by a Federal District Court in previous rounds of redistricting in Georgia. So the idea that we should start by looking at 2001, and ask how things are going there, seems to me deeply problematic.

Senator KENNEDY. Could you comment, Professor Karlan, about the concerns about over-coverage and under-coverage?

Ms. KARLAN. Let me give two answers to that question. One is about the law of the Voting Rights Act and the other is about the facts. In the law there is a bailout provision which has been available to jurisdictions since 1982, and jurisdictions that ought not be covered, but that are brought within the trigger, can get out.

On the other side there is what is called the pocket trigger, and I litigated one of the few cases that actually resulted in a pocket trigger. And that is when courts find pervasive intentional racial discrimination in jurisdictions that are not covered, they can order that those jurisdictions come under pre-clearance, and we actually did that in a part of Arkansas, which you heard from, I think, Professor Gaddie's testimony, is one of the worst States in the south because it wasn't brought within the Voting Rights Act in 1965.

As a factual matter, if you say, well, half of the examples of racial discrimination since 1982 occurred in covered jurisdictions and half occurred in non-covered jurisdictions, it is worth remembering the denominator there, which is, there are 9 fully covered States that are covered jurisdictions and there are 41 States that are not fully covered. So half of the discrimination is occurring in those 9 States. It suggests that there is actually more of a problem in the covered jurisdictions than in the non-covered ones.

Mr. PILDES. Senator Kennedy, can I just respond to at least that last point?

Senator KENNEDY. Yes.

Mr. PILDES. It seems to me that legally the right denominator would have to be the minority population in different jurisdictions. We are not going to have Voting Rights Act issues in Idaho, for example. So when we are comparing the covered and the non-covered parts of the country, the fact that 55 percent or so of African-Americans live in the south means that about half of African-Americans live in the south in covered areas, half do not. That is a very simple figure. And so the fact that the pattern shows about half of the problems are in covered States and half in non-covered States, does I think suggest something that is more general in the United

States. I think Professor Arrington's testimony went to exactly that point. You find racial polarization in Boston and Chicago, in Philadelphia, in Cicero. The cases of vote dilution under Section 2 are spread out across the country. It seems to me the right denominator has to be where the minority populations are, and how do those problems compare across different States that have similar minority populations? Number one.

Number 2. I am more worried than Professor Karlan is about the lack of evidence in the record about the differences between covered and non-covered States. I agree, the power of Congress in the area of voting rights is at its highest, but the Voting Rights Act in Section 5 is also an extremely unusual, indeed unique, provision, as you know, in Federal law. It singles out part of the country.

Now, the constitutional jurisprudence has changed greatly since the courts last looked at this singling out of one part of the country. And it seems to me it is one thing, with the Family Medical Leave Act and cases like *Hibbs*, to base national uniform law on evidence from a number of States, but not all the States. It seems to me, constitutionally, it is a very different question to base geographically selective national law, the only one we have, as far as I know, on evidence that does not today show that that targeting is congruent to the constitutional violations that are out there. That is what I am worried about with the evidence in the record so far.

Senator KENNEDY. I see others have a comment. And then I want to get into sort of this block voting.

But, Professor Arrington, did you want to comment?

Mr. ARRINGTON. Just that I wanted to point out that nobody says that racially polarized voting is in and of itself evidence of discrimination. The question is how that interacts with election procedures, with the traditions in the community, with a number of things, and so I think just to say that racially polarized voting exists everywhere and therefore there is no difference between the covered and uncovered jurisdictions, is simply not true.

That is all I wanted to add.

Senator KENNEDY. How do you distinguish this between other types of voting? I mean Italians vote for Italians, Greeks vote for Greeks, Irish vote for Irish, comment.

Mr. ARRINGTON. I don't distinguish it at all. I think it is exactly the same thing. The difference is that in some places that racially polarized voting has interacted with election procedures to create a situation in which minority voters do not have an opportunity to elect candidates of their choice. And I suspect that happened way back when to Irish voters when they were a minority in certain places. So I don't think it is different in that sense at all.

But we do have special obligations regarding race and the like because of the 15th Amendment.

Senator KENNEDY. Let me ask Anita Earls, doesn't the issue get at the deterrent effect of Section 5, and shouldn't we expect less discrimination in the covered States?

Ms. EARLS. Absolutely. Section 5 not only keeps there from being so much Section 2 litigation because it stops those changes from going into effect to begin with, but it also deters election officials

from enacting and putting in place discriminatory measures to being with.

But I would further suggest that the notion that the standards you have to meet is to show systematic differences between covered and non-covered jurisdictions is not the correct standard, and with all due respect, Professor Pildes is being very pessimistic about the evidence that is in the record before you, and in fact, what you have is evidence of sustained in transigence in the covered jurisdictions that you don't see in the non-covered jurisdictions.

So, for example, in North Carolina, we have recently a pattern of local governing bodies going back to at-large election systems, something that is not occurring in non-covered jurisdictions. So this pattern of continuing to try to either go back to discriminatory patterns or enact new discriminatory measures, is something that is unique to the covered jurisdictions.

Senator KENNEDY. Let me ask Professor Karlan, do you think that Section 2 is an adequate substitute for 5, and do you believe the presence of Section 2 makes it unnecessary for Congress to pass language clarifying the *Georgia* v. *Ashcroft*?

Ms. KARLAN. No, Senator Kennedy, I don't, for a reason that the Supreme Court got at as early as *South Carolina* v. *Katzenbach*, where there is that line that you read in your opening statement about shifting the burden of inertia to the perpetrators of discrimination and away from the victims.

I did a lot of Section 2 litigation in my prior life before I became an academic, and it is costly litigation. I would guess that this Committee is going to see in front of it most of the people in the country who do the litigation actually testifying. It is a very small bar of people who do Section 2 litigation and who have the expertise to do it.

When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on. What Section 5 does is it shifts that burden to the Federal Government, which is far better able to bear it than either minority citizens in poor communities or the very small civil rights bar. So Section 2 is not an adequate substitute for Section 5 because it allows the changes to go into effect, and that means you can go through several election cycles while the litigation is going on where the discriminatory change is in effect. It requires the minority community to find a lawyer who will bring these cases. And let me tell you, from having litigated the cases and having litigated the attorneys' fees issues after the cases, this is not a way of getting rich. It is not even a way of making a living. And it requires that huge amounts of resources in the litigation process be used, both by the jurisdictions and by the individual citizens. So I don't think of it as an adequate substitute in any way.

Mr. PILDES. Senator Kennedy, I want to just say I agree with all of that. The point, though, is that *Georgia* v. *Ashcroft* is about redistricting, and statewide redistricting, as least in that case, so that is the one area in which there is litigation all over the country, not just under the Voting Rights Act, but in partisan gerrymandering and other cases too. This is not the low visibility issue of moving polling places or changing voting systems in some county. So while it is generally true that there is a very important dif-

ference between Section 2 and Section 5, the question that is relevant here, I think, with respect to Georgia, is whether that difference is significant enough that the south, the covered States, should not be able to make the same deals in the redistricting process that the north can where there are significant minority voting populations in the north. That is, I think, the focus.

Ms. KARLAN. But it is not just—

Mr. PILDES. Let me just respond to one or two other things. I agree also with Anita Earls, that if there are areas we can identify of real sustained intransigence and the like, absolutely those areas should be covered by Section 5. I simply am saying that in the record, where there is some comparison, it suggests more similarity than difference, and we ought to build a record that actually shows that the coverage that we end up with is congruent to what the record shows about where the violations are and where they are not.

The final thing I want to say just so I am not misunderstood—and I consider it important—I am not in any way saying the problems of race discrimination in the voting area are in the past. I do not mean to say that. What I mean to say is the Voting Rights Act in Section 5 was created in an era where Congress didn't believe it had power to regulate voting rights as such, but that it had to act under the 14th or 15th Amendments, particularly to deal with racial discrimination in voting.

Congress'ss powers now are clearly much broader, not only under Article I, Section 4, as Professor Karlan mentioned, but I believe, given that the Supreme Court has held that the right to vote is a fundamental right in all general elections, Federal, State and local, for general governmental bodies, I believe the Congress may well have a general power to enforce the right to vote, not just in Federal elections, but in all elections for political bodies that are exercising general governmental powers.

So what I mean is I want us not to stay locked in the mindset of the past, in which we think we can only deal with race discrimination in voting at the national level. We can deal with the right to vote as such at the national level, and HAVA and the NVRA reflect that.

Senator KENNEDY. Let me just ask you. Of course, we did, didn't we, in Congress, specifically on the right to vote on the poll tax, didn't we eliminate for the poll tax, which was an individual issue?

Mr. PILDES. And the literacy test.

Senator KENNEDY. And the literacy test.

Mr. PILDES. Yes, absolutely.

Senator KENNEDY. I want to give Professor Karlan must a response, and then I would like to ask Professor Gaddie and maybe Arrington, if they would talk a little bit about the Hispanic, you know, the disparity in terms of the registration, where we are in terms of that, and Professor Earls, if you have any kind of comment. And then we are going to be voting shortly, but this has been enormously interesting, and helpful.

Ms. KARLAN. The first point, Senator Kennedy, is that the *Georgia* v. *Ashcroft* standard doesn't just apply to statewide partisan redistricting, but it applies to all cases, and that is what worries me, because so much of the discrimination that goes on is under the

radar screen of the national political parties or the national groups. So when a school board comes in and says, "It's true we have some majority black districts right now, but we think black people would be better off, they'd have more influence if they were 30 percent of each of the districts, rather than actually electing anybody to the school board, than charging it against the *Ashcroft* standard," fine, States can pick among theories of representation.

And I think it is important to understand this is not mostly a bill about Congressional redistricting or a bill about State legislative redistricting. It is about what goes on at the local level, and that is a really critical place to think.

The second thing is I think all of us on the panel here would support Congress being more aggressive in protecting the right of every American to register, to cast a ballot and to have that ballot counted, but there are distinctive problems in the south with regard to the voting rights of blacks and of Latinos, which will not be dealt with solely by allowing people to register and vote. That is part of what you found out in the move from 1965 to 1970, which was, you know, in the 1965 Voting Rights Act you have provided for Federal registrars. They went down to the south and in 2 years they registered more black people in the south than had been registered in the previous hundred years. A fabulous achievement. And what did we see? Almost immediately, jurisdictions started changing the electoral rules to make sure that the blacks could register and vote and even have their ballots counted. Those ballots didn't count for very much. Their votes were diluted.

So I think it is important to recognize that there is both a general voting rights problem and there is a specific voting rights problem that deals with the issues of blacks and Latinos in the covered jurisdictions.

Mr. GADDIE. Senator Kennedy, I am learning today that I need to be a bit more assertive. I am used to having lawyers lead my questioning.

[Laughter.]

Mr. GADDIE. I can speak with firsthand experience about the application of the Ashcroft standard in pre-clearance, having the dubious distinction of having been involved in the Texas redistricting. At the time the Texas—if I may have a moment?

Senator KENNEDY. Yes.

Mr. GADDIE. As the Texas redistricting was going on, the *Ashcroft* decision came down. And I went to Glen Abbott, the Attorney General of Texas, went to his outside counsel, and said, "I have a strong suspicion that with this decision you'll see DOJ possibly applying a different retrogression standard, a different kind of baseline." And indeed what happened, both at trial, in front of Judge Higginbotham, down in the Fifth Circuit, and also in the pre-clearance process, the argument was made to include any district that appeared to look like a coalition district as part of the minority baseline in the initial assessment by the professional DOJ staff. There was disagreement between the DOJ staff and the political staff regarding which position should prevail. The political position prevailed.

When we get into this issue of baselining retrogression, the challenge for Professor Arrington and I is how do we treat these coali-

tion districts? How do we treat a 30 percent minority district where there is a 1 in 4 chance the minority voter gets their outcome of interest versus a 65 percent district where the outcome is certain. At the end of the day it is going to be politics that will guide how that standard is applied by the DOJ because they will apply their own theory of representation independent of the theory that the State chooses to apply.

Mr. ARRINGTON. I think you asked about the question of Latinos and Asians too?

Senator KENNEDY. Please.

Mr. ARRINGTON. Often, particularly in places where the African-American community has been very well organized for a long time, like some places in North Carolina, their rate of voting and turning out is pretty good, often not quite up to the same as whites, but pretty good. But the disparity between Latinos and Anglos is generally much greater. And in places where you have a mixed population, where you have Anglos and Blacks and Hispanics, the general pattern is that Anglos turn out and register at the highest rate, Blacks are close to that in many areas, and then Latinos far, far below that. So you have a much more serious problem there.

What that means in terms of districting is that if you want to create a district in which Latinos have a reasonable opportunity to elect a candidate of their choice, they have to be concentrated much more in that district than would black citizens. Often in States like North Carolina, for example, you can create a district in which African-Americans have a reasonable opportunity to win with less than 50 percent black population. That is not true generally for Latinos. It is a very different situation. It is a much more severely difficult situation to solve.

Mr. GADDIE. And the other challenge is that we can't count on homogeneity within the Latino population. There is tremendous variation of participation across Latino populations, even within a particular Latino ethnic group within a State. You look at South Texas, you see high rates of Latino participation in most of the South Valley, outside of the sweep between El Paso and San Antonio; very low Latino participation, relatively speaking, in Metro Dallas and Metro Houston. So, it becomes extremely contextual with regard to Latino participation throughout the United States.

Senator KENNEDY. Professor Earls?

Ms. EARLS. I would just make one final point about the record before you.

Senator KENNEDY. Yes.

Ms. EARLS. There are so many examples of recent discriminatory conduct, it is hard to summarize them in the time we have, but just two quick things.

Recently, 125,000 voters in predominantly African-American precincts, that is, targeting black voters in North Carolina, were sent postcards erroneously telling them that they could not vote on election day if they had moved, causing great confusion, discouraging them from voting.

Another example, in 2004, the sheriff of Alamance County in North Carolina, took a list of registered voters in his county that had Spanish surnames, and said publicly that he would send deputies to the homes of each of those voters to verify that they were

citizens. That type of discouraging of minority voting—those people are all registered, but they are still targeted by these types of campaigns. That is the atmosphere that we are dealing with, and those types of examples are found in numerous other States.

Senator KENNEDY. Let me ask you—and others can make a brief comment—in the *Bossier II* case, the Supreme Court ruled that Section 5 prohibits the voting changes only if they worsen or intend to worsen the position of minorities. In other words, under Section 5, voting change may not make minorities worse off, for instance, if they are already completely shut out of power, it is hard for a change to put them in a worse position, but it may still dilute their voting power, intentionally discriminate. Would you agree that under the *Bossier II* standard the Department of Justice and District Court for the District of Columbia must pre-clear even an illegal or an unconstitutional voting change so long as there is no backsliding in minority voting power? What is your view on the case?

Ms. EARLS. Yes, that is the impact of *Bossier II*. It is essentially a discrimination dividend. As long as you have excluded blacks or other minorities effectively, you can keep excluding them, and it has—it is a significant impact on the ability of—on the Section 5 pre-clearance process to truly keep discriminatory practices from being put in place.

Senator KENNEDY. OK. We are voting on a judge just in a few minutes, and Senator Feingold, I believe, wanted to come over. So we will have a brief recess, and then if it turns out that he is not going to, we will recess.

This has been enormously interesting, and we will ask the staffs to submit some questions. I was looking to see whether they had some questions because this is a great panel here. So there it is, so we will have a brief recess.

We thank you. Let me just ask you, if there are some areas—we gave you very short time and you have got some good written statements. All the written statements will be made a part of the record, and my colleagues, Senator Specter's, Senator Leahy's statements. They, I believe, passed out the House bill 33–1 last week in the markup.

But as a result of these questions, if you want to provide some additional information, we would welcome that, and we will ask our—I do not know what the rule of the Chair was—two, 3 days for questions? Seven. So we will recess at the call of the Chair.

Thank you very much.

[Recess.]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD [presiding]. I am going to reconvene the hearing. I want to thank the Chairman for allowing me to continue and perhaps conclude the hearing after I have asked some questions, unless another colleague comes. Thank you to the panel. I am sorry that I was not able to hear your testimony.

First, I want to thank you for this important hearing on Section 5, the pre-clearance provision of the Voting Rights Act. Section 5 rightfully imposed heightened oversight on some of those jurisdic-

tions that were the very worst actors in discriminatory voting practices.

The advances in minority votes and representation in areas covered by Section 5 in the past 40 years have been profound. Although we have made significant advances as a result of the Voting Rights Act, there is still more work to do. The goal of the Voting Rights Act is not to reduce discriminatory voting practices, but to eradicate them entirely.

Section 5 has been instrumental in bringing about the dramatic improvements in voting rights and representation for minorities in covered areas. Keeping it in place with a reasonable bail-out provision is the best way to be sure that we don't lose the progress that has taken place.

Let me just say in response to some comments that were made at last week's hearing that all Members of Congress, regardless of whether they represent a covered or non-covered jurisdiction, and regardless of their political affiliation, have an interest in ensuring the continued effectiveness of the Voting Rights Act. As Federal legislators, we have a responsibility to address and eliminate discrimination wherever it is found. The integrity of our elections and our very democracy depends on it.

Now, let me turn to Professor Arrington. Can you talk a little bit about racially polarized voting in Section 5-covered jurisdictions? Do you have any recent evidence of the concern?

Mr. ARRINGTON. Senator Feingold, I have attached to my written testimony the decision of both the circuit court and also the district court on the Charleston County Commission case, and I think that is an interesting one because it shows the interaction of Section 2 and Section 5.

The United States brought a Section 2 action against the county council in Charleston County, and I found there the most extreme polarized voting I think I have ever seen, and I have been doing this work since 1985. So there was no evidence of any reduction in polarized voting, at least in Charleston.

The interesting thing to me was that the judge found, in accordance with my testimony, that there was legally and substantively polarized voting; that because of that and the at-large elections that they had there, African-Americans did not have a reasonable opportunity to elect candidates of their choice. But he also found that in the school board where the elections were non-partisan and, as I remember, were not in numbered posts, African-Americans did have a pretty good chance of winning.

Right after the judge's decision, the State legislature changed the school board so it would look like the county commission elections that the judge had just said violated Section 2. In turn, of course, the Justice Department would not pre-clear that change because it was clear from the judge's decision that that change was in violation of Section 2 and Section 5.

The racially polarized voting in the school board elections was only slightly less than the racially polarized voting in the county commission. They were extreme. We are talking about 90 percent of the blacks typically voting for black candidates and some similar number of whites voting for white candidates.

Senator FEINGOLD. Well, thank you, Professor, for that specific answer. I appreciate it.

Professor Karlan, I wondered if you could expand a bit on the point I understand you made earlier about federalism and the distinctive power of Congress in the voting rights area. Does the *Boerne* line of cases apply differently when we are talking about voting rights?

Ms. KARLAN. Yes, Senator Feingold, it does apply differently. The major concern in the *Boerne* line of cases was the sovereign immunity of the States to lawsuits brought by individuals against the State. Of course, that specific part of the concern in the *Boerne* line of cases, in cases like *Kimel* or *Garrett* or the *Florida Prepaid* cases, is totally absent here because Section 5 is not about lawsuits by private individuals against States for damages at all.

Indeed, the only place where private individuals are involved is either as defendant intervenors where the State has brought a lawsuit and has waived any sovereignty claim or in cases trying to force States actually just to comply with the obligation to seek preclearance.

Now, that being said, there are a couple of other things about the *Boerne* line of cases that I think are very helpful in explaining why I think Congress's power here is, if anything, at its absolute peak. One of them is even the post-*Boerne* cases all cite the Voting Rights Act of 1965 as the example of a statute that meets the *Boerne* test of being congruent and proportional.

That is true as late as *Lopez* v. *Monterey County*, the California partially covered State case, where Justice O'Connor wrote for the Court that the Voting Rights Act by its nature intrudes on State sovereignty, but the 15th Amendment permits that intrusion. Indeed, I think because the enforcement clauses of both the 14th and 15th Amendments tell Congress to enforce that, it almost demands that Congress intrude on State sovereignty when States are denying blacks or Latinos the right to vote.

Now, on top of that, as I suggested in my testimony this morning, the one concrete suggestion I would have for the Committee in the drafting of Section 5 is to make it clear that you are not just relying on the enforcement clauses of Section 5 of the 14th Amendment and Section 2 of the 15th Amendment, but that you are also relying on Article I, Section 4, of the Constitution, which is the so-called Time, Place and Manner, or Election Clause.

That is the clause that says, in the first instance, States decide how to conduct the time, place and manner of the elections for the House of Representatives, but Congress may override. And the Supreme Court has made clear since 1917 at the latest that that means Congress can override any determinations the States made about that.

In the *Foster* v. *Love* case, the Supreme Court says—and let me just quote a little bit here—"The clause gives Congress comprehensive authority to regulate the details of elections, including the power to impose the numerous requirements as to procedures and safeguards which experience suggests shows are necessary to enforce the fundamental right involved."

And in other cases, they have said that includes registration, day of election protection, protection against fraud. And since 1842, as

you probably know, Congress has required that States elect members of the House of Representatives by district. That is not something the Constitution requires. The Congress requires it, and that overrides.

So if a State said tomorrow, well, we want to elect our members of the House of Representatives at large, the answer would be you can't. There is no Tenth Amendment reserved power for the States at all when it comes to the regulation of Federal elections, and much of what the Voting Rights Act does is to regulate people's participation in Federal elections. And as Senator Kennedy was saying when he was here earlier, that includes mixed elections. So if you have any Federal candidate on the ballot, it counts as a Federal election for Article I, Section 4, purposes.

Senator FEINGOLD. Thank you very much, Professor.

Finally, Ms. Earls, what would happen in covered jurisdictions in the absence of Section 5?

Ms. EARLS. I think that actually the North Carolina experience is very instructive on that question because 40 of the State's counties are covered. There are 100 counties in the State as a whole, so we really have a basis for comparison. There are at least three examples I can give of current things that are happening in non-covered counties that are protected in the covered counties.

For example, several counties non-covered under Section 5 sued under Section 2, required by court order to put in place single and redistrict systems, are now passing laws to go back to at-large election systems. Under Section 5, that would be retrogression and it is prohibited. It is not happening in the covered counties.

Another example is the deterrent effect of Section 5. In preparation for the report that we prepared on North Carolina and Virginia, we had hearings and local residents came and talked about how in the covered counties local officials will consult with them if they want to move a polling place or when they are enacting new districting plans. That doesn't happen in the non-covered counties. So there is real evidence of a deterrent effect that currently means that minority voters have a greater involvement in decisions about election procedures as they are being made.

A third example is the whole question of annexations. We are dealing in North Carolina with a number of traditionally minority communities that are left out of town boundaries. They don't get public services and they don't have the right to vote.

In Rocky Mount, a covered city, in the late 1990's, that city annexed Battleboro, a predominately black neighborhood, because under Section 5 they couldn't continue to annex white areas and not annex that black neighborhood. In Pinehurst, not a covered jurisdiction, there are four or five African-American communities that are outside the town boundaries that still don't have water and sewer and still can't vote for local officials. So there is really a difference in the experiences of covered versus non-covered counties.

I would finally just say the impact of Section 5 being removed—in North Carolina, we have under cases decided in the past few years in the State courts a whole-county provision that requires legislative districts to be drawn from whole counties. If Section 5 is removed, we are at risk of losing from 5 to 11 of our current leg-

islative districts that elect candidates of choice of black voters. So we really will see a huge impact if Section 5 is lost.

Senator FEINGOLD. I thank you for all of your answers. I don't think there is any more important subject than the subject of voting rights, so we thank you.

I understand it is appropriate for me to adjourn the hearing. Thank you very much.

[Whereupon, at 11:12 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Written Responses to Members of the United States Senate

Committee on the Judiciary

Regarding

"The Continuing Need for Section 5 Pre-Clearance"

Following the Hearing 16 May 2006

Theodore S. Arrington, Ph.D.
Professor and Chair
Department of Political Science
University of North Carolina at Charlotte

1 June 2006

The answers I can give to this series of questions are largely interrelated. I will try to avoid repetition, while answering fully. Some aspects of each answer are necessarily related to the answers given to previous questions. When I have not addressed a question it is because I do not have the expertise or the experience to deal with the topic. I am reluctant to testify about matters that I have not studied deeply.

From Senator Cornyn:

1. What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.

The inability of minority citizens to participate equally in the political process and to be equally able to elect representatives of their choice is related to racially or ethically polarized voting (RPV). However, RPV is a problem only when it interacts with electoral arrangements in such a fashion as to prevent minority citizens from having a reasonable opportunity to elect representatives of their choice, regardless of whether their choice is a member of their racial or ethnic group. If minority citizens do not have such reasonable opportunity, we say there is vote dilution. They are not denied the vote, but their vote doesn't count because it is diluted. At-large voting, numbered place or residency requirements, majority vote rules, or apportionments that "crack" minority populations are examples of the kinds of arrangements that can produce minority vote dilution where there is RPV.

Since RPV is widespread throughout the United States, we need to look for the incidence of the use of voting arrangements that interact with RPV to produce vote dilution. We should consider whether the current Section 5 coverage is useful to identify the

places where the use of such devices are most likely to be proposed. Concrete comparative statistics are not possible for two reasons. First, the areas covered by Section 5 have been significantly deterred from considering such devices because they know that such changes would not be pre-cleared. There are other instances where such changes were proposed and were not pre-cleared. This makes the covered jurisdiction much "cleaner" than they would have been without Section 5 coverage. Second, each jurisdiction is distinct and must be examined in light of the totality of the circumstances "on the ground." This is the way the courts and the Justice Department approach both Section 2 and Section 5 cases. The examination of specific cases cannot be dismissed as mere anecdotes. Social scientists sometimes joke that anecdote is the singular of data. Taken together, the findings of vote dilution in Section 5 covered jurisdictions by courts and the Justice Department provide a compelling basis for reauthorizing Section 5 in those jurisdictions.

I believe that the covered jurisdictions in the South are systematically different from the uncovered jurisdictions in the North and Midwest because of their different political histories. The North and Midwest experienced a long period of in-migration during which the political arrangements were modified to accommodate intense ethnic politics. Districts were drawn to reflect ethnic interests, and the balanced slate was invented to take account of ethnic and racial diversity for executive offices. These accommodations were by no means perfect. But the history of ethnic accommodation still echoes in these regions and can often be used to provide minority representation in the face of RPV. For example, single-member districts are the rule in these regions, and districting to take account of racial or ethnic concentrations is the tradition.

The European migrants of previous centuries avoided the South, and there was no similar history of accommodation. The major migration pattern in the South until after World War II was the out-migration of blacks. The political history in this region was one of efforts to prevent racial accommodation. This history still echoes in this region, as my experience indicates, even though things have changed greatly because of three factors: in-migration since World War II from the North and Midwest, return of blacks, and the VRA.

My CV (which was attached to my written testimony) indicates the broad range of my expert testimony in the South and in a few jurisdictions that are not covered by Section 5 such as Illinois, New York (including boroughs of the City that are covered and other parts of the State which are not), Montana, Connecticut, Maryland, and Counties not covered in Florida and North Carolina. Let me cite some examples of jurisdictions that should absolutely remain covered as indicated by their recent behavior.

The District Court's decision in *United States v. Charleston County Council* (2001) and the Circuit Court affirmation of that decision were attached to my original testimony. One interesting thing about this case is the extreme RPV that still exists in that county. The RPV existed in all kinds of elections in Charleston. But it was the interaction of RPV with the particular arrangement for election of County Council that deprived black citizens of their right to an equal opportunity to elect representatives to that body. The system was a partisan, countywide, numbered post system. My testimony and the Court's opinion clearly stated that blacks had a much greater (though not necessarily equal) opportunity to elect representatives to the Charleston School Board because it was structured differently. Soon after the Court's decision was final, the South Carolina legis-

lature passed a bill to restructure the Charleston School Board to be an exact replica of the old County Council structure that the Court had just declared was a violation of the VRA. Of course, the Attorney General refused to pre-clear. I cannot think of a clearer indication that Section 5 is needed.

In redistricting after the 2000 US Census, the Louisiana Legislature had to deal with population loss in the New Orleans region. This loss dictated that the City area would have one less State House district. The legislature chose to reduce the number of black districts and maintain the same number of white districts. When I say "black district" I merely mean a district in which African-American citizens have a reasonable opportunity to elect a representative of their choice. A "white district" simply means a district in which no such reasonable opportunity for black voters exists. The US Census for 2000 indicated that the loss of population in New Orleans was in the white population. Indeed, the number of blacks in the City had increased. I drew several district plans for the region that had lower population deviations, had more compact districts, and treated incumbents equally as well as the districts proposed by the State. Yet I maintained the same number of black districts and reduced the number of white districts by one. How could anyone justify reducing opportunities for blacks when it was the white population that was leaving the area? Of course, Louisiana could not justify their arrangement and the Attorney General did not pre-clear their original proposal. They finally adopted something similar to my district plans.

My experience in uncovered jurisdictions, especially in the North, has been different to a great extent. I have found a willingness to accommodate minority populations as part of the general pattern of representation, even though there is no Section 5 "club"

forcing immediate compliance with the VRA. In statewide redistricting in Connecticut, New York, and Illinois I found that provisions for representation for minorities was not considered to be anything out of the ordinary. Various interests fought over details, but within the context of understood needs for representation. In New York the battles were over how to provide representation for both Latinos and blacks. In Illinois the disputes had to do with arrangements that did or did not provide for minority representation separate from the Democratic Party Machine. When the Machine agreed not to run Anglo candidates in minority districts, the Court easily approved the district plan proposed by the State. I do not claim that the inhabitants of uncovered jurisdictions are racial liberals. I only claim that in my experience there is a lesser chance of such jurisdictions trying to change voting arrangements in such a fashion as to dilute minority votes in a context of RPV.

From Senator Coburn:

7. In the Unofficial Transcript of the hearing on May 16, 2006, pg. 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in *Georgia v. Ashcroft*, that the Department of Justice "got it right" because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?

I agree with Professor Karlan. The African-Americans in those districts will have no (or at least vanishingly little) influence on the Republican representatives for two reasons. First, as I am sure the Senator knows, every electoral politician divides his or her constituency into three groups: Sinners, saints, and saveables. Republican politicians, especially in Georgia, must know from public surveys, private surveys for campaigns and

other public information that fewer than 10% of black voters vote for Republican candidates in general and a similar percentage might be considered independent voters (saveables). There is very little that a Republican candidate can do to get any appreciable percentage of the black vote other than to "arrange" to have an avowed racist nominated by the Democrats.

Second, any attempt by Republican politicians to court the black vote would suffer from a backlash from those who still harbor the racial animosity of the past and regularly vote Republican. It is doubtful that such voters would vote for a Democratic candidate, but they might be discouraged from turning out to vote especially in an off-year election. Attempts to bridge that gap between these "core" Republican voters and blacks, who are strongly opposed to Republicans, would be doomed from the start.

These two Georgia representatives, who have suddenly become Republicans, might take actions that help their black constituents, or at least oppose actions that are clearly racist. If they take such actions, however, it is because they think it is the right thing to do, not because black voters in their districts have influenced them. The best I can say about "influence" in these districts is that the representatives might be careful not to take the lead in actions that offend black voters in order to discourage black mobilization. While this is a kind of negative influence, it is not what the majority opinion of the US Supreme Court had in mind in *Georgia v. Ashcroft.*

From Senators Kennedy and Leahy:

1. Describe how racially polarized voting has changed over time in the South. In your response, explain how these changes have affected the demographic composition of districts necessary to provide minority voters with an equal opportunity to elect candidates of their choice in the following years: 1965; 1982, and 2006.

In the period since 1965 there has been enormous progress in registering African-American voters and getting them to the polls on election day. There has been little progress in reducing racially polarized voting (RPV). In a sense it has increased, since there was no polarized voting in some areas before 1965 because there were few or no black voters. In the 1980s there was a myth that a "majority-minority" district necessarily required a 65% black majority. The idea was that anything less than that did not provide minority voters with a reasonable opportunity to elect representatives of their choice even if their choice was a candidate of color because RPV was so extreme. This was never a "rule," as there were jurisdictions where careful analysis by experts would demonstrate that less or more than this level of minority concentration was necessary for a district to "perform."

The lack of change in RPV in some areas can be seen in my analysis of New Orleans for *The Louisiana House of Representatives v. Ashcroft.* In that Section 5 case (see some details on this case above) I had to determine the level of black concentration necessary to create a minority opportunity district. Because of the unusual two-stage open election process in Louisiana and the low rate of white crossover voting in New Orleans, that level is still above 60%, as I demonstrated in my declaration for the Justice Department in that case. On the other hand, in helping the Attorney General with pre-clearance of the North Carolina General Assembly Districts after the 2000 census, I found that a much lower threshold of minority concentration was necessary to form a minority opportunity district. Indeed the black turnout and voter cohesion is so good and the white crossover for black Democratic nominees so high that less than a majority of registered voters is required to permit an equal opportunity to elect a black candidate of choice.

Generally a higher threshold is necessary when one is dealing with Latinos or Indians, whose levels of registration and turnout are generally far lower than for blacks. For example, in *United States of American v. Blaine County, Montana* I found that the concentration of Indians had to be very high (well above 50%) in order to form a district that would perform. I found a similar pattern in New York City for the Latino districts there, but not for the black districts.

In short, there has been an increase in white crossover vote in some places, especially for minority candidates who can win the Democratic nomination. In other places the crossover is still minimal. If minority candidates are better off today, it is mostly because they have increased their levels of registration and turnout. But the degree of polarization in some areas covered by Section 5 remains as high as ever. This is certainly true in South Carolina and Louisiana.

2. How is racially polarized voting addressed by Section 5? What impact does the *Georgia v. Ashcroft* standard have on the ability of Section 5 to address racially polarized voting?

Section 5 is the first line of defense in preventing changes in election procedures that would interact with racially polarized voting (RPV) to prevent minority citizens from being equally able to elect representatives of their choice. See my analysis above on this subject.

Georgia v. Ashcroft could have a strongly negative impact on the ability of the Justice Department and the D.C. District Court to prevent retrogressions. In that case the narrow 5 to 4 majority seemed to support the notion that a jurisdiction could satisfy §5 (and perhaps by implication §2) by substituting what are called "influence districts" to provide "substantive representation" instead of creating or maintaining districts in which

minority voters have a reasonable opportunity to elect representatives of their choice. There are a number of problems with this. First, there are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in *Shaw v. Reno* and its progeny, we are left with no clear guidelines for drawing districts; no way to know how to comply with the Court's mandate. This is quite unlike the one-person-one-vote standard, which can be mathematically determined as the districts are being drawn. At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide "influence"? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district in providing equal participation?

Second, to the extent that I can imagine what measures would be used to determine whether substantive representation or influence has been enhanced to prevent retrogression, these measures amount to simply helping Democratic Party candidates. In virtually every state legislature, in the Congress, and in many local jurisdictions, minority representatives – especially African Americans – are strongly allied with the Democratic Party. Helping Democratic Party candidates would be argued to be equivalent to increasing minority voter influence and helping minority substantive representation. In other words, influence districts, if seen as a replacement for opportunities for minority voters to elect representatives of their choice, would become simply a rationale for creating Democratic Party gerrymanders. This takes us back to the situation before *Gingles* when minority voters did not participate equally in the political process and Republican voters were underrepresented.

Substantive representation is often contrasted with what is called "descriptive representation," which means that only a black person can represent African-American voters, only women can represent female voters, and so forth. Quite frankly, the concept of descriptive representation is a straw man. The Voting Rights Act does not require the election of minorities, and I know of no competent expert or voting rights lawyer who has argued that it does. But I believe that the Voting Rights Act should require that minority voters have an equal opportunity to elect representatives of their choice, regardless of their race or ethnicity. The fact derived from extensive analysis of voting patterns shows that minority voters, like the rest of us, usually prefer candidates who are like themselves in race, ethnicity, and partisanship. This is not descriptive representation, it is just giving minority voters the same opportunity that Anglo voters have to elect their choice. If minority voters are restricted to choosing among Anglo candidates, they cannot be said to be participating equally in the political process. Experts have developed procedures for determining whether a district offers minority voters a reasonable opportunity to elect representatives of their choice, and this can be known as the districts are drawn. The reauthorization of the Voting Rights Act should make it clear that influence districts and substantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.

3. Can politics be separated from race in examining evidence of polarized voting? Why or why not? Do you have specific examples that support your answer from cases in which you have been retained as an expert witness?

Race and politics have always been linked in American politics. This is our history, we cannot run from it and expect to formulate just policy in the area of election law. But I think your question really asks whether partisanship and race can be separated.

No, I do not believe that partisanship and race can be separated in any meaningful way. First, race and partisanship are so closely intertwined in many jurisdictions that there is no way to separate them in statistical analysis. In technical terms, there is the problem of multicollinearity. Second, they are intertwined in the minds of voters. Black citizens are strongly allied with the Democratic Party, and Latinos somewhat less so. The prevalence of racially (and ethnically) polarized voting (RPV) in partisan general elections is a clear indication that some white (or Anglo) voters are "polarized" or driven to the Republican Party, perhaps in part because they identify the G.O.P. with their interests seen to be in conflict with the interests of minority citizens. This was evident in my analysis in the Charleston County Council case (see discussion above). The degree of racial polarization was greater in partisan Council contests than in nonpartisan School Board elections held at the same time. Party and race complimented or reinforced each other when the party labels were on the ballot.

In my analysis of New Orleans elections I found that the two-stage election process with party labels attached to candidates names at both stages served to hinder the election of minority candidates. On the other hand, in closed primary states, such as North Carolina, blacks can form a majority within the Democratic electorate, obtain the Democratic nomination, and count on a somewhat larger crossover white vote from "yellow dog Democrats." This often enables them to form an effective voting majority in districts in which they are not a majority of the voters. These examples show that the way in which the election is structured in terms of partisanship interacts with RPV to dilute or to enhance the vote of minority citizens. This is why jurisdiction specific analysis is always required.

4. Kennedy: What can we infer from the fact that African American registration and turn-out numbers are similar in covered and non-covered jurisdictions? Does this mean that the VRA has done its job? Leahy: Professor Gaddie testified about his report. Have you reviewed that report and, if so, do you believe it includes all relevant evidence? Does his comparison of covered jurisdictions and non-covered jurisdictions take into account the widely recognized deterrent effect of Section 5?

The data on registration and turnout rates for African-Americans indicates that the VRA has accomplished miracles throughout the country, but especially in the South where black voting was largely or totally suppressed prior to 1965. The progress among Latinos, Indians, and other minority groups is not as great. These other racial and language minorities still lag behind Anglos in voter participation in many areas. In my work in Montana I found that Indian turnout was a mere fraction of that of their Anglo neighbors. I found similar problems with turnout among Latinos in New York City (in Section 5 covered jurisdictions there). Even when you take citizen voting age population into account, these other groups are seriously hampered in their attempts to mobilize eligible citizens to vote.

But the VRA is about more than just the mere ability to cast a vote. The Congress has always recognized that vote dilution can be a problem. The vote must be counted and must count. This job is far from over. Both Section 5 and Section 2 are very much needed to prevent or to remedy vote dilution for all kind of minority voters. My discussion above should demonstrate the continued necessity for both parts of the VRA.

In my analysis (above) I have indicated why comparisons of registration and turnout rates between covered and uncovered jurisdictions are not a reliable indicator of whether Section 5 is still needed. Nor are such comparisons a reliable indicator of whether the "trigger" needs to be revised. Dr. Gaddie's data is a good indicator of the

progress we have made in mobilizing black citizens in the covered jurisdictions. But it does not address the lagging turnout of other minorities nor does it deal with the question of vote dilution. In my discussion above, I addressed the deterrent effect and the way in which it makes such comparisons irrelevant.

From Senator Kohl:

1. We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division testified last week that "our work is never complete" with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?

In my discussion above, I think I make clear that the VRA is still needed, and definitely needs to be extended.

2. Some argue that the reason African Americans and Latinos are underrepresented in elective office in the South and Southwest has more to do with partisan politics than race. Based on your research in this area, is that right?

I address some aspects of the partisanship question above. But I think I can address this question more directly here. In doing so, let me emphasize that I am not lecturing the Committee on what the law is. I am not lawyer and many of you are. Instead, let me speak as a political scientist about what I think the law should be. After all, the Congress is making the law and should be concerned with what would be simple justice in this area.

There is no question that Latinos are mostly allied with the Democratic Party, although not as much so as African-Americans. There are those who argue that the voting rights of minorities should not be protected if they are part of the Democratic coalition.

Their argument runs this way: Minority voters prefer Democratic candidates; this jurisdiction only elects Republicans; therefore, there is no racial problem here, it all just partisanship. There are several problems with this analysis. First, we frequently find that nonpartisan elections are also racially polarized, and sometimes the RPV is greater for nonpartisan than for partisan offices. When it is possible to control statistically for partisanship, there is a residual ethnic or racial effect in the voting. Second, the argument essentially denies minority voters an equal opportunity to elect representatives of their choice because of the nature of that choice. The argument is that minority voters could elect their choice, if they would only choose Republicans. Third, the argument is based on the idea that a *de facto* partisan gerrymander is a justification for laying the VRA aside.

To illustrate the third point, I return again to the Charleston County Council case. In recent years the Council had been 100% Republican, although Democratic candidates regularly received more then 40% of the votes in all kinds of elections in Charleston County. The countywide numbered post arrangement was, therefore, a *de facto* Republican gerrymander. As to the legal question of whether at-large elections could be considered an illegal gerrymander, I refer the Senator to *Republican Party of North Carolina v. Hunt* (CA No. 88-263-CIV-5, E.D.N.C., 1996) in which the court found that statewide election of superior court judges in North Carolina was designed to and had the effect of being an illegal partisan gerrymander, because Republican candidates for judge could have won election in many judicial districts across the state. I was the Republican Party's expert in that case, which is to my knowledge, the only successful partisan gerrymandering case in American history, and certainly the only successful case meeting the rigors of the *Davis v. Bandemer* (1986) standard.

Since all the candidates supported by black voters in Charleston were Democrats, they were all defeated for County Council. A black Republican had been elected several times to the Council, but he was never a candidate of choice of black voters. Defendant's expert, Dr. Ronald Weber, argued that the system was not a violation of the VRA. He maintained that the loss of election by minority-supported candidates was the result of partisanship not racial bias. The district court and the circuit court saw the case as I did. Countywide numbered post elections for County Council had the effect of preventing minority voters from having an equal opportunity to elect representatives of their choice. I would add that it would be a strange legal situation if a partisan gerrymander were to be considered justification for racial discrimination.

The proof could be stated another way. If the partisan aspect of the Charleston County Council elections were changed but the countywide numbered post provisions remained in place, the black candidates would still have been usually defeated, as was clear from comparisons of the County Council elections with the nonpartisan Countywide School Board elections. Black preferred candidates had been more successful in elections for School Board, but were still usually defeated by white bloc voting. But the County Council members could be elected from districts with a partisan ballot and black voters would then have an equal opportunity to elect representatives of their choice. This proved that the partisan aspect of the election system was not the problem.

If partisanship were considered a justification for vote dilution, the situation would be illogical. This result would say that racially polarized voting (RPV) in Democratic primaries and nonpartisan elections that usually result in the defeat of the choice of minority voters could be a violation of the VRA. But RPV that usually results in the de-

feat of the choice of minority voters in partisan general elections is not a violation of the VRA. It creates a "catch-22." If the voting is not polarized in partisan general elections, then there is no violation of the VRA. If it is polarized in partisan general elections, then it is "just partisanship." Under this Alice in Wonderland interpretation of the VRA, minority vote dilution can never occur in partisan general elections unless white Democrats are elected and black Democrats defeated. This interpretation would make the race of the candidate rather than the choice of minority voters the key indicator of vote dilution. This is an approach that has generally been rejected by the Congress and the Courts. The purpose of the VRA is to protect minority voters, not minority candidates.

3. What can we infer from the fact that African American registration and turn-out numbers are similar in covered and non-covered jurisdictions? Does this mean that the Voting Rights Act has done its job?

See my discussion, above, of a similar question from Senators Kennedy and Leahy.

Response of Anita Earls, Director of Advocacy, Center for Civil Rights, University of North Carolina School of Law
To Written Questions from Senate Judiciary Committee Members
On "The Continuing Need for Section 5 Pre-Clearance"
June 16, 2006

Questions from Senator Coburn

Question 1: With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?

It is appropriate for Section 5 to continue covering the jurisdictions that are currently covered. The trigger formula of Section 4 was designed to identify those jurisdictions where literacy tests or similar devices had been used to prevent blacks from participating in the electoral process.[1] The special remedial provisions that applied to jurisdictions so identified were "aimed at areas where voting discrimination has been most flagrant."[2] The purpose of Section 5 was to "insure that old devices for disenfranchisement would not simply be replaced by new ones."[3] Section 5 was not intended merely to increase minority registration rates, but rather to make sure that covered jurisdictions did not put in place at-large election systems, use their annexation powers in a discriminatory fashion, move polling places, enact majority vote requirements, or resort to a host of other practices that would negate or dilute the voting strength of newly enfranchised black voters. Current minority voter registration and turnout rates are not the right indicators of where in the country Section 5's non-retrogression principle is necessary to protect minority voting rights.

The Supreme Court previously rejected a constitutional challenge to the coverage formula and approved the application of Section 5 to the jurisdictions identified by the Section 4 trigger, holding that "Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by ... the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment."[4]

The relevant question today is whether the current coverage of Section 5 correctly identifies jurisdictions where there is a danger of new laws and practices being put in place that would have the purpose or effect of disenfranchising minority voters. There are two reasons why the current coverage is appropriate. First, the jurisdictions currently covered by Section 5 still enact laws that disadvantage minority voters. There is

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[1] S. REP. NO. 417, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177, 182 [hereinafter "1982 SENATE REP."]
[2] *South Carolina v. Katzenbach,* 383 U.S. 301, 315 (1966).
[3] 1982 SENATE REP. at 6.
[4] *South Carolina v. Katzenbach,* 383 U.S. at 329.

significant evidence before Congress, particularly from objections, submissions that have been withdrawn or modified, and unsuccessful declaratory judgment actions, that the covered jurisdictions in fact do continue to enact changes affecting voting that would have the purpose or effect of making minority voters worse off.[5] Second, the current coverage is appropriate because self-correcting measures in the law allow for expanded or contracted coverage if it becomes apparent that additional jurisdictions need to be covered in order to prevent continuing racial discrimination in voting, or that covered jurisdictions no longer pose a risk of enacting discriminatory measures.

When the Section 4 trigger was originally passed, it faced criticism for being under-inclusive.[6] Attorney General Nicholas Katzenbach noted that the provision could miss some districts that should have been included under Section 5 coverage. However, the Voting Rights Act [hereinafter "VRA"] also gives a court the power to initiate Section 5 coverage by court order in any proceeding instituted by the Attorney General or an aggrieved person where the court finds that violations of the fourteenth or fifteenth amendment justify equitable relief.[7] In fact, some jurisdictions have been brought under Section 5 coverage as a result of such litigation.[8] Thus, coverage can be expanded to include jurisdictions where there are serious constitutional violations and the risk is great of continued barriers to minority political participation.

Any worry about the Section 4 trigger being over-inclusive is negated by the more than ample "bailout" provisions of the VRA, created in Section 4 and amended in 1982. According to voting rights attorney J. Gerald Hebert, these provisions are "easily proven" for jurisdictions that do not have discriminatory voting practices.[9] The fact that a majority of jurisdictions have failed to bailout on an individual basis illustrates that Section 5 is still necessary in those jurisdictions.

Altering the Section 4 trigger for Section 5 coverage is thus both unwise and unnecessary, as the bailout provisions already in place provide suitable means for the termination of Section 5 coverage for jurisdictions without discriminatory voting

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[5] In addition, a recent analysis of reported opinions in Section 2 litigation revealed that courts in covered jurisdictions have found more acts of official discrimination that impact voting rights, the use of devices that enhance opportunities for discrimination against minority voters, the use of racial appeals in campaigns, more extreme racially polarized voting, and other factors disadvantaging minority voters, than courts in non-covered jurisdictions. *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2,* June 19,2006, at page 4; publication forthcoming, available at: http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf. This further demonstrates that Congress is justified in continuing coverage for the currently covered jurisdictions.

[6] Protecting Minority Voters: The Voting Rights Act at Work 1982-2005, The National Commission on the Voting Rights Act. 28. Feb 2006.

[7] *See* 42 U.S.C. § 1973a(c).

[8] *See Jeffers v. Clinton,* 740 F.Supp. 585 (E.D. Ark 1990), *appeal dismissed* 498 U.S. 1129 (1991);*McMillan v. Excambia County,* 559 F. Supp. 720, 727 (N.D. Fla. 1983) *cert. denied* 464 U.S. 830 (1983). *See also Sanchez v. Anaya,* Civ. No. 82-67M (D.N.M. 1984) (requiring preclearance of redistricting plans for ten year period); 1982 SENATE REP. at 15 (Thurston County, Nebraska covered by the preclearance provisions of Section 3(c) as the result of a court order).

[9] CivilRights.org, Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, http://www.civilrights.org/issues/voting/details.cfm?id=37137&currentpage=1 (last visited June 14, 2006).

practices. The bailout provision is more appropriate than a change in the Section 4 trigger because it deals with jurisdictions on a case by case basis rather than trying to find a proxy that applies to all jurisdictions, regardless of their current voting practices.

Question 2: If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?

It is appropriate to extend coverage for 25 years because the current evidence of continuing voting rights violations in covered jurisdictions supports the judgment that it will take at least that long to afford minority voters a level playing field for political participation. Moreover, extending coverage for 25 years is appropriate because the bailout provisions allow jurisdictions that have complied with the law for ten years to no longer be covered.

The current trigger, however, is not based only on the 1972 presidential election participation. It is important to understand how the Section 4 trigger was amended in 1970 and 1975. The 1970 Amendments did not replace the initial trigger, but rather added to it.[10] Thus, coverage included all jurisdictions previously covered along with any political subdivisions that used a literacy test as of November 1, 1968 and where less than 50% of the voting age population were registered as of that date, or less than 50% of such persons voted in the presidential election of November 1968. The new jurisdictions covered by the additional 1968 trigger included counties and towns in Arizona, California, Connecticut, Maine, Massacuhsetts, New York, New Hampshire and Wyoming.[11] In addition, several jurisdictions in Alaska, Arizona and Idaho that had successfully bailed out from coverage were re-covered.[12]

Likewise, the 1975 Amendments added to the prior covered jurisdictions rather than replaced the existing triggers.[13] In addition to those jurisdictions covered by the 1965 and 1970 triggers, the 1975 Amendments added any jurisdiction using a literacy test in 1972 and meeting one of the two 50% criteria. The 1975 legislation also brought language minority groups within the Act's special remedial provisions, and expanded the definition of "test or device" to include any practice of conducting elections only in English where more than five percent of the citizens of voting age residing in the jurisdiction are members of a single language minority group.[14] Thus, if a jurisdiction conducted elections only in English, had a five percent citizen voting age population of a single language minority group, and had less than 50% of the voting age population registered or voting in the 1972 election, they would be covered by Section 5 and required to comply with the preclearance provision. The 1975 coverage formula resulted in the entire states of Texas, Arizona and Alaska being covered by Section 5, as well as

[10] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 373.
[11] *See* 39 Fed. Reg. 16, 912 (1974); 36 Fed. Reg. 5809 (1971).
[12] *See* 36 Fed. Reg. 5809 (1971).
[13] Voting Rights Act of 1965 – Extension, Pub. L. No. 94-73, tit. II, §202.
[14] Id., § 203.

local jurisdictions in California, Colorado, Florida, Michigan, New Mexico, North Carolina, Oklahoma, and South Dakota.[15]

There was no change in coverage under Section 4 in the 1982 Amendments. However, the current trigger is a combination of jurisdictions that meet the standards based on 1962, 1968 and 1972 registration and turnout data, not simply the 1972 participation. The current bill to reauthorize Section 5, like the 1982 legislation, does not alter the coverage of Section 5. The fact that it was considered appropriate, in 1982, to extend Section 5 for 25 years without altering the trigger at that time illustrates that the measure of the need for Section 5 preclearance is whether or not the jurisdictions it covers are likely to continue to try to dilute minority voting strength.

Question 3: Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "blacksliding" if the trigger is updated from 1972?

I am not aware of any new trigger formula using registered voter data or turnout that would better capture jurisdictions that are likely to enact new voting laws that disadvantage minority voters. In past reauthorizations, when the trigger was updated, Congress added new covered jurisdictions without removing any of the existing covered jurisdictions. At a minimum, any such alternative conceptualization of the trigger should be applied in addition to the existing covered jurisdictions rather than to replace or remove any currently covered areas.

Question 4: Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?

No. Changing the trigger will not make a 25 year reauthorization of the expiring provisions of the Voting Rights Act more likely to be upheld as a constitutional exercise of Congress' power. Since the current coverage best corresponds to the jurisdictions most likely to pass laws that make minority voters worse off, as further explained in the answer to Question 1 above, the reauthorization bill as drafted satisfies the constitutional requirement that there be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[16]

If the goal of changing the trigger is to add new jurisdictions that should be covered but are not, while desirable to enhance the effectiveness of Section 5, the failure to do so cannot make the reauthorization unconstitutional. Congress has the authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to enforce the voting rights of racial minorities but the fact that its measures do not reach every corner of the country where such discrimination may occur does not invalidate those measures. Thus, the only constitutional concern is if the failure to change the

[15] See 41 Fed. Reg. 783-84, 34,329 (1976); 40 Fed. Reg. 43,746, 49,422 (1975).
[16] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

trigger results in jurisdictions being covered that should not be covered because there is no history of unconstitutional conduct or no likelihood of "backsliding" in the future. This problem of over-inclusiveness is readily resolved by several observations. First, the Supreme Court previously has found the coverage to be congruent and proportional, and re-affirmed that finding in the *City of Boerne* case itself as well as in post-*Boerne* cases.[17] The issue at this stage is not whether these jurisdictions can be covered at all, but whether continuing coverage is justified, which should be a lower burden. Second, over-inclusiveness can be corrected by jurisdictions making use of the bailout procedures, which allow them to withdraw from coverage once they have established a relatively short history of full compliance with the Act. Thus, leaving the trigger unchanged does not jeopardize the constitutionality of the Act's reauthorization.

Question 5: Please discuss how a possible broad-based "bailout" of covered jurisdictions might be implemented?

During the last reauthorization in 1982, there were extensive discussions of whether to change the bailout procedures and consideration of various revisions that ultimately resulted in substantial changes in the bailout procedures.[18] Proposed changes at that time ranged from measures that would have been a virtual automatic termination of Section 5, to changes that might have made it even more difficult for jurisdictions to bailout. The record at this time does not justify instituting a broad-based bailout. As Congress concluded in 1982, "if we turn the bailout into a sieve, it would make the extension of Section 5 an exercise in futility and a cruel hoax on millions of black and brown Americans."[19]

Question 6: Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?

Certainly there are ways to modify the bailout provision that would make it easier for jurisdictions to meet the requirements. The important question is whether termination of Section 5 coverage in those circumstances will result in new laws and practices that disadvantage minority voters and make it more difficult for them to participate equally in the political process. The current bailout requirements are reasonable and strike the right balance between allowing jurisdictions that comply with the law to bailout while keeping Section 5 in place where it is still needed to protect minority voting rights.

Question 7: In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice "got it right" because two of the

[17] *See Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding constitutionality of Section 5 preclearance requirement).
[18] *See* 1982 SENATE REP. 43-62.
[19] *Id.*, at 44.

white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?

From the question itself, it appears to me that Professor Karlan did not assert that minority voters in Republican districts have no influence but rather, that she asserted that black voters had no influence in the particular districts at issue in the *Georgia v. Ashcroft* case. To the degree that influence may be measured at all, that is an empirical question that I would answer by looking at the degree to which voting in the districts in the new plan is racially polarized, and by examining the voting records and positions on issues of the legislators who were elected in those districts. I do not have that information.

However, I do agree with the Justices who dissented in the *Georgia v. Ashcroft* case that generally, measuring influence is extraordinarily difficult and cannot be done simply by looking at the percentage of the identifiable minority group in a district, whereas measuring the ability to elect is more manageable. Justice Souter, writing for himself, and Justices Stevens, Ginsberg and Breyer, explained:

> Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely *ad hominem,* looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.[20]

Finally, I would add that if the black voters in the districts at issue in the statement quoted above are Democrats, and the candidates who were elected are now Republicans, it seems a fair conclusion that the black Democratic voters in those circumstances have no influence over the Republican elected official.

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[20] *Georgia v. Ashcroft*, 539 U.S. 461, 495 (2003).

Questions from Senator Cornyn

Question 1: What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.

There are three sources of empirical data I would cite that demonstrate that minority voters have significantly less ability to participate fully in elections in the covered jurisdictions compared to the non-covered jurisdictions. I do not mean to suggest that these are the only sources of empirical data, these are simply three sources that I am aware of. In addition, my response only pertains to Section 5 covered jurisdictions and not Section 203 jurisdictions.

First, Spencer Overton has compiled a list of states that are most susceptible to political practices that disadvantage voters of color, assessing eight different factors.[1] His indicators of political exclusion are:

1. Most voting rights act objections and claims per capita
2. Most federal observers sent to monitor elections per capita
3. Largest disparities between citizens of color and statewide elected officials of color
4. Largest disparities between citizens of color and officials of color in all elected positions
5. Least party competition for voters of color
6. Largest racial disparities in voter turnout
7. Largest minority group
8. Largest low-English-proficient populations

Section 5 covered states predominate in every category above except 6 and 8.[2] Thus, on six of eight indicators of political exclusion, Section 5 covered states are in the lead. In addition, the fact that Section 5 states do not predominate in the list of states with the largest racial disparities in voter turnout leads to a very significant finding – even though minority voters in the covered jurisdictions actually turn out to vote in numbers more commensurate with non-minority voters than they do in non-covered jurisdictions, they still cannot elect persons of color to statewide or local offices in covered jurisdictions.

The second source of empirical data is the cumulative evidence contained in individual state reports on covered jurisdictions since 1982 that have been introduced into the record during the Voting Rights Act reauthorization hearings in the House and Senate. A careful review of those reports yields overwhelming evidence of polarized voting in covered jurisdictions, attempts to circumvent court orders regarding redistricting plans and other election practices, widespread use of racial appeals in election campaigns, violations of Section 2 of the Voting Rights Act, and overt attempts

[1] SPENCER OVERTON, STEALING DEMOCRACY 118-19 (2006) (copy of table attached as Exhibit 1)
[2] *Id.*

to intimidate minority voters. While there are isolated incidents of such practices in non-covered jurisdictions, and some Section 2 cases are brought and won in non-covered states, there is no evidence of significant and continuing violations of minority voting rights at the state and local level in non-covered jurisdictions.

The third source of empirical data comparing covered jurisdictions to non-covered jurisdictions is highlighted in a recent article by Ellen D. Katz based on a review of every reported opinion in a Section 2 case throughout the country since 1982.[3] The most significant of the many findings from that study is the fact that racially polarized voting is more extreme in covered jurisdictions. Reviewing elections results from hundreds of state and local elections, the courts regularly found more extreme racially polarized voting in the covered jurisdictions than in non-covered jurisdictions..

> Nearly ninety percent of the specific minority v. white elections documented in covered jurisdictions involved white bloc voting rising to at least 80 percent, meaning that 80 percent of white voters voted exclusively for white candidates in these elections. Virtually all of the elections (96%) analyzed by courts in covered jurisdictions since 1982 exhibited white polarized voting at a level of seventy percent or more. In non-covered jurisdictions, by contrast, only forty percent of the elections documented involved white polarization of 80 percent or higher, and about 60 percent involved white polarization rising to seventy percent.[4]

In short, in the elections that involved white and minority candidates analyzed as part of Section 2 claims in cases with reported decisions, virtually all such elections in covered jurisdictions had levels of white bloc voting at 70% or above while less than two thirds of such elections in non-covered jurisdictions had white bloc voting at 70%. Even more striking, 90% of elections in covered jurisdictions were at the 80% level for white bloc voting while only 40% of elections in non-covered jurisdictions were at that level. The level of racially polarized voting is a key factor that determines whether minority voters can elect a candidate of their choice. This wide divergence in racially polarized voting between covered and non-covered jurisdictions is an important empirical finding demonstrating that minorities have less ability to participate equally in the political process in covered jurisdictions.

Question 2: Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

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[3] *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2,* June 19,2006, at page 4; publication forthcoming, available at: http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf.

[4] *Id.,* at 10 (references omitted).

a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

a. No, I would not support changing Section 5 coverage to refer to elections of 2000 and 2004 because it is my understanding that doing so would in effect repeal Section 5. No states would be covered as a whole by such a standard.[5] I do not know nationally how many counties, cities, school boards or other local jurisdictions would meet this standard. If North Carolina is typical of other covered states, only a very few local jurisdictions would be covered[6] There is no justification for repealing Section 5 in this manner because of the extensive evidence of the continuing need for its protections.

Additionally, it would be irresponsible to change Section 5 coverage based on this new formula without first knowing what jurisdictions will be covered. By changing the coverage formula, Congress is thereby not simply keeping in place an existing enforcement mechanism but rather potentially expanding it to new areas of the country. Some scholars suggest that the Constitutional standard under *City of Boerne* is somewhat different when Congress is enacting a new law rather than simply continuing an existing remedial program.[7] If Congress changes the coverage formula, it is enacting a new law for the newly-covered areas. At a minimum, Congress needs to examine evidence of whether there is a history of unconstitutional conduct in the new jurisdictions affecting the ability of minority voters to participate in elections, and in order to do that, Congress must know which jurisdictions are being added. Thus, it is crucial to know which jurisdictions, if any, would be covered by Section 5 under this new formula.

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[5] Hawaii is the only state in which turnout as a percentage of citizen voting age population in 2000 and 2004 was less than 50%. Since Hawaii did not use a literacy test, it would not be covered by Section 5. *See* Amie Jamieson, Hyon Shin, and Jennifer Day, "Voting and Registration in the Election of November 2000" *Current Population Reports,* February 2002, available at: www.census.gov/prod/2002pubs/p20-542.pdf; U.S. ELECTION ASSISTANCE COMMISSION, A SUMMARY OF THE 2004 ELECTION DAY SURVEY 7 (September 2005) available at: http://www.eac.gov/election_survey_2004/pdf/EDS%20exec.%20summary.pdf.

[6] It appears that only four of the currently covered counties in North Carolina would meet this standard, and that another three counties might be added, depending on whether they used literacy tests in the past. This is based on turnout as a percentage of registered voters in 2000 and 2004, data available at: http://www.sboe.state.nc.us/enrs/main_primary.asp?ED=11xx02xx2004&EL=GENERAL&YR=2004&CR=A. and http://www.sboe.state.nc.us/y2000elect/stateresults.htm.

[7] *See* Katz, *supra note* 3, at 20-21; *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary* (May 16, 2006) (written testimony of Pamela Karlan, Professor, Stanford Law School).

Finally, as discussed in my answers to Questions 1 and 2 from Senator Coburn, I would not support replacing the current trigger with one using data from the Presidential elections of 2000 and 2004 because I believe the important question for reauthorization is not whether the original basis for coverage should be changed but rather whether there is evidence in the jurisdictions currently covered by Section 5 that indicates that the preclearance requirement is still necessary to protect minority voters.

b. As stated above, I believe that the current coverage of Section 5 is appropriate, justified by the evidence of recent discrimination, and compelled by the risk of retrogression if Section 5 expires just as the country is enacting more election reforms than ever before. Adding new jurisdictions, whether by identifying the few local areas where turnout was below 50 percent in recent elections, or by looking at where there have been Section 2 violations, is justified to the extent that there is evidence specific to those jurisdictions that there are likely to be laws passed that disadvantage minority voters. To some degree, however, changing coverage in this manner is redundant because Section 3(c) of the Act allows federal courts to bring jurisdictions under the preclearance requirement where circumstances justify it.

Question 3: In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?

No. Removing from coverage all the states that are covered as a result of the 1964 turnout data is not required by the Supreme Court's holding in *City of Boerne v. Flores*. First, the Supreme Court did not say that Congress may not rely on data over forty years old as a basis for enacting remedial legislation under the Fourteenth and Fifteenth Amendments. Instead, the Court was making the point that there was no evidence of recent constitutional violations to support Congress enacting the Religious Freedom Restoration Act (RFRA). In making that point, the Court, writing in 1997, specifically referred to the record supporting the Voting Rights Act as containing what is required. The Court wrote:

> A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. The absence of more

> recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country."[8]

Thus, the problem with RFRA was not that it relied on forty year old evidence, but that it only relied on such evidence. There was no recent evidence of widespread or significant constitutional violations. The *Boerne* Court went on to explain that lack of support in the legislative record was not the most serious problem with the statute. The Court determined that RFRA exceeded Congresses' power under the Fourteenth Amendment because, "regardless of the state of the legislative record," the statute was out of proportion to a supposed remedial or preventive purpose.[9] The Supreme Court explicitly noted that judicial deference is not based on the state of the legislative record compiled by Congress.

More recent decisions by the Supreme Court have also indicated that historical evidence, while not sufficient standing alone, can form part of the record justifying remedial legislation. For example, in upholding the application of the Family and Medical Leave Act (FMLA) to states as employers, the Court noted the "long and extensive history of sex discrimination" in concluding that the record of constitutional violations compiled by Congress was sufficient to justify the FMLA.[10] Similarly, in upholding application of Title II of the Americans with Disabilities Act to the states, the Supreme Court referred to the long history of discrimination against persons with disabilities and the persistence of such discrimination despite earlier legislative attempts to remedy it.[11] Thus, there is no reason to believe that inclusion of jurisdictions covered in part because of the trigger that was initially based on 1964 data and subsequently amended, will make the reauthorization unconstitutional. The extensive record of continuing discrimination in voting in the covered jurisdictions since 1982 makes clear that those jurisdictions should continue to be covered.

Question 4: While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Yes. The record of discrimination in voting in covered jurisdictions is sufficient to warrant continuing Section 5 coverage. Focusing solely on the number of objections fails to measure the true impact of Section 5 and is misleading. The evidence in the record is not simply anecdotal. I identified some sources of broad empirical data in my answer to Question 1 above. Numerous research reports have been submitted to

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[8] *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).
[9] *Id.*, at 532.
[10] *See Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 730-35 (2003).
[11] *See Tennessee v. Lane*, 541 U.S. 509, 528 (2004).

Congress, including two authored by the UNC Center for Civil Rights, that provide detailed information about all of the Section 5 objections, litigation under Sections 2, 5, and 203 of the Voting Rights Act, the extent of racially polarized voting in the jurisdiction, the extent to which candidates of choice of minority voters are elected, and significant events that have recently occurred that deny, discourage or dilute the minority vote.[12]

In addition, it appears from publicly available information on the Department of Justice website that this question understates the number of submissions and the number of objections during the period indicated.[13] Further data supporting my answer to this question is contained in my answer to Question 3 from Senator Kohl below.

To properly measure the true impact of Section 5 it is necessary to take into account all of the ways that the preclearance requirement operates to deter and prevent the use of voting practices that disadvantage minority voters. Objections are not the only way that changes with a discriminatory impact or effect are blocked. Whenever a jurisdiction seeks preclearance in the D.C. District court and is denied, those unsuccessful declaratory judgment actions also bar the implementation of discriminatory laws.

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[12]In addition to the materials already referenced in response to these questions, additional materials already submitted to Congress include, but are not limited to: Debo P. Adegbile, Voting Rights in Louisiana 1982-2006 (Mar. 2006), http://www.civilrights.org/issues/voting/LAVRA.pdf; Juan Cartagena, Voting Rights in New York, 1982-2006 (Apr. 2006), http://www.civilrights.org/issues/voting/NewYorkVRA.pdf; Anita S. Earls, Kara Millonzi, Oni Seliski, and Torrey Dixon, Voting Rights in Virginia, 1982-2006 (May 2006), http://www.civilrights.org/issues/voting/VirginiaVRA.pdf; Anita S. Earls, Emily Wynes, and LeeAnne Quatrucci, Voting Rights in North Carolina, 1982-2006 (May 2006), http://www.civilrights.org/issues/voting/NorthCarolinaVRA.pdf; Ellen Katz et. al, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, http://www.votingreport.org (Dec. 2005); Robert Kengle, Voting Rights in Georgia, 1982-2006, (March 2006); Natalie Landreth and Moira Smith, Voting Rights in Alaska, 1982-2006 (Mar. 2006), http://renewthevra.civilrights.org/resources/akreport.pdf; Laughlin McDonald & Daniel Levitas, American Civil Liberties Union, The Case for Extending and Amending the Voting Rights Act Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union (Mar. 2006), http://www.votingrightsact.org/report/finalreport.pdf; Laughlin McDonald, Janine Pease, and Richard Guest, Voting Rights in South Dakota, 1982-2006 (May 2006), http://www.civilrights.org/issues/voting/SouthDakotaVRA.pdf; Robert McDuff, The Voting Rights Act in Mississippi, 1965-2006 (May 2006), http://www.civilrights.org/issues/voting/MississippiVRA.pdf; National Commission on the Voting Rights Act & Lawyers' Committee for Civil Rights Under Law, Protecting Minority Rights: The Voting Rights Act at Work 1982-2005 (Feb. 2006); JoNel Newman, Voting Rights in Florida, 1982-2006 (Apr. 2006), http://www.civilrights.org/issues/voting/FloridaVRA.pdf; Phillip A. Olaya, Glenn D. Magpantay, Nancy W. Yu & Margaret Fung, Asian American Legal Defense and Education Fund, Asian Americans and the Voting Rights Act (Jun. 2006), http://renewthevra.civilrights.org/resources/details.cfm?id=44388; Dr. James Tucker & Dr. Rodolfo Espinio, Voting Rights in Arizona, 1982-2006 (May 2006), http://www.civilrights.org/issues/voting/ArizonaVRA.pdf; James Thomas Tucker and Rodolfo Espino, Arizona State University, Minority Language Assistance Practices in Public Elections (Mar. 2006) http://renewthevra.civilrights.org/203report.pdf.

[13]*See* http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.

One of the options available to the Department of Justice (DOJ) once they receive a submission is to request more information regarding the proposed change.[14] Thus, in addition to issuing objections to proposed changes, the Department frequently sends More Information Requests (MIRs). The MIR procedurally acts to give the DOJ all necessary information about the policy before it issues an objection to a proposed change. Therefore the requirement prevents valid changes from being objected to simply because of a lack of information or procedural misstep. However, often these letters lead to submissions being withdrawn. The use of MIR's has increased dramatically over the last ten years.[15]

MIRs are also a useful tool in deterring voter discrimination, often signaling to the local authorities that new policies may be questionable.[16] When the DOJ requests more information, a local authority is given the opportunity to review the policy they submitted and make appropriate changes. What often results from a MIR is the withdrawal of the policy altogether. This means that many questionable policies that would have likely been objected to are preemptively withdrawn. Therefore, in considering the potency of Section 5, the number of policies that are withdrawn or altered because of a MIR must be considered in the same vein as an objection.

In their study of MIRs, Fraga and Ocampo characterize the request as having a deterrent effect if the submission is withdrawn, if subsequent changes are made, or if there is no response back to the DOJ.[17] They conclude in their report that since 1982 the use of MIRs has increased the deterrent effect of Section 5 by 51 percent.[18]

MIRs should not be viewed simply as a bureaucratic gap-filler but as an additional tool available to the DOJ under Section 5 to preempt discriminatory policies in voting legislation. Because MIRs allow for revision and clarification by the submitting authority, they emphasize the narrow tailoring of the Voting Rights Act in striking only those rule changes with discriminatory effects. MIRs play an essential role in the DOJ's ability to combat minority voter dissolution by ensuring that the DOJ is always acting on the most accurate information available.

The Department also has a deterrent impact by routinely conferring with jurisdictions before they make a submission, explaining how the retrogression standard is applied and how changes affecting voting, including measures such as majority vote requirements, annexations, polling place changes, changes to appointed from elected office, and numerous other non-redistricting changes are reviewed by the Department. While I was a Deputy Assistant Attorney General, from 1998 to 2000, I observed how this informal consultation process assisted jurisdictions in enacting laws that would not unfairly burden minority voters. Often, an objection letter was the result of such

[14] 28 C.F.R. Part 51 Subpart E 51.37(a).
[15] *See* Louis Ricardo Fraga & Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act (June 7, 2006) (unpublished essay, submitted to Senate Judiciary Committee on June 9, 2006).
[16] *Id.*
[17] *Id.* at 3.
[18] *See id.* at 3.

"negotiations" falling apart, but frequently jurisdictions changed how they planned to implement a state law based on such discussions.[19] Similarly, Section 5 review has a deterred effect even without any involvement of DOJ personnel. Jurisdictions are less likely to try to enact discriminatory redistricting plans, or voting procedures because they know that the Justice Department will object.

Finally, there are several explanations for the lower number of Section 5 objections in recent years which demonstrate that the numbers are not the result of a decrease in discriminatory actions by state and local governments. First, it is important to remember that percentages here can be misleading. Prior to 1982 there was widespread non-compliance with the preclearance requirement.[20] While there continues to be some non-compliance by jurisdictions, the number of submissions has increased. In some instances they are recent submissions of pre-1982 changes. With a larger number of submissions overall, it is not surprising that the percentage of changes objected to would decrease. More importantly, the *Bossier II* decision has had a severely negative impact on the ability of DOJ to object to intentionally discriminatory voting changes, as I explained in my original testimony.

There are also some issues of under-enforcement of Section 5, in circumstances where the Department should have objected, but failed to. Because affected communities do not have the right under the statute to appeal the grant of preclearance,[21] there are many examples of minority community groups opposing voting changes as retrogressive where the Department has granted preclearance. In the Georgia Voter ID case, the submission of a law later enjoined by a federal district court on the grounds that the plaintiffs were likely to prevail on their claims that the law was an unconstitutional poll tax and that it lacked a rational basis, was precleared against the advice of career attorneys in the Department.[22] This preclearance also departed from earlier objections to Voter ID provisions, where the Department held jurisdictions to higher standards. Thus, there are some instances where the enforcement of Section 5 has not been as rigorous as it needs to be.

The lower number of objections from 2005 is consistent with past patterns of the ebb and flow associated with decennial redistricting. Section 5 submissions and resulting objections are greatest in the years immediately prior to and after redistricting cycles. In a mid-decade year, such as 2005, you would expect to see a smaller number of submissions and objections because the there are significantly fewer redistrictings.

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[19] JoNel Newman gives a recent example of this in the report on Florida. *See* JoNel Newman, Voting Rights in Florida, 1982-2006, *supra* note 12 at 13-15.

[20] *See* 1982 SENATE REP. at 47-48 (finding that "there are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after when sued or threatened with suit. Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.")

[21] *See Morris v. Gressette,* 432 U.S. 491 (1977).

[22] *See* Kengle, Voting Rights in Georgia, *supra* note 12, at 29-30 & n.131; *Common Cause of Georgia v. Billups,* 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

Many of the objections in the last ten years have involved statewide objections impacting minorities throughout the state. Objections at the state level also have prevented sophisticated attempts to disenfranchise minority voters. This is not merely a "numbers" game. No single measure is determinative of the continuing need for reauthorization. Taken together, the evidence in the record supports reauthorization.

The current standard for bailout is the best measure for when Section 5 is no longer needed. If all covered jurisdictions eventually meet this standard, then Section 5 would lapse of its own accord.

Question 5: In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?

Since I believe the evidence indicates there is a clear differentiation between covered and non-covered jurisdictions, and because in my experience of litigating voting rights cases around the country over the past 18 years, including cases in covered jurisdictions and in non-covered jurisdictions I have found important differences between those jurisdictions, I believe that reauthorization needs to be for a period of 25 years. Covered jurisdictions show a continuing pattern of enacting laws and procedures designed to suppress and dilute the voting strength of minority voters. Despite years of Section 5 review, local governments in particular, but also state legislatures in the covered jurisdictions have repeatedly ignored the harmful effect of voting changes on minority voters. Section 5 needs to be in place for another 25 years to ensure that minority voters truly have an equal opportunity to participate in the political process before its protections are removed.

Perhaps the fundamental problem that remains most severe in covered jurisdictions is racially polarized voting, as I explain in greater detail in response to Question 1 above. It is entirely reasonable to conclude that it will be at least another 25 years before those patterns change and the political process is more open for racial and ethnic minorities to field candidates of their choice who have a realistic possibility of winning election. Requiring jurisdictions to keep in place election methods and practices at the state and local levels that provide fair representation for politically cohesive minority voters is also important for federal elections because candidates for federal office frequently gain political experience and prove their leadership capacities in local and state public offices. It is reasonable for Congress to conclude that the Act should be reviewed after another twenty-five years because it is likely to take that long to have a lasting impact on election practices.

Another fact that supports reauthorizing the Voting Rights Act for 25 years instead of a shorter period is that not only do there continue to be wide disparities between minority and white voters' participation in the political process, as measured by

factors such as the rate of minority office holding[23], but the gains that have been made are very recent. At the Congressional level, for example, many covered jurisdictions in the south only elected an African-American to Congress for the first time since reconstruction following the 1990 round of redistricting. Such recent gains will be easily reversed if the non-retrogression standard is removed.

Finally, it is important to remember that the bailout provisions give jurisdictions that comply with the Act a streamlined procedure for ending coverage once they have met the criteria. It is entirely possible that most, if not all, jurisdictions will have "bailed out" within the next twenty-five years, if they comply with the Act's requirements and no longer pass laws that make minority voters worse off.

Question 6: Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft – I want to better understand some of the practical implications. Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

No. In my view so-called "influence" districts would not be protected by Section 5. As I understand the language in the reauthorization bill, the intent is to protect the ability of minority voters to elect candidates of their choice. As I explained in my answer to Question 7 from Senator Coburn, I believe that "influence" is difficult to define, measure and implement in the practical world. On the other hand, it is usually possible to determine when minority voters have the ability to elect their candidate of choice by using regression analyses to determine voting patterns.[24] Thus, I would understand the Section 5 retrogression principle to be applied where minority voters have the ability to elect their candidates of choice, without regard to any particular numerical cut-off.

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[23] *See, e.g.,* data on political exclusion in response to Question 1 above, and the state reports of covered jurisdictions. *supra* note 12.

[24] Occasionally in very small jurisdictions it may be difficult to analyze polarized voting if there is only one voting precinct in the jurisdiction. In these instances, other types of evidence of racially polarized voting, such as lay testimony, may be relevant.

Questions from Senator Leahy

Question 1: Some witnesses have testified that voting changes leading to DOJ objections under Section 5 have declined since the last authorization. Some have cited this decline in the overall percentage of objections compared to submissions as evidence that Section 5 is not longer needed. What explains this declining percentage? Is the declining percentage of DOJ objections relevant to the question of whether Section 5 is effective or should be extended?

The declining percentage in Section 5 objections is explained by several factors, including:

1. The fact that more changes are being submitted for preclearance;
2. The fact that the Department is increasingly using More Information Letters and informal contacts with jurisdictions rather than objection letters to achieve the same goal – barring the implementation of a discriminatory election practice;
3. The fact that jurisdictions are more often seeking declaratory judgments in the D.C. District court, meaning that settlements or the denials of judgments for plaintiffs in those actions are what enforces the Act rather than objection letters from the Department of Justice;
4. The fact that the Department of Justice is severely hampered in its ability to object to changes that have a discriminatory but non-retrogressive purpose or effect following the *Bossier Parish II,* decision; and
5. The fact that the Department on occasion fails to object even when a law will have a retrogressive effect.

I explain each of these in greater detail in my answers to Question 4 from Senator Cornyn and Question 3 from Senator Kohl.

The declining percentage of Section 5 objections is only slightly relevant to the question of whether Section 5 is effective or should be extended. The declining percentage must be examined in light of evidence about what is happening in the covered jurisdictions. Since there is strong evidence that racially discriminatory redistricting plans, unfair annexations, racially polarized voting, voter suppression tactics aimed at minority voters, and a host of other practices that disadvantage minority voters are still occurring in the covered jurisdictions, it is clear that Section 5 is still needed. The question of its effectiveness in recent years actually relates to whether Congress has engaged in sufficiently rigorous oversight of the Department of Justice's enforcement of the Act.

The more important question is how Section 5 enforcement has protected minority voters in recent years and whether that protection is still needed. Between 1965 and 1981, there were 815 objections to submissions sent to the DOJ for preclearance.[1] Between 1982 and 2005, the number of objections totaled 2,282.[2] Thus, while the

[1] Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, 1 (June 7, 2006).
[2] *See id.*

percentage of submissions that were not precleared may have lowered in the last twenty-five years, the number of objections has actually almost doubled from an average of fifty-one per year from 1965 to 1981 to an average of ninety-nine per year from 1982 to 2005.[3] The drop in percentage of submissions that are objected to is therefore not a product of objections going down, but of submissions becoming over 6.7 times more frequent.[4]

Even in light of the severe limitations on Section 5 review that occurred as a result of *Bossier II*, discussed further in my answer to question 3 from Senator Kohl, the Department of Justice (DOJ) has objected to fifty-four submissions since 2000 for changes to voting procedures from Alabama, Arizona, California, Georgia, Louisiana, North Carolina, South Carolina, Texas, and Virginia.[5] These objections have ranged in subject from state and local redistricting, annexations, voting methods, voting time, poll place location, and in at least one occasion the absolute cancellation of an election.[6] Section 5 objections have functioned to aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection.[7]

DOJ objections since 2000 have protected 8,764 voters in Virginia, 10,518 voters in Georgia, and 12,756 voters in North Carolina.[8] During the same time period, nine objections to South Carolina submissions protected 96,143 African-American voters, two objections to Arizona submissions protected 163,647 Hispanic and American Indian voters, and six objections to Texas submissions protected 359,978 African American and Hispanic voters.[9] Approximately thirteen school board members, twenty-seven local legislators, and six state legislators have been determined by this activity.[10] In total, 663,503 minority voters in the last six years have been aided by Section 5 objections.[11]

Although a large percentage of voters protected by Section 5 are those living in jurisdictions where objections have prevented the use of retrogressive election laws, they do not constitute the full number of voters assisted by the law. It is also possible to partially measure the number of voters protected by Section 5's deterrent effect by examining records showing when jurisdictions have abandoned a proposed change

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[3] *See id.*
[4] U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, Section 5 Changes by Type and Year, http://www.usdoj.gov/crt/voting/sec_5/changes.htm (last visited June 13, 2006) (cataloging Section 5 submissions by year).
[5] U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last visited June 13, 2006).
[6] *See id* (containing links to .pdf files that catalogue the objections made by the DOJ).
[7] *See id.*
[8] The number of minorities affected by Section 5 were obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). *See* Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.
[9] *See id.*
[10] *See id.*
[11] *See id.*

because the Department of Justice sends a More Information Request (MIR). MIRs are used by the DOJ to "promote submission, facilitate full review, and develop arenas of understanding" among all the parties involved.[12] A recent study at Stanford University found that MIRs contributed to the deterrent effect of Section 5 by 51%.[13] Between 1982 and 2005, 13,697 MIRs and 3,120 follow up requests were sent to various jurisdictions submitting voting alterations.[14]

While it is impossible to measure deterrence regarding submissions that are never written, there is clear evidence of deterrence when looking at the number of MIRs that are either withdrawn, submitted subsequently with a superseded change that replaced the original change, or never responded to or responded to with insufficient information. These numbers have not only stayed constant since 1982, they have actually increased of late from an average of 47.3 withdrawn, superseded, and no response MIRs from 1982-1998, to an average of 51 per year from 1999 to 2005.[15] This figure illustrates that the need for Section 5's deterrent effects are needed at least in as great of a capacity as they have been in the past.

A conservative estimate of voters aided specifically by withdrawals can be determined from information catalogued on the DOJ's website. In the last six years, fifty-seven submissions to the DOJ have been withdrawn before they could be fully reviewed.[16] Similarly to Section 5 objections, withdrawn submissions cover all kinds of alterations of voting time, place, and manner. Since 2000, withdrawn submissions have aided as few as 63 and as many as 171,132 voters in a single withdrawal.[17] They have come from eleven different states and have influenced both local and state-wide elections.[18] At least thirteen school board members, twenty-one city and county legislators, and one state legislator have been determined in great part due to withdrawn submissions to redraw districts.[19] In total, conservative estimates of 532,396 voters have been protected by withdrawn submissions to the DOJ.[20] When combined with the more abstract figures of submissions that are altered due to MIRs and potential submissions that are never written due to Section 5's influence, it is clear that deterrence plays an essential role in assuring minority voting strength.

When combined, the number of voters helped by Section 5 objections, MIRs, and deterrence is staggering. In the last six years alone, minority voters have maintained the ability to elect a candidate of choice in at least eighty-one state and local elections.[21] A

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[12] Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, 3 (June 7, 2006).
[13] *See id.* at 9.
[14] *See id.* at 3.
[15] *See id.* at 12.
[16] *See* Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.
[17] *Id.*
[18] *See id.*
[19] *See id.*
[20] *Id.*
[21] *Id.*

minimum of 1,195,899 minority voters have been directly aided by Section 5.[22] Voting is a fundamental right, guaranteed by the Fifteenth Amendment to the Constitution.[23] With the amount of activity generated by Section 5 authority, it is clear that Section 5 is still necessary to ensure this right to a significant portion of the minority population.

Question 2: Can you tell us about recent examples of DOJ objections and types of objections that have made a difference in preserving voting rights for minority citizens? How many citizens' voting rights have been implicated in your examples? What would have happened in these cases if Section 5 did not exist? How much more difficult would it have been for minority voters to invalidate these changes if Section 5 did not exist? Why wouldn't a Section 2 lawsuit work just as well?

Between 1965 and 2001, the town of Kilmichael, Mississippi did not elect a single African-American to the Board of Aldermen and only one African-American even ran for mayor of the town.[24] Statistics from the 2000 census indicated that the town had become majority African-American and would likely elect multiple black Alderman and perhaps even a black Mayor in the 2001 election.[25] With this knowledge, the all-white council cancelled their general election three weeks before its scheduled date with no notice to the community.[26] The stated purpose for the town's action was to develop a single-member ward system for electing town officials; however, because the town was required to submit the proposal to the DOJ for preclearance, the elections were reinstated.[27] Thus, without Section 5, voters in the town would not have been able to elect new town officials, and the existing officials would have been able to enact a single-member districting plan that unfairly diluted the voting strength of black voters. Ultimately black voters would have had to find a way to file a Section 2 lawsuit in order to vindicate their rights. Such a case would probably not have been resolved until at least a year after it was filed.

Earlier this year in Texas, the DOJ issued a Section 5 objection when the North Harris and Montgomery Community College District, comprised of an area of over 1000 square miles, reduced the number of polling places from 84 to 12.[28] Had this change been implemented, it would have put a disproportionate burden on minority and poor populations, who are less likely to have access to the transportation necessary to travel long distances to the polling places. Also, these groups are less likely to be able to take the time off of work necessary to make it to one of the few polling places. The Department's objection letter noted specifically that under the proposed change, the site with the smallest proportion of minority voters served just 6,500 voters, while the site

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[22] *See id.*
[23] U.S. Const. amend. XV, § 1.
[24] U.S. Dept. of Justice, Civil Rights Division, Kilmichael, Mississippi, http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_121101.pdf (last visited June 14, 2006).
[25] *See id.*
[26] *See id.*
[27] *See id.*
[28] U.S. Dept. of Justice, Civil Rights Dvision, North Harris Montgomery Community College District, http://www.usdoj.gov/crt/voting/sec_5/ltr/l_050506.htm (last visited June 14, 2006).

that served a population that was 79.2% black and Hispanic served over 67,000 voters. Without Section 5, the polling place change would have gone into affect and minority voters would have found it much more difficult to vote.

In 2002, the DOJ objected to an Arizona plan for statewide redistricting which would have diminished the districts where Hispanics could elect their candidate of choice from eight districts to five districts.[29] The plan would have made it so the Hispanic population, which constituted over 25 percent of the state's population, would only have been able to elect 16 percent of the state's congressional delegation.[30]

A conservative estimate of 162,067 minority voters were protected in the three districts which were retained in the Arizona objection.[31] Similarly, an estimated 215,406 minority voters were protected in the Texas polling place objection, and 219 minority voters were saved from vote dilution in the Kilmichael objection.[32] These cases illustrate that the VRA is effective for large districts as well as small municipalities, aiding minority voters both by the hundreds and by the hundreds of thousands. In total, the right to vote of a conservative estimate of 1,195,899 minority voters since 2000 has been protected by the enforcement of Section 5 of the VRA.[33]

In these three examples, as in all Section 5 objections, the DOJ was able to stop the problematic voting alteration *before* it was put in place. If Section 5 were not renewed, then violations would have to be dealt with retroactively under Section 2 of the VRA. A Section 2 lawsuit is a more burdensome method of protection as it must retroactively stop voting legislation after it has already been implemented. It takes time to assemble plaintiffs with standing, file a case and engage in discovery, and even on an expedited schedule, trial will be months and possibly over a year after the new law is put in place. Section 2 is also more difficult as it shifts the burden of proving the violation to the plaintiffs, where Section 5 requires the submitting authority to preemptively show no such violation would occur.

Question 3: Assistant Attorney General Wan Kim testified that covered jurisdictions have overwhelmingly complied with Section 5 of the VRA. Yet, other witnesses have testified that Section 5 has been so successful it is no longer needed. What is your

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[29] U.S. Dept. of Justice, Civil Rights Division, Arizona, http://www.usdoj.gov/crt/voting/sec_5/ltr/l_052002.htm (last visited June 14, 2006).

[30] *See id.*

[31] The number of minorities affected by Section 5 was obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). *See* Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

[32] *See id.*

[33] *See id.*

opinion on whether overwhelming compliance with the law is a reason for doing away with it?

Evidence that a law is being complied with is not a reason to do away with it. If there were an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but rather that it is sufficiently serving its purpose. So long as the risk of pollution continues the law would need to be renewed. Professor Ellen Katz makes this point as well when she argues that "Section 5's very success in addressing racial discrimination in voting is itself neither proof that preclearance has become obsolete nor license for the statute to continue indefinitely."[34] While there is evidence that certain jurisdictions are not complying with the act, evidence that Assistant Attorney General Wan Kim may not have been aware of,[35] the most important question is whether Congress has reason to believe that racially discriminatory laws and practices that disadvantage minority voters will be put in place in the covered jurisdictions if Section 5 is not renewed. There is a strong basis in evidence before Congress at this point for concluding that retrogression will occur if Section 5 is not renewed.

Question 4: We have received testimony that Section 5's preclearance requirement is effective in not only preventing, but deterring, discriminatory voting practices. Can a successful deterrent still be a success if it is no longer operational? In your opinion, would softening or removing this successful deterrent risk the emergence of new abuses?

Section 5 will not have a deterrent effect if it is not renewed. There are several reasons why I believe that new abuses will occur if Section 5 is allowed to expire. First, as I testified earlier, we are seeing in North Carolina that counties that are not covered by Section 5 are seeking to return to at-large election methods even though racially polarized voting in those counties has not decreased. There is every reason to believe that covered jurisdictions throughout the country will seek to do the same if they are released from the preclearance requirement.

Second, the recent use of voter suppression techniques aimed at minority voters, such as the post-card campaign in North Carolina, threats to videotape voters as they enter polling places, threats to challenge voters on election day, and a variety of other practices, indicate that racial animus still motivates some actors in the political process. Without Section 5, they will have no restraint and can implement new voting practices that disadvantage minority voters.

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[34] *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2,* June 19,2006, at page 20; publication forthcoming, available at: http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf.

[35] *See* Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study,* 29 AM. INDIAN L. REV. 43, 43-44 (2004) (South Dakota enacted hundreds of statutes affecting elections that were never submitted for preclearance between 1976 and 2002); Written Testimony of Jerome A. Gray before the House Judiciary Committee, November 1, 2005 at 3 (a county in Alabama failed to submit voting changes for preclearance from 1995 to 2005).

Third, there have been more new election laws passed since the 2000 election than at any time in recent memory.[36] The wave of election reform laws has not yet crested, and these laws should be examined in the covered jurisdictions to ensure that they do not operate to the detriment of minority voters.

Question 5: Professor Gaddie testified about his report. Have you reviewed that report and, if so, do you believe it includes all evidence relevant to the continuing need for Section 5? Does his comparison of covered jurisdictions and non-covered jurisdictions take into account the widely recognized deterrent effect of Section 5?

I have reviewed the paper that that Professor Gaddie attached to his written testimony[37] and the seventeen studies of various jurisdictions authored by Professors Bullock and Gaddie posted on the American Enterprise Institute's website, referred to by Professor Gaddie in his written testimony.[38] Professor Gaddie's paper examines voter turnout and minority office holding in eleven states. Most of the seventeen studies evaluate three factors: Black registration and turnout, African-American office holding, and racial voting patterns. The reports for Texas, Arizona, California, Florida and New York examine minority registration and turnout and minority office holding, and the report that combines Alaska, Michigan, New Hampshire and South Dakota looks at registration and office holding for various minority groups. Gaddie's report on Georgia includes a section on redistricting, and his report on Florida has a section on "Representation and Section 5 Covered Counties". With these minor exceptions, all of the reports are uniform in their coverage of the three factors identified above: turnout, office holding and racial voting patterns.

These reports do not include all evidence relevant to the continuing need for Section 5. The bulk of the evidence I have identified in my answers to Questions 1 and 4 from Senator Cornyn, Questions 2 and 3 from Senator Kohl and Questions 1 & 2 from Senator Leahy above is completely missing from Professor Gaddie's paper and reports. While some of the findings in Professor Gaddie's reports indicate that there is a continuing need for Section 5 coverage,[39] his overall emphasis on just three factors does not include the range of information about the current ability of minority voters to participate in the political process that is relevant to determining whether Section 5 is still needed.

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[36]The National Conference of State Legislatures has started maintaining a database of new election-related laws introduced and passed by the states. *See* www.ncsl.org/programs/legman/elect/taskfc/database.htm.

[37] Charles S. Bullock, III & Ronald Keith Gaddie, "A Comparative Analysis of the Impact of the Voting Rights Act", paper presented at the annual meeting of the Southwestern Political Science Association in San Antonnia, TX, April 13-15, 2006.

[38] The seventeen reports can be found at: http://www.aei.org/publications/pubID.23859/pub_detail.asp.

[39] For example, he finds that in Virginia "black turnout still lags white participation levels in the Commonwealth and sometimes lags black voter turnout in the rest of the country. The proportion of African-American legislators compares less favorable with the black proportion in Virginia's adult population than is found in similar comparisons in other southern states subject to Section 5." Charles S. Bullock, III & Ronald Keith Gaddie, An Assessment of Voting Rights Progress in Virginia, at pg. 12, unpublished paper prepared for the Project on Fair Representation, American Enterprise Institute, available at: http://www.aei.org/publications/pubID.23864/pub_detail.asp.

Professor Gaddie's paper and reports do not discuss the deterrent effect of Section 5 in any of the covered jurisdictions. Thus, his comparison of covered and non-covered jurisdictions does not appear to take this effect into account. He does not discuss more information letters, withdrawn submissions, or the informal consultation that occurs between state and local officials and Department of Justice lawyers. Professor Gaddie does not examine the extent to which local officials in covered jurisdictions involve minority community leaders in their decision making. In short, he does not examine the totality of circumstances facing minority voters as they seek to participate in the political process.

Question 6: You have had extensive experience with Section 5 through your 18 years of practice with voting rights cases, including two and a half years as a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, with responsibility for the Voting Section, and through the public hearings you held in North Carolina and Virginia to gather information about the impact of the Voting Rights Act at the local level in those states. In your experience, do state and local officials find section 5 to be burdensome? To what extent do they find Section 5 to be beneficial?

One of the best indicators of the fact that many state and local officials do not find Section 5 to be burdensome is that so few have sought to bailout from coverage. To be sure, during my time at the Justice Department there were occasional complaints from state and local officials about an objection that we issued. Similarly, a few jurisdictions made known their general opposition to having to submit changes and, in a few instances, refused to cooperate with our requests for information. Overall, however, the majority of officials that I had direct contact with did not find Section 5 requirements to be burdensome, and in the majority of instances that I was aware of, there was an excellent working relationship between Department personnel and state and local officials.

I was at the Justice Department during the time that the Civil Rights Division was preparing for the onslaught of redistricting submissions that would follow release of the 2000 Census data. The Voting Section went to great lengths to make sure that the technology and internal operating procedures in place would facilitate electronic submission of much of the required information. We conferred with state and local officials so we could take their concerns into account as we structured our processing of submissions. We also modified the Section 5 regulations to make the process technically easier for jurisdictions.

The main benefit of Section 5 for state and local jurisdictions that I heard expressed by local officials was that after a voting change was precleared, they could deflect criticism by minority voters by pointing out that the redistricting plan, or polling place change, for example, had been precleared by the Department of Justice.

As a practicing attorney litigating Section 2 voting rights cases, I saw a different benefit to Section 5 coverage. In negotiating with local officials to change from an at-

large system to single-member districts, local officials could use Section 5 preclearance as a justification for doing the right thing when some constituents did not want them to create avenues for minority voter participation. Thus, Section 5 was a shield for local officials when they were negotiating settlements in Section 2 cases.

Question 7: In your professional opinion, does the existing coverage formula requiring preclearance of voting changes need to be altered?

No. The coverage formula does not need to be altered. I have discussed this issue at length in my answers to Questions 1 through 4 from Senator Coburn and Questions 2 and 3 from Senator Cornyn above.

Questions from Senator Kohl

Question 1: We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division testified last week that "our work is never complete" with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?

Yes, I agree that more work needs to be done and that the Voting Rights Act must be extended. Two of the most salient facts that demonstrate why are: First, the continued prevalence of racially polarized voting that denies black voters the opportunity to elect candidates of their choice, and the fact that racially polarized voting is more severe in the jurisdictions covered by Section 5, as further explained in my answer to Question 1 from Senator Cornyn, and second, the continued disparity between the number of minority elected officials and the percentage of minority voters. Until minority voters have a level playing field to participate in the political process, we need the full protections of the Voting Rights Act to be extended and restored to the force they had in 1982.

Question 2: Given that there is evidence that black voter registration has increased dramatically since 1965, why do we still need the Voting Rights Act?

While black voter registration has increased dramatically since 1965 in the aggregate, there is ample statistical evidence that the Voting Rights Act (VRA) still has work to do in improving the ability of all citizens to fully participate in elections. Nationally, white voter registration continues to be consistently higher than black voter registration (in 2004, 67.9% to 64.4%).[1]

Evidence that minority voter registration has increased since the inception of the Voting Rights Act is not an indication of its irrelevance but rather a mandate of its continued necessity. The VRA assures the civil rights of many minorities, and it was put in place not to simply increase black voter registration or even voter turn-out; it also serves to make sure that once those votes are cast they are not diluted by methods such as redistricting and annexations. The sad truth is that in certain areas of the country the civil rights of many citizens are still threatened, and the VRA must reauthorized and strengthened to address continued racial discrimination in voting.

While black voter registration has increased, the same cannot be said of all other minority citizens. The Voting Rights Act protects the rights of many minorities, not just African Americans. There are instances where the Voting Rights Act has been used to protect the rights of Hispanic Americans, Asian Americans, Native Americans, and American Eskimos. For example in Bayou La Batre, Alabama during the 2004 election

[1] U.S. Census Bureau, Voting and Registration, http://www.census.gov/population/www/socdemo/voting.html (last visited June 14, 2006).

Asian Americans constituted a third of the electorate and fielded a candidate for city council.[2] Supporters of the Caucasian candidate engaged in systematic voter intimidation through legal challenges to Asian American voters. Allowed by state law, the challenges required voters to fill out a paper ballot and have a registered voter vouch for them. The Department of Justice was able to use the VRA to prevent purely racially targeted challenges from occurring during the general election. Though African American registration rate has been raised, that fact alone does not indicate the VRA is obsolete because it applies to all minorities.

Section 203 of the VRA requires election officials in covered areas to provide bilingual assistance if it is needed.[3] Bilingual assistance is required if more than 10,000 people or 5 percent of the voting age population has limited English proficiency and the area's literacy rate is below the national average. Bilingual assistance can consist of having someone proficient in another language to aid at the polls, bilingual ballots, and advertisement of bilingual assistance.

According to the 2000 Census, 46,951,595 people spoke a language other than English at home.[4] And of those people, 10,986,851 of them listed their English proficiency as 'not well' or 'not at all.'[5] The VRA illegalized literacy tests as a requirement to vote; and the Supreme Court has agreed that holding literacy tests violate equal protection.[6] Without Section 203 millions of Americans will have a serious burden placed upon their ability to exercise their constitutional right to vote.

The Voting Rights Act is not aimed at simply increasing minorities' voter registration rates. According to the Supreme Court's interpretation, the purpose of the VRA is to thwart any weakening of minority electoral influence.[7] The VRA protects the rights of minorities to exercise their electoral rights without impediment in areas where there is a history of prior discrimination.

One recent example of the VRA combating voter discrimination occurred in Kilmichael, Mississippi in 2001, where the African American voting population became over 50% of the voting age population according the 2000 Census.[8] Three weeks before the 2001 election, the all-white board of aldermen cancelled the election when four of the ten citizens running for Aldermen were black as well as one of the three mayoral candidates.[9] However, due to Section 5, the DOJ was able to object to the change. This

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[2] Protect Voting Rights, Renew the VRA; Learn More, Real Stories, http://renewthevra.civilrights.org/resources/detail.cfm?id=196 (last visited June 14, 2006).
[3] Voting Rights Act of 1965 § 203.
[4] U.S. Census Bureau, American Fact Finder, http://www.census.gov/prod/2003pubs/c2kbr-29.pdf, Table 1.
[5] Id.
[6] *See Katzenbach v. Morgan*, 384 U.S. 641 (1966).
[7] *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000).
[8] U.S. Census Bureau, American Fact Finder, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006).
[9] U.S. Department of Justice, Civil Rights Division, http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_121101.pdf (last visited June 14, 2006).

example, among dozens of others,[10] illustrate that the need for Section 5 of the VRA has remained in great capacity in recent years and must be renewed.

The decrease in DOJ objections issued, along with increasing African American voter registration rate indicate progress, but by no means do they signify that the fight is over. As previously mentioned, since 2000, a conservative estimate is that the VRA has prevented 1,195,899 Americans from having their voting rights violated.

Attempts to disenfranchise minorities are not always as blatant as poll taxes and literacy tests, but simply because some of the threats to minority voting are more subtle does not mean they are any less potent. Today the biggest threats to minority political influence come from creatively drawn districts that dilute minority voting strength, selective annexations, and prohibitive voting methods.

These statistics demonstrate that the VRA does more than just help minorities vote; it ensures that once that vote is cast, it is not diluted by techniques such as redistricting and annexations. Evidence obtained from the Department of Justice's website and the Census Bureau shows that just since 2000 at least 1,195,899 minority voters have been directly aided by Section 5.[11] The majority of these cases occurred after these citizens had registered and voted by prohibiting legislation changes that would diminish the power of these minority votes.[12] In the last six years alone, minorities would have lost the ability to elect a candidate of their choice in 81 state and local elections without Section 5 assistance.[13]

Evidence that a law is being complied with to some degree is not a reason to do away with it. If there was an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but that it is sufficiently serving its purpose and must be renewed.

Failing to renew Section 5 of the VRA would not only be unwise, it would be totally unnecessary due to the self-terminating mechanism of the bailout provision created in Section 4 and amended in 1982. J. Gerald Hebert, an attorney who specializes in national voting rights issues, testified to the House Judiciary Committee on October 20, 2005 that "Most of the factors to be demonstrated [for a jurisdiction to bailout of Section 5] are easily proven for jurisdictions that do not discriminate in their voting

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[10] *See, e.g.*, U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last visited June 13, 2006).

[11] The number of minorities affected by Section 5 was obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). *See* Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

[12] *See id.*

[13] *See id.*

practices."[14] Despite the fact that bailout provisions are "easily proven," few jurisdictions have done so. The fact that a majority of jurisdictions have failed to bailout on an individual basis illustrates the ongoing need for Section 5 regulation.

Hebert further testified that the most common complaint issued by a jurisdiction failing to bailout of Section 5 is that they were rejected due to a recent submission that was not precleared.[15] This complaint, however, illustrates that several of the jurisdictions attempting to bailout of Section 5 still have work to do in altering their voting legislation. Once these jurisdictions have proven that they can enact voting laws that do not have a retrogressive effect on their minority voters, they will be able to bailout of Section 5 coverage through already approved means.

Question 3: The Department of Justice has testified that the rate of objections by DOJ to election law changes is very low in recent years. Does this mean that we no longer need Section 5?

While it is true that the rate of objections to submissions has lowered in recent years, it is misleading to conclude that this drop signifies that Section 5 is not necessary. Two more accurate analyses are that the drop is in part due to the severe increase in submissions to the DOJ and in part due to the fact that *Bossier II*[16] has limited the ability of the DOJ to object to purposeful discrimination in voting practices. I make these points and others in my answer to a very similar question (Question 4) from Senator Cornyn above. However, I would like to provide additional data in support of these analyses.

The number of submissions to the DOJ has skyrocketed since 1982, going from an average of 2,566 submissions per year from 1965 to 1981, to an average of 16,506 submissions per year from 1982 to 2005.[17] Thus, while the percentage of submissions that were not precleared may have lowered in the last twenty-five years, the number of objections has actually almost doubled from an average of fifty-one per year from 1965 to 1981 to an average of ninety-nine per year from 1982 to 2005.[18]

Bossier II, decided on January 24, 2000, seriously hinders the ability of the Department of Justice (DOJ) to combat intentional discrimination. The literal language of Section 5 of the VRA allows the DOJ to preclear a submission only if it "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."[19] Prior to *Bossier II* the DOJ had the ability to find

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[14] CivilRights.org, Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, http://www.civilrights.org/issues/voting/details.cfm?id=37137&currentpage=1 (last visited June 14, 2006).
[15] *Id.*
[16] *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000).
[17] U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, Section 5 Changes by Type and Year, http://www.usdoj.gov/crt/voting/sec_5/changes.htm (last visited June 13, 2006).
[18] *See id.*
[19] 42 U.S.C. 1973c.

discriminatory purpose regardless of the current state of the jurisdiction.[20] However, in a controversial 5-4 decision, the Supreme Court in *Bossier II* tied the Department's hands by permitting an objection on purpose grounds only if the jurisdiction has the purpose specifically to retrogress rather than a general purpose to discriminate against minority voters.[21] The practical effect of *Bossier II* has been to reward the "most intransigent perpetrators of discrimination."[22] These jurisdictions, after decades of purposeful discrimination to dilute minority voting influence, may now continue their prejudices legally as long as they maintain an "exclusionary *status-quo*."[23]

An analysis of the DOJ's activity pre and post-*Bossier II* shows how this *status-quo* has functioned to hinder voting equality. Between 1982 and 1999, the DOJ objected to an average of 124 submissions a year.[24] Following *Bossier II*, that average dropped to 9 objections a year.[25] It is important to note that at the same time the number of objections fell to less than 10% of their previous average, the number of More Information Requests (MIRs) issued by the DOJ to deter voter dilution actually increased (from an average of 47.3 withdrawn, superseded, and no response MIRs from 1982-1998, to an average of 51 such MIRs per year from 1999 to 2005).[26] The comparison illustrates that the need for DOJ intervention in voting alterations has continued in at least a great of capacity as before; it is just the ability of the DOJ to effectively intervene that has been undermined.

While *Bossier II* and the increase in Section 5 submissions have led to a decrease in the percent of submissions that are objected to by the DOJ, Section 5 objections have still aided a minimum of 663,503 minority voters in the last six years.[27] Using this substantial number as a starting point to hypothesize about the number of voters who could have been helped in the absence of *Bossier II*, it becomes evident that Section 5 should not simply be renewed, it should also be strengthened by a statutory amendment to clarify that discriminatory "purpose" means any discriminatory purpose, not simply the purpose to retrogress.

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[20] *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

[21] *See generally Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

[22] Testimony of Debo P. Adegbile Before the House Judiciary Committee's Subcommittee on the Constitution, Legislative Hearing on H.R. 9, http://www.naacpldf.org/content/pdf/reauthorization/VRA_House_Testimony_Presented_by_Adegbile.pdf, 4 (last visited June 14, 2006).

[23] *See id.* at 4.

[24] Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, 12 (June 7, 2006).

[25] *See id.* at 12.

[26] *See id.* at 12.

[27] The number of minorities affected by Section 5 was obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). *See* Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

Finally, it is important to remember that the preclearance requirement is especially important at a time when state legislatures are enacting significant changes to their election laws in response to the Help America Vote Act. These new laws affect everything from the creation of statewide voter registration databases to election day polling place procedures to the use and counting of provisional ballots.[28] Depending on how they are implemented, these changes can have a disproportionate effect on minority voters, making it harder for them to register to vote, and possibly more likely that their vote may not be counted.[29]

[28] According to the National Conference of State Legislatures, there were 92 new election reform laws passed in 2005 in the sixteen states that are covered in whole or in part by Section 5 of the Voting Rights Act. *See* http://www.ncsl.org/programs/legman/elect/elections.cfm.

[29] For example, an objection to a Florida law dealing with absentee ballots noted that in the areas where the law had been put in place without preclearance, the votes of minority voters were more likely to have been declared illegal than the votes of white voters because of the onerous witness requirements. *See* Letter from Bill Lann Lee, Acting Assistant Attorney General for Civil Rights to Robert Butterworth, Florida Attorney General, dated August 14, 1998, available at: http://www.usdoj.gov/crt/voting/sec_5/fl_obj2.htm. Similarly, in the November 2004 election in North Carolina, minority voters were 18% of the electorate, but 36% of those who cast an out-of-precinct provisional ballot, so that a rule that prevented the counting of those ballots would have disproportionately affected minority voters.

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This supplement statement to my written and oral testimony of May 16, 2006, before the Senate Judiciary Committee, is submitted in response to questions received from Senators Herbert Kohl, John Cornyn, and Tom Coburn. My responses are directed to the questions from these senators, in the order noted above. In some instances, the inquiries of two or more senators overlap, and I direct the reader to those responses where appropriate.

First, Senator Kohl appropriately asks the question regarding the Voting Rights Act and progress in voting rights, "would you agree that more work remains to be done? Why or why note? And given that statement, would you agree that the Voting Rights Act should be extended?"

It is evident that more work needs to be done. The reality that selective jurisdictions continue to attempt to dilute minority participation opportunities, that some jurisdictions continue to host racially-polarized voting to the detriment of the minority communities beyond the structures of partisanship, and that some jurisdictions fail to learn the lessons to be taught through preclearance requires a reauthorization of the Act. By the same token, after two generations, perhaps it is time to recognize that there are states and jurisdictions where much has been accomplished, and that recognition of the work that has been done is in order.

The reauthorization of the Act requires a circumspect examination of the reality of race and political participation in the United States. The progress in minority voter participation in the covered jurisdictions is significant, especially in the Deep South. Black voters participate at rates approaching or exceeding the rates of white voter participation. To the extent that differences remain, they are matters of degree rather than orders of magnitude. The great success of the Voting Rights Act is that it has ushered in two entire generations of increasing black voter participation in regions and localities where such participation was impossible six decades ago. Voter participation was a symptom of the larger effort at the exclusion of black Americans from public life. This symptom is in abeyance.

The Act should be extended, but not without a careful discussion and delineation of what the problems are in the jurisdictions to be covered by the Act. It is important to show that the law is sufficiently inclusive in defining jurisdictions to be covered by the Act, but also not insufficiently exclusive. The reality of race-related voting problems in the United States is that those problems are not exclusive to jurisdictions subject to the Voting Rights Act, Section 5, and that jurisdictions with real problems of minority voter access and participation are not picked up by the 1972 trigger mechanism. I address this issue further in my response to other questions.

Extend the Act. But, take care to ensure that the extension both rewards patterns of good behavior and attainment by the covered jurisdictions, while also creating an Act that confronts the new challenges of voting rights identified by others in this process of discovery. And, in extending the Voting Rights Act, let us take care to ensure that the extension is not so lengthy as to exhaust the institutional memory and attentions of the Congress to the topic of voting rights. I elaborate on these points further in the answers to specific questions by the other senators.

Senator Cornyn advances a series of specific questions, starting with: what empirical data can one cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside of the covered jurisdictions?

There are multiple sources of information, but the most readily-available evidence comes from the compilation of reports developed by Charles Bullock and myself, and also the white paper we authored and which was submitted with my original testimony.[1] Those reports show that there is an ongoing improvement in minority voter participation in

[1] Charles S. Bullock III and Ronald Keith Gaddie. 2006. A COMPARATIVE ANALYSIS OF THE IMPACT OF THE VOTING RIGHTS ACT. Presented at the annual meeting of the Southwestern Political Science Association, San Antonio, TX, April.

many of the Section 5 states, and that the rate of minority participation compares favorably to the history of those states and also to the non-Southern states.

In these reports, we compare minority and Anglo white voting rates both within particular covered jurisdictions, and also to minority and Anglo white participation outside of covered jurisdictions. Within the covered jurisdictions, especially the jurisdictions of the traditional South,[2] there are decreasing differences in black and Anglo white voter participation. In particular, a recent phenomenon we are witnessing with regard to turnout is the increase in black voter participation in the southern Section 5 states relative to black participation outside the South.

The tables below note the Census Bureau's estimate of black voter turnout and registration for the years 1992 through 2002, and also the relative ranking, above or below that number, for Section 5-covered states.[3] Only two states had black vote turnout below the non-Southern rate for the entire time series – Georgia and Florida. One state, Alabama, had black voter turnout above the non-Southern rate in all six years, and Mississippi ranked above the non-South in four of six elections. In 2000 and 2002, in eleven of eighteen comparisons, the southern Section 5 states had black voter turnout greater than the non-South. The data on black voter registration indicate generally greater success in enrolling blacks to vote in Section 5 southern states than outside the South. Between five and nine Southern Section 5 states have black registration rates greater than

[2] The traditional South is defined as Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia; see V. O. Key, Jr. 1949, 1984, *Southern Politics in State and Nation,* Knoxville: University of Tennessee Press, chapter 1.

[3] The data for these tables are from Charles S. Bullock III and Ronald Keith Gaddie, 2006. *IMPACT OF USING NON-HISPANIC WHITE DATA.* Prepared for the American Enterprise Institute, for submission to the United States Senate Judiciary Committee and United State House of Representatives Judiciary Committee Subcommittee on the Constitution, June 6; and from tables correcting for Hispanic-identifiers in Florida, Texas, and Georgia in Charles S. Bullock III and Ronald Keith Gaddie. 2005. *An Assessment of Voting Rights Progress in Texas.* Washington, DC: American Enterprise Institute(revised May 2006); Charles S. Bullock III and Ronald Keith Gaddie. 2005. *An Assessment of Voting Rights Progress in Georgia.* Washington, DC: American Enterprise Institute(revised May 2006); and Charles S. Bullock III and Ronald Keith Gaddie. 2006. *An Assessment of Voting Rights Progress in Florida.* Washington, DC: American Enterprise Institute (revised May 2006).

the non-South for 1992-2002, and since 1996 only two southern Section 5 states – Virginia and Florida – have self-reported black voter registration rates lower than the self-report rate among non-Southern blacks. Black voters are generally more often eligible and enrolled to vote in Section 5 states in the South, though that eligibility is not acted on with as much frequency.

Black Voter Turnout Relative to the NonSouth						
	1992	**1994**	**1996**	**1998**	**2000**	**2002**
						SC
	LA				LA	LA
	MS				SC	TX
	VA		LA	**AL**	MS	**AL**
	AL	**AL**	**AL**	LA	TX	NC
	NC	MS	VA	SC	**AL**	MS
NonSouth	53.8	40.2	51.4	40.4	53.1	39.3
	TX	SC	SC	MS	**GA**	**GA**
	SC	VA	MS	**GA**	NC	**FL**
	GA	TX	TX	NC	VA	VA
	FL	LA	**GA**	TX	**FL**	
		GA	NC	**FL**		
		FL	**FL**	VA		

Black Voter Registration Relative to the NonSouth						
	1992	**1994**	**1996**	**1998**	**2000**	**2002**
			LA			
			AL			
			MS	**AL**	**MS**	**LA**
	LA		NC	**MS**	**LA**	SC
	MS	**MS**	GA	SC	**AL**	**MS**
	AL	**AL**	FL	**LA**	**TX**	**AL**
	VA	**LA**	SC	GA	SC	**TX**
	NC	SC	VA	**TX**	GA	GA
	TX	**TX**	**TX**	NC	NC	NC
NonSouth	63	58.3	62	58.5	61.7	57
	SC	GA		VA	VA	FL
	FL	NC		FL	FL	VA
	GA	VA				
		FL				

Senator Cornyn then inquires about whether I support updating the voter participation trigger formula to reference participation in more recent elections, and whether I would extend Section 5 coverage to jurisdictions that have been the subject of a successful Section 2 challenge.

I support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972, but with a proviso: that in updating the trigger to the two most recent elections, the trigger be given the capacity to consider the evolution of the electorate. In addition to updating the trigger for current coverage to 2000 or 2004, I would suggest revising the language of the trigger to state that a jurisdiction where less than 50 percent of voting age *eligible* were registered to vote as of the Monday before *the most recent Presidential election*, or less than 50 percent of voting age *eligible* voted *in the most recent Presidential election*, that jurisdiction would trigger section 5 coverage.

This change in wording would guarantee that jurisdictions wherein there was a falloff in voter participation would trigger oversight by the Department of Justice. This floating trigger provision *should not* automatically bailout a jurisdiction just because the jurisdiction attained majority voter turnout in the most recent presidential election.

I also support adding the presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last five or ten years, to this formula in order to pick up jurisdictions that have begun discriminating wince the 1970s. The purpose of the Voting Rights Act is to ensure minority voter participation where historic disfranchisement has prevented such participation. Our own analysis shows that the longer one applies the oversight mechanism, the more successful minority voters are in achieving full participation in the process. The history of Section 2 challenges in the United States demonstrates that the problems of abuse of minority access to the electoral process are neither exclusively southern or exclusively in jurisdictions where Section 5 has been applied since 1972. Applying Section 5 as a mandatory sanction as a consequence of losing a Section 2 challenge can have the chilling effect of discouraging jurisdictions from engaging in discriminatory voting practices even if they do not trip either the existing trigger mechanism or the proposed trigger mechanism articulated by Senator Cornyn.

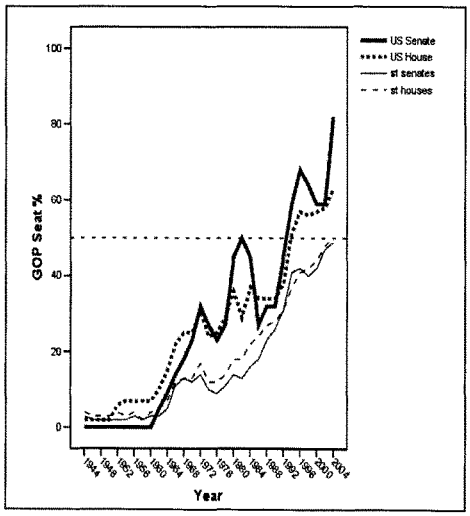
In addition, I would support the continued application of Section 5 to a jurisdiction that had been subject to an objection under Section 5 in the last ten years, and which objection had been sustained on appeal. These jurisdictions would not be eligible to "bail out" from under Section 5 coverage under the existing law, and updating the trigger should not be sufficient grounds to excuse the inability to comply with Section 5 in recent memory.

Taken together, propositions such as those advanced above create an evolutionary and responsive trigger mechanism for the Voting Rights Act that ensures the integrity of the intent of the Act – maintaining minority voter access – while also ensuring that the Act's scope of coverage can evolve to include new, potentially problematic jurisdictions in the future.

Senator Cornyn's next question inquires after the relevance of City of Boerne v. Flores, *in which the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments, because legislative record of the Religious Freedom Restoration Act "lacks examples of modern instances of generally applicable laws passed because of religious bigotry." Would I support removing – at a minimum – the year 1964 from the coverage formula?*

I am not a legal scholar so I will be circumspect in my answer to the *City of Boerne* question. The court has indicated that data over forty years old cannot be relied on as a basis for legislating under the 14th and 15th amendments. The election of 1964 occurred over 40 years ago. Certainly striking the 1964 election from the trigger is consistent with the Court's interpretation of the scope of data that might be used to craft policy in this area. Too, because tests and devices as qualifications to vote have been abolished for forty years, one must ask whether that evidence can inform the shape of policy into the future. An informative contrast is to consider the politics of the South in the summer of 1964: Republicans held one US Senate seat, no state executive positions, and literally a handful of US House seats and a paucity of state legislative seats. As illustrated in the

figure[4] below, which graphs the growth of *Republican* political development, things have certainly changed. The Republican Party has emerged as a competitive – if not dominant -- political alternative in the South. Whether from a partisan perspective or a racial perspective, the environment of the early 1960s is not informative of the current shape of politics in the Southern Section 5 states. An examination of the time-series data we have collected on minority political progress in the Section 5 indicates a similar difference over four decades.



[4] Figure from Charles S. Bullock, III, Donna R. Hoffman, and Ronald Keith Gaddie, 2006. Regional Variations in the Realignment of American Politics, 1944-2004. *Social Science Quarterly* 87 (September): 503.

Noting the very low rate of Department of Justice preclearance objections, Senator Cornyn asks: What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

With regard to the question of how few objections must occur before Section 5 coverage is no longer warranted, it is evident that there is no bright-line number. Advocates of blanket renewal note the need for sustained Section 5 coverage because "some jurisdictions don't get the message," and point to both instances of Section 2 challenges and instances of Section 5 objections as blanket evidence. But jurisdictions *are* getting the message on most levels and in most places. In the table below, I indicate the number of objections, by state, under the Voting Rights Act.

Frequency of DOJ Preclearance Objections Since 1965

State	1965-1974	1975-1984	1985-1994	1995-2005
Alabama	21	44	35	2
Georgia	41	68	52	10
Mississippi	25	67	66	11
Louisiana	38	27	62	19
North Carolina	5	23	30	4
South Carolina	20	44	42	14
Virginia	8	10	7	6
Texas	---	105	79	13
Florida	---	1	2	2
California	---	2	3	1
New York	2	4	5	2
Arizona	1	6	13	2
Michigan	---	0	0	0
New Hampshire	---	0	0	0
South Dakota	---	2	0	1
Alaska	---	0	1	0

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

The state with the most objections, Texas at 197, also has the largest number of covered subjurisdictions (254 counties, over 300 school boards, and over 1,200 incorporated cities), as does the second most-objected jurisdiction, Georgia (159 counties, over 450 cities, and over 180 school districts). Two states with covered jurisdictions have never had a section 5 objection (Michigan and New Hampshire) and another four have had objections in the single-digits (Alaska, California, Florida, South Dakota). The majority of objections outside of Texas have come in the southern states covered by the original 1965 trigger, and of those the top five states for objections are all in the Deep South.

The rate of objections under Section 5 has declined appreciably in the past decade. From 1965 to 1974, the DOJ objected to 161 changes in election practices across nine states. Of those objections, one was in Arizona and two were in New York, while 41 were in Georgia and 38 were in Louisiana. From 1975 to 1984, 403 three objections were issued across thirteen states, with a high of 103 in Texas and none in Michigan, New Hampshire, or Alaska. Only fifteen other objections were issued in states outside those states original covered by the original trigger. From 1985 to 1994, 397 objections were issued. Alaska incurred its only objection to date, while Texas again led with 79 objections. Only 24 non-Texas objects occurred outside the original 1965 trigger states, where Mississippi (66) and Louisiana (62) led in objections. In the most recent decade, DOJ objections have fallen appreciably across the board. Only 87 total objections were lodged (recall that Texas alone averaged 92 objections a decade for the previous two decades), with Louisiana (nineteen) and South Carolina (fourteen) leading all states. The number of objections to changes in the original 1965 trigger states fell from 294 from 1985-94 to just 66 from 1995 to present. The effect is across the board: Alabama, from 35 to two (-94.3%); Georgia, from 52 to ten (-80.7%); Mississippi, from 66 to eleven (-83.3%); Louisiana, from 62 to nineteen (-69.4%); North Carolina, from 30 to four (-86.6%); South Carolina, from 42 to fourteen (-66.7%); Virginia, from seven to six (-14.3%). In Texas, objections fell from 79 to 13 (-83.6%), while in the remaining covered jurisdictions, objections fell from twenty-four to eight (-66.7%).

The bailout provision of the 1982 reauthorization does give an indication of the minimal amount of time a jurisdiction must be objection-free to be eligible to exit Section 5 oversight: ten years. The paucity of objections in the last decade indicates that the lessons of the Voting Rights Act are being learned by the affected jurisdictions, and that many localities are meeting this first, initial criterion for exiting coverage. I address this issue further in my responses to Senator Coburn regarding jurisdiction bailout.

Senator Cornyn next inquires about support for a shorter renewal period, say five or ten years.

There is a lack of clear differentiation between covered and non-covered jurisdictions on dimensions of minority voter participation and access to the political process. A shorter period of reauthorization is therefore in order. A better rationale for a short reauthorization of, say, seven years is based on the need for there to be greater institutional memory among members of Congress and an active monitoring of Voting Rights progress by the Judiciary committees of the US Senate and US House of Representatives. Even a five-year renewal guarantees that the preclearance provision will be in force for the next round of redistricting, and the Act would come up for review in the midst of its application.

In conclusion, Senator Cornyn asks after the practical implications of the Ashcroft decisions and whether "influence" districts, with relatively low numbers of minority voters, should be protected under the plan?

I am not of the opinion that districts with relatively low numbers of minority voters should be protected under a redistricting plan. I direct the committee to my comments in *Sessions v. Perry*, in response to the evaluation of the "performance" of coalition districts and districts with low minority percentages in the Texas congressional map. In the Texas redistricting trial, the three-judge panel was confronted with an argument that districts that were not majority-minority, but which performed for minority voters who did not control the election, enjoyed special protection. The majority in *Sessions* responded that

> *Gingles* and the cases that followed it have been keenly aware that the defining concepts of *Gingles* – numbers and cohesion – are critical to its studied effort to confine the limits of the Act to those situations that dilute minorities' opportunity to vote without protecting coalitions that may be helpful or even essential to the leveraging of their strength. Properly confined, the Act implements the fundamentals of factions. Unconfined it reaches into the political market and supports persons joined, not by race, but by common view. Serious constitutional questions loom at that juncture.[5]

The majority quoted my argument in deposition for the case, that

> "Plaintiffs' view of influence districts 'would lock in a majority of seats for the party getting the minority of the vote' . . . that [the alleged coalitional district 24] was not protected under § 2 and that it was not possible to draw a second, sufficiently compact majority minority district in Dallas."

I observed at that time and continue to hold that

> "[District 24] is not going to meet the first prong of the *Gingles* criteria. . . . It is not a district in which you have one minority group which can constitute a majority of the population. It's not a district where that minority group controls primary and the general election. It's not possible to draw a second sufficiently compact majority district in Dallas if you draw District 30"

and that if § 2 protection extended to the then-District 24 absent the *Gingles* factors, the Voting Rights Act begins to protect political affiliation rather than race, because if the act protects a district where coalitions are required to elect a candidate of choice

> "you're on a slippery slope to essentially saying, 'Well, if it's a Democratic district, you can't re-draw it.' And intellectually, that to me is troubling because it sets up a circumstance where one party has its constituency protected under the Voting Rights Act and . . . the other party doesn't have any protections at all.'"[6]

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[5] *Sessions v. Perry*, Federal Court for the East District of Texas, 2:03 CV 354, page 46.

[6] *Ibid*, note 114.

The district court concluded that

> "Protecting districts that are defined and controlled by political coalition and not race would infringe on the clear right of the state to choose its method of compliance with the Voting Rights Act. If there is no obligation to create an influence district, there is no obligation to retain one."[7]

I also direct the committee my previous observations about the redistricting that led to the *Ashcroft* decision, at the end of our report on Georgia.[8] These statements by then-advocates of the Georgia approach clearly articulate a set of circumstances that indicate a diminished role for race in the state's politics, and the willingness to use race in the context of party politics to create districts that elect members based on common political belief:

> "A leading supporter of the effort to reduce minority concentrations in legislative districts was Congressman John Lewis . . . Explaining why he did not object to the reduction in minority concentrations, Lewis said of Georgia,
>
> > The state is not the same state it was. It's not the same state that it was in 1965or in 1975, or even in 1980 or 1990. We have changed. We've come a great istance. I think in - - it's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.[9]
>
> Elsewhere in this same affidavit, Lewis elaborated,
>
> > 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. And they have seen people deal with issues as, I said before, that transcend race: economic issues, environmental issues, issues of war and peace. . . So there has been a

[7] *Ibid.*

[8] Charles S. Bullock III and Ronald Keith Gaddie. 2006. *An Assessment of Voting Rights Progress in Georgia.* Washington, DC: American Enterprise Institute (revised submission, May 2006).

[9] Affidavit of John Lewis in *Georgia v. Ashcroft*, 539 U. S. ____ (2003), February 1, 2002, p. 18.

> transformation, it's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really.[10]

> Senator Robert Brown who served as vice-chair of the Senate Reapportionment Committee also agreed that major changes have taken place in Georgia. During the course of an affidavit, he express the nature of the change as follows: "There are other examples of that around the state that I think suggest that there has been some change from that rigid, 'if there's an African-American on the ticket, there's an automatic 'no' votes for whites.'"[11],[12]

Our examination of partisan elections in Georgia substantiated the claims of Representative Lewis and Senator Brown, that Democratic candidates are undifferentiated by white voters based on the respective candidates' race. Black and white candidates can run similarly well or similarly poorly among Georgia's white voters. In a political environment where black and white legislators coalesce to pull down the concentration of black majorities to achieve broader political gains; where party politics, while having a racial structure does not differentiate candidates on the basis of race; where black candidates who are preferred by black voters prevail both statewide and potentially in non-majority minority districts; and where black officeholders increasingly approach proportionality in officeholding, the need for continued coverage under section 5 is called into question. When taken out of the majority-minority context, the use of race in crafting electoral districts takes on predominantly a political rather than racial or ethnic character, as observed by the majority in *Sessions v. Perry*.

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[10] *Ibid*, pp. 15-16.

[11] Affidavit of Robert Brown in *Georgia v. Ashcroft*, 539 U. S. ____ (2003),, February 1, 2002, p. 8.

[12] Charles S. Bullock III and Ronald Keith Gaddie, 2005. *An Assessment of Voting Rights Progress in Georgia*. Prepared for the American Enterprise Institute, Washington, DC (revised version, May 2006): 16-17.

Senator Coburn advances a series of related questions, some of which overlap with the queries of Senator Cornyn. Senator Coburn first asks if, with the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?

I address this issue in my response to Senator Cornyn's second and third questions. An updated trigger is called for, although simply updating the trigger to the most recent presidential election is insufficient to the purpose of the legislation. We possess two generations of information on progress in voting rights, minority participation, and litigation nationwide with which to guide the crafting of both a trigger mechanism and a bailout provision. Also, we do know of jurisdictions activated by the old trigger where "lessons have not been learned," where Section 5 objections continue to be issued, despite relatively high voter registration and turnout.

Then, Senator Coburn inquires whether, if the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?

As I indicated in response to Senator Cornyn's fifth question, while the Voting Rights Act should be renewed, there are many persuasive legal and practical reasons for a shorter renewal period, not the least of which is the fact that the purpose of sunset legislation is to compel the legislature to visit with frequency and an existing institutional memory the need to continue public policies.

With regard to Senator Coburn's third question "[a]re there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating concerns of 'backsliding' if the trigger is updated from 1972": the potential updated triggers I describe in response to Senator Cornyn's second question can guard against backsliding. This conceptualization of the trigger does so by holding out the prospect of triggering renewed coverage should voter

registration or participation fall below 50% of the voting age *eligible* population in the most recent presidential election. A bailed-out jurisdiction could "bail back in" if voter participation falls off. A jurisdiction that loses a Section 2 challenge would find itself back under Section 5. It might also make sense to strike the "tests and devices" provision from the trigger, as those tests and devices are now permanently banned in any event.

Senator Coburn next inquires whether leaving the trigger unchanged increases the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court.

Again, while I am neither legal scholar or prognosticator of the actions of the Supreme Court, but the time-limitations on the use of data in crafting policy under the 14th and 15th amendments in *City of Boerne* indicate a potential vulnerability should the legislature choose to leave the trigger unchanged in the renewed legislation.

The next two questions posed by Senator Coburn ask how a broad-based "bailout" of covered jurisdictions might be implemented, and if there are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?

In my initial written testimony to the committee, I noted that

> The Lawyers Committee on Civil Rights Under the Law offers an efficient description of the conditions to be met by a jurisdiction seeking to bail out from under Section 5 coverage. The jurisdiction must show that, for the previous ten years: it has not used a test or device that has a discriminatory purpose or effect as a precondition to registering or voting; not have had a US court issue a final judgment against the city or county for voting discrimination; show full compliance with section 5 -- including timely submission of voting changes and no implementation of objectionable changes before final resolution; not had a proposed voting change objected to by the attorney general and no declaratory judgment denied under section 5 by the US District Court for the District of Columbia; no Federal examiners were assigned to the city or county under the Voting Rights Act. In addition, a jurisdiction must show that it has not engaged in other discriminatory practices prohibited by the law; must show that it has taken constructive steps to

increaseminority access to the political process; and show that there has been an increase in minority political participation (emphasis added). [13]

A bailout can be implemented by first identifying those jurisdictions that meet the first five conditions identified above. A determination can be made by an examination of the factual public record by the Department of Justice, in order to identify and notify "potentially eligible jurisdictions" that can apply for bailout. Then, the jurisdictions in question can take proactive to steps to document evidence of the last three conditions identified above.

The challenge is that the documentary record for the first five conditions will be subject to dispute, and would most certainly lead to litigation. An alternative, which transfers the burden of proof away from the jurisdiction and toward the national government, is to automatically bailout all of the jurisdictions that meet the first five criteria, and then consider restoring to preclearance coverage jurisdictions where either the DOJ or local plaintiffs challenge the bailout based on the ability to meet the last three criteria. Any jurisdiction failing on any of the three latter criteria would be placed back under Section 5 oversight. This latter proposition transforms continuing coverage under Section 5 to resemble Section 2, by shifting the initiative and burden.

The last question posed by Senator Coburn asks "In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice 'got it right' because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said 'Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts.' Do you agree with Professor Karlan's assertion that minority voters in Republican districts 'have no influence'?"

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[13]http://www.lawyerscomm.org/2005website/projects/votingrights/bailout.html.

If influence is only defined as being part of the electoral coalition that elected those representatives, then Professor Karlan is correct. There are, however, a variety of other ways to consider the issue of representation and influence. But first we might visit Professor Karlan's facts.

After the 2002 elections, it was not two Democrats who changed party to the Republicans, but four: Senators Hill, Bowen, Cheeks, and Lee. Of those, one, Senator Cheeks, represented a majority-black state senate district (23) that was 51.5% black by VAP and 49.4% black by registration.

Senator Cheeks was nominated and elected without opposition in 2002, despite the effort of majority leader Charles Walker to imperil his incumbency in the primary by boosting the black percentage in his district. We cannot determine whether he was or was not the preferred candidate of the minority electorate. The post-*Larios* re-redistricting of 2004 placed Senator Cheeks in a state senate district with African-American Charles Walker, who soundly defeated Cheeks in the general election. Senators Bowen and Lee were not on the 2004 general election ballot, as Bowen retired and Lee was defeated for renomination and their districts sent other Republicans to serve under the Gold Dome. Only Senator Hill, who represented a district just over one-third black by VAP and 32% black by registration, was reelected as a Republican. Such a district might have been considered a coalition district under Justice O'Connor's dicta in *Ashcroft*, but it is far from the empirically-determined 44.3% black threshold for an "even opportunity" advocated by Professor Epstein at trial. The political choices of incumbents defied the electorate, but their defiance was short-lived in three cases and ratified decisively in the subsequent general election in the fourth instance.

For the time that these legislators were in office, the argument that minority constituents were "without influence" does not necessarily hold. First, political science literature indicates that Republican and Democratic legislators both provide constituency service related representation within the bureaucracy to constituents across racial lines. Richard Fenno documents such a case, from Georgia, in the representative efforts of

Republican Mac Collins towards his black constituents in Georgia's 3d and 8th congressional districts throughout the 1990s.[14]

Also, there is the concept of "collective representation," advanced first by Robert Weissberg and then reiterated by Pat Hurley.[15] Collective representation holds that voters find representation not just through their geographic representative, but also through other legislators who descriptively associate with the voter. Work on both racial/ethnic minority representation and also gender representation finds that minority and women legislators perceive themselves as also filling "group" representation roles, so the constituent might find representation through the entire political process rather than just a district in a map. The notion of assessing retrogression in the context of the entire map too implies that minority representation is not localized in nature.

Reasonable intellectual arguments exist to contend that these voters, victimized by politicians who defied the electoral will, can find representation through the political process or beyond the bounds of party. Too, the evidentiary record indicates that the undoing of the *Ashcroft*-case Georia gerrymander by the *Larios* court led to a map that did not return three of four pledge-breakers to the Senate, including the one senator who had defected in a majority-black district, and who ran again in a district that had a somewhat enhanced black VAP. Given the tight linear relationship between the size of a black population in a jurisdiction and the proportion of the vote for Democratic candidates in Georgia politics, and the magnitude of Cheeks loss (nearly twelve points), he might also have lost reelection to a black general election challenger in the old configuration of his district. The electorate was able to correct against these acts of politics, through politics.

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[14] Richard F. Fenno, Jr. 2000. *Congress at the Grassroot: Representational Change in the South, 1970-1998.* Chapel Hill: University of North Carolina Press.

[15] Robert Weissberg, 1978. Collective vs. Dyadic Representation in Congress. *American Political Science Review* 72: 165-177; Patricia Hurley, 1982. Collective Representation Reappraised. *Legislative Studies Quarterly* 7: 119-136.

Supplemental Statement of Pamela S. Karlan
Submitted to the United States Senate Committee on the Judiciary
In Response to Written Questions Received from
Senators Leahy, Kennedy, Kohl, Cornyn, and Coburn

I. Introduction

On May 16, 2006, I presented written and oral testimony to the Committee on "The Continuing Need for Section 5 Preclearance." As a professor of law and experienced voting rights attorney, I testified that renewal and amendment of section 5 represents an appropriate use of congressional power under Article I, section 4 of the Constitution (the "elections clause") as well as sections 5 and 2 of the Fourteenth and Fifteenth Amendments, respectively (the "enforcement clauses").

I have received written questions from five senators. What follows are my answers to those questions. The Senators' questions are in *italics*. My answers are in roman. In some places, I have referred to answers already given. I hope these additional comments will be helpful.

Answers to Questions from Senator Leahy

1. *In 1999, the Supreme Court decided Lopez v. Monterey County, which came after City of Boerne. In Lopez, the Court again upheld, as it has many times, Congress's authority under the Fifteenth Amendment to require a jurisdiction to pre-clear voting changes. It did so even where that change was required to implement the law in a non-covered state and the jurisdiction had no discretion in making it, recognizing "that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions...." Does Lopez provide strong evidence that the Supreme Court will continue to give deference to Congress in reauthorizing the VRA, even after City of Boerne?*

As I explained in my written testimony, *Lopez v. Monterey County*, 525 U.S. 266 (1999), reinforces the Supreme Court's earlier decisions upholding the preclearance regime. In reaffirming the constitutionality of the Act, the *Lopez* Court explicitly cited *City of Boerne*, see *Lopez*, 525 U.S. at 282-83. More generally, the Supreme Court's decisions after *Lopez* – most particularly, *Tennessee v. Lane*, 541 U.S. 509 (2004), and *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) – as well as its elections clause cases, reaffirm that the Voting Rights Act satisfies the *City of Boerne* congruence and proportionality test.

2. *In his dissent in another case coming after City of Boerne, Tennessee v. Lane (2004), Justice Scalia suggests that Congress should be subjected to lesser constitutional scrutiny where its anti-discrimination remedies are tied to discrimination based specifically on race. In your view, should this reauthorized VRA be entitled to greater deference from the Supreme Court for this reason?*

Answering this question as posed is complicated by the fact that I disagree with Justice Scalia's underlying premise: namely, that Congress's enforcement powers with respect to equal

protection are generally quite limited. As you will recall, Justice Scalia's dissent in *Lane* announces that he would apply a test to congressional enforcement powers that would foreclose virtually all prophylactic legislation. See *Lane*, 541 U.S. at 557-60. While he ostensibly carves out an exception for prophylactic legislation involving racial antidiscrimination, see id. at 61, as a matter of stare decisis, his overall approach to congressional enforcement power is so restrictive that I cannot endorse it, since Justice Scalia's approach would prevent legislation broadly protecting the right to vote that rests on the fundamental rights strand (rather than the antidiscrimination strand) of the equal protection clause.

That being said, since under Justice Scalia's cramped approach to enforcement, statutes like the Voting Rights Act are entitled to relatively greater deference, a fortiori such statutes are entitled to greater deference under standards that are more generally respectful of congressional power.

3. *In your analysis of constitutional law, should the level of deference given by the Supreme Court to Congress' powers to reauthorize Section 5 of the VRA depend on the precise length of the extension of the reauthorization?*

No. There is no particular magic to any precise time period. It seems to me that Congress must make a pragmatic assessment of how much longer preclearance is warranted that takes into account factors such as the recent nature of relatively effective minority participation in many covered jurisdictions, current political realities, the relationship to decennial redistricting cycles, the incentives for bailout (with its affirmative efforts to include minorities) provided by different potential extension periods, and the like.

Perhaps the following analogy might be helpful to you in thinking about this issue. The Copyright and Patent Clause of the Constitution, Art. I, § 8, cl. 8, provides that "Congress shall have Power . . . to promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings." In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Supreme Court, by a vote of 7-2, upheld Congress's enactment of the Copyright Term Extension Act that enlarged the copyright terms of existing works by twenty years. The Court's analysis of the word "limited" focused on the ways in which the extension was constrained within certain bounds, but gave tremendous deference to Congress in deciding the length of the extension.

More generally, judicial deference to the specific policy choices is particularly appropriate in light of the fact that Congress itself has both chosen to revisit the question of the continuing need for the Act by requiring periodic renewal and each time compiled a detailed record to justify its decisions.

4. *The Supreme Court requires a strong record of discrimination to uphold laws that impinge on the states. In enacting the VRA and reauthorizing it 4 times, Congress has relied on extensive fact-finding showing the recurring use of discriminatory tactics in covered jurisdictions. Do you believe that the Court views evidence of state discrimination as perishable—with some kind of constitutional expiration date—even after Tennessee v. Lane, in which the Supreme Court upheld key portions of the Americans with Disabilities Act on the basis of older evidence of discrimination?*

There is nothing in the Supreme Court's decisions that suggests some sort of "statute of limitations" on evidence of discrimination. As I explained in my written testimony, this should be especially true when the question of renewing, rather than enacting a statute is at issue. The Voting Rights Act of 1965 was passed only after roughly a century of experience with repeated subversions of minority voting rights in the covered jurisdictions – a century that followed a prior century in which African Americans were expressly barred from voting nearly everywhere in the United States and enslaved in large parts of the nation. It is well within Congress's competence to conclude that the effects of that discrimination have not yet been completely eradicated. The analogy I used in my oral testimony may be helpful here. When a patient is given a strong antibiotic for a virulent infection, the doctor often warns her not to stop taking the drug (which may have some side effects) the moment she feels better, but to continue the course of treatment, because otherwise she cannot be sure the disease has been eradicated completely. So, too, with the racial exclusion the Voting Rights Act was intended to cure.

5. *Because of the history of discrimination in covered jurisdictions, which Congress has established in previous reauthorizations and the Supreme Court has upheld as a constitutional basis for Section 5, is it enough for Congress to find that there are recurring instances of discrimination in covered jurisdictions?*

If I understand this question correctly, my answer is that Congress can rely on the evidence in the legislative history underlying the Act's original passage as well as its amendment and extension in 1970, 1975, and 1982, as well as evidence of discrimination during the past 24 years. That is, the justification for the Act rests not only on examples of discrimination that have occurred since the last renewal, but also on Congress's understanding that that discrimination occurred against a backdrop of prior pervasive discrimination and efforts to eradicate it.

6. *I want to ask you about Professor Gaddie's report in terms of the evidentiary standard that the Supreme Court will apply to Congress' record in support of extending Section 5. In order to establish the kind of record Congress needs in order to extend Section 5, does Congress have to find that that there is more evidence of discrimination in covered jurisdictions than non-covered jurisdictions?*

It does not, as discussed in my response to Senator Kennedy's third question. Prior to the enactment and earlier extensions and amendments to section 5, there were clear and striking differences between covered and non-covered jurisdictions. There is still evidence of a gap, although (fortunately) that gap seems to be decreasing.

The issue here is a conceptual one. If, after several decades of enforcement, the gap between covered and non-covered jurisdictions remained as wide as it was in 1965, or even 1982, that would raise serious questions about whether the Voting Rights Act is appropriate legislation: the lack of any improvement in observed conditions would suggest that the Act had been utterly ineffectual.

By contrast, the fact that the gap is narrowing suggests that the Act is working. But it does not answer the question whether the gap would continue to narrow, remain the same, or grow if the Act were eliminated. Given past history, it seems the more prudent course to keep the Act in place

until the gains it has produced are cemented and internalized within covered jurisdictions.

7. *In 1982, I helped amend the VRA to include a new bailout provision to give covered jurisdictions without recent violations the opportunity to get out of Section 5 coverage. Even though no jurisdiction that has tried to bail out has failed, fewer than a dozen jurisdictions have sought to remove themselves from Section 5 coverage. What is the constitutional significance to the fact that jurisdictions have been choosing not to exercise the option to bailout from Section 5 coverage?*

As with your previous question, there are several different stories consistent with the rarity of bailout. The first is that jurisdictions have not sought bailout because they have not satisfied all the conditions – including the important "constructive efforts" detailed in section 4(a)(1)(F) – and see no point in a futile effort to bail out, an effort that might lead to scrutiny over whether the jurisdiction has even fully complied with section 5. A second is that jurisdictions appreciate either the "seal of approval" that preclearance accords or the political cover it provides. A third is that local jurisdictions are unaware of the bailout process. That the jurisdictions that have pursued bailout have been successful in obtaining it suggests that the actual process strikes an appropriate balance.

8. *Assistant Attorney General Wan Kim testified that Section 5 has had a deterrent effect in covered jurisdictions, discouraging attempts to implement discriminatory voting tactics. Does Professor Gaddie's comparison of the record of covered jurisdictions compared with non-covered jurisdictions ignore this widely recognized deterrent effect? Is evidence of this deterrent effect relevant evidence which would help meet Congress' burden of establishing a sufficient record in support of reauthorization?*

As I explained in both my written and oral testimony, the deterrent effect of section 5 is very real, and cannot be captured by looking at objection letters, reported lawsuits, or other such evidence. Indeed, if section 5 worked perfectly to deter the adoption of discriminatory changes, there would be no objection letters at all.

Analysis of section 5's deterrent effect is entirely relevant to Congress's reauthorization of the Act. As my answer to your earlier question about Justice Scalia and *Lane* indicated, congressional power to enforce the antidiscrimination commands of the Fourteenth and Fifteenth Amendments clearly extends to prophylactic legislation – that is, legislation that prevents violations from occurring, rather than merely remedying them after the fact.

9. *Professor Chandler Davidson and others have testified about the risk of backsliding and the risks to the progress we have made if we were to let Section 5 lapse. Is this evidence of the risk of backsliding constitutionally relevant?*

Yes. Here, too, Congress is addressing the question whether the Voting Rights Act is appropriate prophylactic legislation.

Answers to Questions from Senator Kennedy.

1. *The Supreme Court in the Bossier II case ruled that Section 5 only prohibits voting changes that worsen or are intended to worsen the position of minority voters. Do you agree that under the Bossier II standard the Department of Justice and the District Court in D.C. must preclear even an illegal or unconstitutional voting change, so long as there is no backsliding in minority voting power? What is your view of this case? Could it result in voting changes that may not be retrogressive, but may still dilute minority voting power and intentionally discriminate?*

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, prohibits covered jurisdictions from enacting or administering changes to their voting-related practices or procedures unless they can persuade preclearance authorities (either the Department of Justice or the D.D.C.) that the proposed change "does not have the purpose and will not have the effect" of discriminating against members of a protected class. In *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (*Bossier Parish II*), the Supreme Court limited the phrase "discriminatory purpose" in section 5 cases to apply only to a purpose to retrogress, that is, to make protected voters worse off. Thus, the Court "h[e]ld that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose." Id. at 341.

In general, government actions that have a racially discriminatory purpose are unconstitutional. (Some racial classifications may survive strict scrutiny, but only because a reviewing court concludes that such classifications are narrowly tailored to serve a compelling government purpose. Thus, if the *purpose* is to disadvantage individuals or groups on account of race, the use of race is illegitimate.) That includes actions that deliberately perpetuate existing discrimination. For example, prior to the passage of the Fifteenth Amendment, many states expressly limited the franchise to whites. A state that adopted a new strategy for perpetuating that past, purposeful disenfranchisement would violate the Fifteenth Amendment even if the new device "served only to perpetuate those old laws and to effect a transparent racial exclusion." *Rice v. Cayetano*, 528 U.S. 495, 513 (2000).

"Retrogressive purpose" is thus only a subset of the larger category of "unconstitutional racially discriminatory purposes." Thus, after *Bossier Parish II*, the Supreme Court has directed preclearance authorities to permit changes that have an unconstitutional, racially discriminatory purpose as long as the purpose is simply to perpetuate unconstitutional conditions and not to make them actually worse.

Had the Supreme Court's view in *Bossier Parish II* been the prevailing view in 1965, the Voting Rights Act would have been a dead letter in any covered jurisdiction where black voters were entirely excluded – for example, the counties in Mississippi or Alabama where no black voters (or only a token handful) were registered. Those jurisdictions would have been permitted to substitute other disenfranchisement mechanisms for their literacy tests with impunity: no black voters could vote prior to the suspension of the literacy test, so no black voters would have been rendered worse off by new disenfranchising tactics.

My view is that *Bossier Parish II* is a deeply misguided decision, since the changes for

which it requires preclearance are changes that, by the Court's own hypothesis, are unconstitutional, but will remain in effect until plaintiffs can muster the counsel to bring constitutional or statutory challenges. As I explained in my earlier testimony before the Committee, the voting rights bar is small and underfinanced, and thus it may be hard for the minority community to find lawyers to bring cases challenging many unconstitutional changes, particularly at the local level.

2. *As a result of the Bossier II case, and the new Section 5 standard that the Justice Department has had to implement, would you agree that the number of Justice Department objections since that case is likely to underestimate the unconstitutional attempts to limit minority voting power by covered jurisdictions?*

Yes. As my answer to the previous question set out, *Bossier Parish II* requires preclearance of unconstitutional attempts to limit minority voting power. Moreover, as I explained in my written testimony, *Bossier II* will also decrease the deterrence effects of section 5 because jurisdictions will no longer bear the burden of negating an inference of unconstitutional purpose. Especially at the local level, where practices like selective annexations and deannexations are commonplace, this may be especially important.

3. *Do City of Boerne and its progeny require Congress to compare voting practices in covered states and non-covered states before renewing Section 5 of the Voting Rights Act? Or is Congress constitutionally permitted to address discriminatory voting practices incrementally by focusing first on states with a demonstrated history of discriminatory voting practices, rather than addressing the entire nation's various voting problems in a single piece of legislation?*

I do not believe that *City of Boerne v. Flores*, 521 U.S. 507 (1997), requires Congress to engage in a new and detailed comparison of voting practices and procedures and levels of minority participation and electoral success in covered and non-covered jurisdictions before renewing section 5.

As I set out in my written testimony, the Supreme Court has, both before and after the decision in *City of Boerne*, recognized the propriety of Congress's decision to focus the stringent remedies of section 5 on those jurisdictions with a long and pervasive history of disenfranchising or otherwise limiting the political participation of minority citizens. Congress generally has the prerogative to proceed incrementally. As the Court explained in *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966):

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler v. Dental Examiners*, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

Thus, while I would certainly support additional legislation to more fully protect the right

to vote nationwide, the need for such legislation in no way undermines either the need for, or the continued constitutionality of, the section 5 preclearance framework. This is especially true, considering how effective preclearance has proven in addressing voting discrimination.

4. *Can you provide your analysis of Congressional authority to renew the language access provisions?*

I have not done a sustained analysis of the language access provisions of the Voting Rights Act, but the constitutional analysis I set out in my written testimony can fairly easily be applied to those provisions as well. Congress had before it in 1975, when it extended the preclearance requirement to various jurisdictions that used English language-only election materials despite the presence of large numbers of non-proficient citizens, and in 1982, when it enacted the bilingual election materials provisions, sufficient evidence to conclude that substantial numbers of citizens were not able to exercise effectively their fundamental right to vote. Thus, the decision to regulate this part of the electoral system represents an appropriate enforcement under section 5 of the Fourteenth Amendment of the fundamental rights/equal protection view of voting under section 1 of the Fourteenth Amendment. In addition, as I explained in my written and oral testimony, requirements of bilingual election materials certainly fall within Congress's Article I, § 4 power with respect to the conduct of federal or mixed federal-state elections.

Moreover, Congress has before it evidence of the continuing effects of discrimination against individuals who are members of language minorities, particularly Native Americans and Latinos. The 1975 legislative history describes the historical record in painful detail. And the congressional findings in Section 203(a) explain the constitutional basis for the exercise of that power. I set out the underlying analytic rationale more fully in the William & Mary Law Review article appended to my earlier written testimony, but the language provisions address two separate forms of discrimination, what one might term "internal" and "external" discrimination (with those two adjectives referring to whether the discrimination occurs inside or outside the political process narrowly defined). Language provisions are designed both to remedy voting discrimination and to remedy educational discrimination and unequal learning opportunities that have resulted in high illiteracy rates and prevented some citizens acquiring the English language skills necessary to effective participation. Section 203 is narrowly crafted to address this issue. Thus, Congress's redefinition of "test or device" to recognized that English language-only materials can be tantamount to a literacy test for these citizens is appropriate.

The United States Supreme Court upheld a similar exercise of the Enforcement Clause powers in *Katzenbach v. Morgan*. In *Katzenbach*, the United States Supreme Court upheld Section 4(e) of the Act, which provides for language assistance for "persons educated in American-flag schools in which the predominant classroom language was other than English." The State of New York argued that Section 4(e) of the Act was unconstitutional as applied to New York, which had passed an English language requirement for voting to give language minorities an incentive to learn English. The Court rejected that assertion, finding that Congress may have "questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise." 384 U.S. at 658. *Katzenbach* upheld the language assistance requirements as a

valid exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments, which the Court recognized give "the same broad powers expressed in the Necessary and Proper Clause."

5. *According to Dr. Thernstrom, the Voting Rights Act makes "sure that majority-black districts stay black" and creates "racially safe boroughs." Based upon the most recent round of redistricting in 2000, does the evidence support Dr. Thernstrom's argument? Why or why not?*

Nothing about the Voting Rights Act creates "racially safe boroughs." The fact of residential racial segregation in large parts of the United States remains a reality. To the extent that black Americans, Latinos, and other language minority citizens live in communities with substantial numbers and concentrations of minority residents, any system of representation that uses geography as one indicator of shared interests will create a significant number of majority nonwhite districts.

To be sure, the Voting Rights Act prevents retrogression. In jurisdictions with existing majority nonwhite districts, this may require the preservation of such districts if covered jurisdictions or the preclearance authorities conclude that minority voters will otherwise suffer a diminution in their ability to participate fully and effectively in the political process and to elect candidates of their choice. But in jurisdictions where minority voters can elect candidates of their choice from less heavily minority districts, nothing about the Voting Rights Act – as opposed to run-of-the-mill political considerations – requires preserving the footprint of existing districts.

6. *Dr. Thernstrom contends that taking race into account in redistricting is "political exclusion – masquerading, of course, as inclusion." Do you agree with Dr. Thernstrom? Why or why not?*

I am not entirely sure what Dr. Thernstrom means by this phrase. Race and ethnicity have *always* been taken into account in redistricting, for a variety of reasons. The old "balanced tickets" in urban areas – for example, in New York City, the traditional slating of Jews, Irishmen, Italians, and blacks for various offices, see Nathan Glazer & Daniel Patrick Moynihan, Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City xxvii-xxviii, 305 (2d ed. 1970) – were examples of explicit race-conscious political inclusion. Since I am not certain who Dr. Thernstrom is claiming has been excluded, I find it hard to answer her contention in more detail.

More generally, though, the argument that consciously drawing some districts in which blacks, Latinos, Native Americans, or Asian Americans can elect representatives of their choice somehow excludes other, nonminority voters from the process depends on minority voters having distinctive political interests that the majority does not share. But Dr. Thernstrom, at least in the work of hers that I have read, denies this fact. Thus, her argument is deeply self-contradictory.

Answers to Questions from Senator Kohl

1. *We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division*

testified last week that "our work is never complete" with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?

I agree that more work remains to be done, and that some of that work is best accomplished by extension of the preclearance provisions. The record, both before the House and in the Senate, shows that minority citizens still have not fully realized the promise of the Fourteenth and Fifteenth Amendment. Indeed, just this past month, the Department of Justice objected to a reduction in polling places in a Texas community college district – a reduction that evidenced, in the Department's words, a "remarkably" uneven assignment of polling places, with the most heavily minority polling place being expected to serve more than ten times as many voters and the least minority polling place. As we all know, long lines can discourage voters from participating.

2. *Some argue against reauthorization of the Voting Rights Act on the ground that since voting discrimination is not limited to the states subject to the Act, the provisions of Section 5 should not be limited to them. Do you agree?*

I believe my answer to Senator Kennedy's third question, combined with my earlier testimony, responds to this question.

3. *We have heard testimony that the proposed bill to reauthorize the Voting Rights Act, S. 2703, may need to be changed in order to survive constitutional scrutiny by the Supreme Court. Based on your extensive experience litigating these issues, including in the Supreme Court, do you agree?*

I do not agree. I think it is unlikely that the Supreme Court will strike down outright an extension of the Voting Rights Act of the kind laid out in the current bill. More possible, to my mind, is yet another set of restrictive interpretations of the Act by Justices fundamentally unsympathetic to the Act or to congressional power more generally. As to this risk, I am not sure there is much that can be done, other than to make as clear a record of the problems that have led Congress to extend and amend the Act and to make as clear as possible in the legislative history what Congress's intent is with respect to how the Act should be interpreted. For example, that is what S. 2703 does with respect to the Supreme Court's misinterpretations of congressional intent in the *Bossier II* and *Georgia v. Ashcroft* decisions.

Answers to Questions from Senator Cornyn

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.*

I am not a political scientist. As you will have seen from my written and oral testimony, I have limited my remarks primarily to the issues on which I have special expertise – primarily the extent of congressional power to amend and extend the Voting Rights Act and secondarily, based

on my experience as a voting rights litigator and counselor to elected officials, how the Act has operated in the jurisdictions in which I have worked.

Moreover, my view on the underlying constitutional question does not turn on the kind of empirical differences about which your question inquires, as my answer to Senator Kennedy's third question explains. Given that view, I have not personally conducted a detailed study of electoral participation and success in covered and non-covered jurisdictions. Rather, I have relied on the work and analysis of trained social scientists and empirical scholars whose work I have come to respect. Among those on whom I have relied who have testified or whose work has been included in the record before this committee are Theodore Arrington, Chandler Davidson, Richard Engstrom, Bernard Grofman, Ellen Katz, Alexander Keyssar, J. Morgan Kousser, Peyton McCrary, and Nathaniel Persily.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."*

a. *Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?*

b. *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

With all respect, I think the subquestions rest on a fundamental misperception of the triggers. In its earlier enactments, Congress did *not* pick the 1964, 1968, or 1972 elections as triggers because it thought something distinctive had happened in any of those elections. Rather, quite frankly, Congress was looking for a formula that reached the jurisdictions that had a long, open, and notorious history of disenfranchising minority citizens and diluting their voting strength whenever they did manage to register and cast ballots. To be sure, the trigger has always been both slightly over- and under-inclusive. Some jurisdictions (for example, the New Hampshire townships) that don't have a history of discrimination got covered, while some jurisdictions (for example, the Arkansas Delta) with sorry histories of racial discrimination were not picked up (because Arkansas used a poll tax, rather than a literacy test). But the trigger formula overall fit the problem closely enough.

So the question about which jurisdictions should be covered is *not* really one about what turnout was like in a particular presidential election, but rather about whether this jurisdiction has a history of pervasive discrimination that calls for more stringent oversight. The turnout in the specified elections was but an indicator of a broader problem, and not the problem itself.

I don't think we need to add additional triggering conditions. I would like to see more use of the "pocket trigger" of section 3© of the Act if there are areas where preclearance is warranted. I explain this point more fully in my written testimony. Any over-inclusiveness issues are addressed

already by the bailout provision of section 4(a) of the Act, which allows jurisdictions free of voting discrimination for ten years to be removed from Section 5 coverage.

In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

3. *Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?*

I believe you have misstated what the Supreme Court said in *City of Boerne*. The Court did *not* say that Congress cannot rely on forty year-old data to legislate under the Fourteenth and Fifteenth Amendments. What it said was that, with respect to RFRA, "[t]he history of persecution in this country detailed in the hearings mentions *no* episodes occurring in the past 40 years." 521 U.S. at 530 (emphasis added). That is, the most recent example of the underlying problem occurred so far in the past that the legislation could not reasonably be said to be addressing a current problem.

By contrast, the record before Congress regarding the Voting Rights Act, while it of course stretches back to the century of blatant, sustained, overt discrimination between 1865 and 1965, also contains a substantial volume of documented examples of continued exclusion of minority citizens and continued racial bloc voting up until the present day. This evidence is in the form of hundreds of Section 5 objections, hundreds of successful Section 2 cases, dozens of successful enforcement actions, and requests for more information, as detailed in the study by my colleague at Stanford, Professor Luis Fraga. Moreover, as I explained both in my written testimony and in response to Senator Kohl's eighth question, the imposition of preclearance has also had a significant deterrent effect. Thus, although there is substantial evidence of continuing problems, there is also evidence that the Voting Rights Act has prevented a substantial number of violations that might otherwise have occurred.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

I have already answered this question. The number of objections does not capture the Act's tremendous deterrent effect.

5. *In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?*

As I explained in my answers to Senator Leahy's third and fourth questions, there is nothing magical about extending the Act for any particular period of time. My own view is that a five year extension would be nothing but a sham, since it would not even take the preclearance regime through the next full round of redistricting. Moreover, as I have already explained in my answer to Senator Leahy's seventh question, extending the Act for too short a time period undermines the incentive for jurisdictions to undertake the constructive efforts detailed in the bailout provision. See also S. Rep. No. 97-417, at 60-61 (1982). In addition, given the huge investment of time in compiling and considering the detailed record, reenacting the Act for too short a period seems inefficient.

Given these considerations and the Supreme Court's decisions in *Hibbs* and *Lane*, there is no reason for the Supreme Court to second-guess implementation-level decisions about preclearance, such as the precise length of reauthorization, as long as the record supports the extension of preclearance.

6. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft – I want to better understand some of the practical implications.*

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

No. As I read the proposed amendment responding to *Georgia v. Ashcroft*, it does not require examination of, or protection for, so-called "influence districts." To the contrary, it is the Supreme Court's current interpretation that seems to require this kind of analysis, as I set out in the article on *Georgia v. Ashcroft* appended to my written testimony.

[7.] *Please explain, in your view, precisely when and under what circumstances "covered" jurisdictions should be relieved of such coverage under Section 5.*

I think the current bailout requirements of section 4(a) strike precisely the right balance regarding when covered jurisdictions should be relieved of such coverage.

[8.] *In you written testimony, you state "[t]he question whether Congress can continue coverage of the already covered jurisdictions as part of an extension of the Act does not require that Congress conclude that if it were writing on a completely clean slate today, it would choose the original triggering formulas. Rather, it depends on whether continuing to subject the covered jurisdictions to the preclearance regime is congruent and proportional to preventing future constitutional injury." Your position seems to be that if it is constitutional (as you believe it is) then coverage should continue as long as there is at least some evidence of bad conduct. Is it your position that re-authorization of the expiring provisions of the Voting Rights Act should not take into account the relative state of affairs today in covered jurisdictions vs. non-covered jurisdictions?*

I think you have misstated my position. I never said that extension of the preclearance regime is warranted "as long as there is at least some evidence of bad conduct." Rather, I said that

minority success and enfranchisement is still a sufficiently recent phenomenon in the history of this country that it is entirely appropriate for Congress to conclude that the Act remains necessary.

Of course, Congress can take into account the relative state of affairs in covered and non-covered jurisdictions, including the impact that Section 5 coverage itself has had on the conditions in covered jurisdictions. But as I explained in response to Senator Leahy's sixth question, that evidence does not clearly show that preclearance is unnecessary. To the contrary, it is entirely consistent with the view that preclearance is necessary to achieve the narrowing of the gap that has occurred.

[9.] *Do you believe that today, in 2006, the people residing in covered jurisdictions are more racist than those living in non-covered jurisdictions? On what evidence do you base your belief?*

I have no evidence one way or another about whether particular individuals are racists. There is substantial evidence that the candidate preferences of minority and nonminority voters differ more significantly in many covered jurisdictions than in non-covered jurisdictions. In the last round of redistricting, for example, federal courts in cases involving South Carolina, Georgia, and Texas all found the continued existence of racial bloc voting. Both Professor Arrington and Professor Engstrom have testified before Congress on their work finding significant racial bloc voting in South Carolina and Louisiana. The question of *why* racial bloc voting occurs is one Congress does not need to answer. That it does is clear, and that the consequences include the exclusion of minority voters from effective participation are also clear.

In fact, in 1982, one of the reasons Congress amended section 2 of the Act to prohibit practices with a discriminatory impact regardless of the intent behind them was precisely because it concluded – quite wisely in my view – that requiring courts to label jurisdictions or officials as racists was unnecessarily divisive. The same holds true for labeling individual voters.

[10.] *Can you say with any degree of certainty whether non-covered jurisdictions are more likely to respect voting rights of minorities than covered jurisdictions? What evidence can you cite that defends your claim one way or another?*

I cannot reach any certain conclusions on this point. It is precisely because the issue is uncertain that I have concluded that a decision to extend the Voting Rights Act lies within Congress's enforcement powers, not to mention its plenary powers under Article I, § 4.

[11.] *Many Americans, across the political spectrum, believe that there are significant benefits to requiring immigrants to learn English and ballots be printed in English. Do you believe that any American, elected or otherwise, who believes that an individual should be required to learn English to become an American citizen is racist or anti-immigrant? Do you believe that any American, elected or otherwise, who believes that an individual be required to be proficient enough in English to vote on English-only ballots is racist or anti-immigrant?*

If you had phrased your question "Do you believe that *every* American, elected or otherwise" who would deny citizens the right to vote until they are English proficient is a racist, I would of

course answer *that* question "No." Of course not. But do I believe that there is "*any* American" who holds that view for racist reasons, the answer is certainly "Yes." I believe that some individuals who hold those beliefs are racists, some individuals who hold those beliefs seek to cynically manipulate the political process, some individuals who hold those beliefs are ignorant of the evidence suggesting that a majority of citizens who benefit from the language-assistance provisions of the Voting Rights Act are native-born American citizens (and that many of those citizens are the victims of shoddy public education systems), and some individuals who hold those beliefs are acting in good faith but are mistaken about what the promise of American democracy means. As to any particular American, elected or otherwise, I cannot tell you into which category he or she falls.

Answers to Questions from Senator Coburn

1. *With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?*

For the reasons I gave in response to Senator Cornyn's second question, the answer to this question is "yes." Section 4's trigger was a formally neutral device for capturing a more historically based truth: certain jurisdictions have had a long history of racial disenfranchisement and dilution. The identity of the jurisdictions with that pervasive history and contemporary voting discrimination has not changed.

2. *If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?*

I believe that my answers to Senator Leahy's third and fourth questions and Senator Cornyn's fifth question provide a response to this question.

3. *Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?*

I have not considered this question in any systematic way and thus don't feel qualified to give an informed answer as to whether there are alternative triggers that might also satisfy the various concerns involved.

4. *Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?*

I don't think the length of the reauthorization period is likely to have an outcome-determinative effect on the Supreme Court's analysis of the continued constitutionality of the Voting Rights Act for the reasons I have explained already.

5. *Please discuss how a possible broad-based "bailout" of covered jurisdictions might be implemented?*

As I explained in response to Senator Cornyn's seventh question, and in my written testimony as well, the current bailout provision strikes the right balance.

6. *Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?*

I'm not entirely sure what you mean by alternative conceptions of the bailout provision. Of course, it would be possible to amend section 4(a) to make it easier for jurisdictions to bail out. I have yet to see any convincing argument as to why that should be done. The congressional decision in 1982 about what bailout should require seems entirely appropriate to me. If a jurisdiction has a clean bill of health free of voting discrimination for ten years, it can bailout.

Response of Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law to Written Questions from Senator Arlen Specter

Supplement to Original Testimony Before Senate Judiciary Committee on May 16, 2006 Hearing Titled: "The Continuing Need for Section 5 Preclearance"

Is there anything that Congress can do to ensure that the reauthorization of the Voting Rights Act is upheld by the Supreme Court under the "congruence and proportionality" test articulated in City of Boerne v. Flores, *521 U.S. 507, 518 (1997)?*

First, I believe the best way Congress can ensure the constitutionality of a renewed VRA is by viewing the statute as an integrated whole. I believe this is how the courts will view it if and when the courts assess the constitutional issues. The courts will not focus on one element of the statute in isolation, but will examine the way the statute functions as a whole and whether, taken as an entirety, a renewed Section 5 is sufficiently congruent and proportional to racially discriminatory voting rights practices in recent years.

Viewed as a whole, the statute has a front end (the coverage formula), a middle (the substantive standards that determine what constitutes a § 5 violation) and a back end (the bailout provisions and the expiration date). The key point, in my view, is that, to the extent Congress makes adjustments at any one or two of these places to reflect the changed circumstances of voting rights today, the Court is less likely to find constitutional concerns with the Act. Conversely, to the extent Congress does not adjust either the front or middle parts of the Act, adjustments on the back end would be all the more wise in the effort to increase the likelihood that courts will uphold the Act. For this reason, my answer to whether it improves the chances the courts will uphold the Act if any particular provision in isolation is changed is that the answer depends, in part, on whether *other* provisions are also being changed or not at the same time.

For example, if the coverage formula is not changed at all, the Court is more likely to accept the Act's constitutionality if the renewal term is shorter, such as the seven-year renewal term in the 1975 amendments – or if the bailout provisions are significantly adjusted. The intersection of voting rights, federalism, race, and a unique federal law that selectively targets only certain parts of the country implicates many foundational constitutional values and provisions, some of those in tension with others. The Court is more likely to accept policies that muddle through (in a sense I do not mean as pejorative) in this complex terrain if they must be revisited again in a relatively shorter period than longer period of time. The Court is likely to be less receptive to muddling through for 25 years, in an area freighted with such weighty constitutional values and principles.

Similarly, the more Congress adapts the coverage formula to contemporary circumstances, the more accepting the Court is likely to be of a long re-authorization period, such as 25 years. Those changes could include expanding the jurisdictions singled out for coverage, to reflect recent patterns of voting rights violations. These changes could instead include contracting the number of jurisdictions covered, to reflect recent patterns of actual voting

problems. Congress could also focus on removing certain *categories* of voting changes from coverage, based on the absence of evidence that changes in these categories, as opposed to other categories, like redistrictings and annexations, have generated enough DOJ objections or requests for more information (MIRs) in recent years. Given that more than 99% of all submitted changes do not even trigger a request from DOJ for more information, let alone trigger an objection, it might be that certain categories of changes, where objections or MIRs are even lower than this already low level, can appropriately be removed from coverage at this time. For example, according to one recent study, covered jurisdictions submitted to DOJ 4,473 proposed changes to "Voting Methods" from 1982-2005; yet DOJ objected to only 1 and in only 6 more of these did the jurisdiction withdraw the change, supersede it with a different change, or not respond to an MIR from DOJ.[1] Thus, in only 0.15% of proposed changes in this category of "Voting Methods" was there either a DOJ objection or one of these other actions by the jurisdiction. Perhaps, then, this *category* of change no longer ought to have to be precleared in every context. I have not examined the record with this question in mind, and hence I do not know which specific categories might be the best candidates. But the more Congress tailors a renewed Section 5 to contemporary circumstances through changes in the coverage formula, the more a longer renewal term is not likely to generate constitutional concerns.

Yet as currently drafted, the bill takes the same form prior versions of Section 5 did, versions that were enacted many years before the Court's more recent *City of Boerne* line of cases. The proposed bill does not change in any way the regime Congress last revisited in 1982. That regime itself, in turn, was based primarily (with respect to Section 5) on legislation a decade or more before that. On what I call the front end of Section 5 – the coverage formula and approach – the bill does not adjust the formula or coverage approach from the 1975 reauthorization. Keep in mind, also, that even the triggering factors established in 1975 largely go back to the original 1965 Act. On the back end, the bill does nothing to address, modify, or ease the bailout provisions, which have had little practical effect as a means for overcoming the presumption that jurisdictions that had tests or devices dating to 1964 continue to warrant a form of federal receivership today. At the same time, the bill proposes the longest extension of the Act in its history, a 25 year term, as compared to the five year and seven year extensions that were the norm before 1982. The only changes in existing law that the bill proposes are with regard to the middle part of the Act, the substantive standards to be used, and those changes aim to overrule two divided Supreme Court opinions, including one, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that the bill proposes to replace with a return to a standard established in a 1976 case, *Beer v. United States*, 425 U.S. 130 (1976). On its face, a bill which concludes that no changes to § 5 are warranted today, as compared to 1982, to reflect the changing factual and constitutional contexts in which voting rights issues arise today takes a very aggressive posture toward the *City of Boerne* line of cases. Despite the major changes in constitutional doctrine since 1982, as well as changes in minority turnout, registration, participation, election rates, the rise of two-party politics in the South, and the like, the courts will be asked to accept that a law unchanged since 1982, and which is to be re-authorized until 2031, is "congruent and proportional" to the remaining problems of racially discriminatory voting practices today.

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[1] *See* Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, at Table 2 (June 7, 2006) (unpublished manuscript submitted earlier to Senate).

Moreover, the cautious lawyer in me is concerned about how much weight can be put on Court decisions that pre-date this more recent doctrinal transformation in constitutional law. In particular, as many witnesses have noted, the Supreme Court's upheld the then-relevant version of § 5 in *City of Rome v. United States*, 446 U.S. 156 (1980). But even then, a mere 15 years after the original VRA was passed, the Court was divided 6-3 in *City of Rome* on the constitutionality of Section 5. Justices Powell, Rehnquist, and Stewart dissented from the majority opinion of my former boss, Justice Marshall. Yet at that time, the Court had not invalidated an act of Congress as beyond Congress' constitutionally enumerated powers since the New Deal. Doing so with regard to Section 5 would have been out of accord with the rest of constitutional doctrine at the time, which was deferential to congressional judgments underlying the exercise of enumerated congressional powers.

But much has changed since. A cornerstone of the Court's jurisprudence over the last decade and more, during the era when Chief Justice Rehnquist presided, has been an aggressive judicial role in enforcing limits on the scope of Congress' enumerated powers.[2] As a result, some of the nation's leading constitutional scholars, including those typically supportive of expansive federal legislative power, have concluded that *Boerne* casts serious constitutional doubt on portions of the VRA, with direct implications for renewal of § 5.[3] The only decision since *City of Rome* that directly touches on the constitutionality of earlier versions of Section 5 is Justice O'Connor's opinion for the Court in *Lopez v. Monterey County*, 525 U.S. 266 (1999), but that case dealt with an arcane, technical issue (whether the Constitution is violated when Section 5 is applied to a covered county within a non-covered state when that state mandates a change that will effect a voting change in the covered county) whose bearing on the broader constitutional issues involved in renewing Section 5 today might not be greatly significant. Yet even there, again, Justice Thomas would have held this application unconstitutional, and Justices Kennedy and Chief Justice Rehnquist concurred separately to indicate that they thought it "quite possible" Justice Thomas was correct about the unconstitutionality of this application of Section 5, but that they did not believe the facts squarely presented the constitutional issue that Justice Thomas addressed.

In the 25 years since *City of Rome*, constitutional doctrine on the scope of Congress' enumerated powers has moved in the direction of the views expressed in the dissents of then-Associate Justice Rehnquist, Justice Powell, and Justice Stewart. Considerations of *stare decisis* will of course carry weight with the Court when it reviews a recently renewed Section 5. But the Court will be reviewing a new statute and will assess it on the basis of the record in recent years regarding racially discriminatory voting practices. I cannot predict how reliable a guide the Court's divided opinion in *City of Rome* will be to the modern Court's resolution of the constitutional questions.

I have not directly addressed in more formal doctrinal terms how I believe the Court will apply *Boerne* and the related line of cases to a renewed Section 5 today. Instead, I have approached that question as would a cautious lawyer seeking to advise on how a renewed

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[2] *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Morrison*, 529 U.S. 598 (2000).

[3] *See, e.g.*, Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 749-52 (1998) (concluding that vote dilution standards in VRA are likely unconstitutional, in light of *Boerne*).

Section 5 might best be designed to minimize the risk the Court will hold it unconstitutional. The Court might not approach the question as if the renewed Section 5 were being enacted on a blank slate today; that is, the Court might not ask whether such a statute, if enacted for the first time today, would meet the *Boerne* standard. Instead, the Court might accept the constitutionality of Congress starting today from the baseline of the currently covered jurisdictions, and the Court would then apply *Boerne* to whatever modifications from that baseline Congress does or does not make.

But a bill that makes no modifications on the front or back end of Section 5, and overrules Court decisions on the substantive standards of Section 5, will require convincing evidence that, even starting from the 1982 baseline of coverage, no modifications are need to ensure the Act is congruent and proportional to the location of racially discriminatory voting rights practices today. Simply put, the constitutional concerns are serious enough that Congress would be wise to minimize the risk of constitutional invalidation.

The Court's recent decision in the Texas redistricting case, *League of United Latin American Citizens v. Perry*, 126 S.Ct 2594 (2006) continues to suggest that Congress must act with considerable deliberateness and evidentiary foundation in this freighted area. With respect to the Voting Rights Act, three aspects of that opinion indicate to my mind that the majority of the Court remains deeply concerned about constitutional issues at the center of a renewed Section 5. First, Justice Kennedy's opinion for the Court suggests that excessive race-consciousness in the design and administration of the VRA would raise "serious constitutional questions." *Id.* at 2625. In particular, the DOJ staff had concluded that the VRA precluded diminishing the black population below its then level of 25.7% because that district regularly elected a white Democratic candidate, Martin Frost, whom black voters supported. If this is what the VRA requires, Justice Kennedy concluded, such a policy would raise "serious constitutional questions" because it would pervasively mandate particular racial percentages once established, even at the relatively low levels at issue there. Most noteworthy, Justice Kennedy cited his own concurrence in *Georgia v. Ashcroft* for the proposition that interpreting section 2 of the VRA to lock into place minority populations at levels as low as 25.7%, on the view that otherwise the ability of these voters to elect candidates of choice would be diminished, would raise "serious constitutional questions." Thus, Justice Kennedy indicated, in his view at least, that the Court's decision in *Georgia v. Ashcroft* reflects constitutional principles, as well as ones of statutory interpretation. Given Justice Kennedy's pivotal role in these cases, I believe the Senate should consider this point carefully.

Second, Chief Justice Roberts, joined by Justice Alito, penned the following strongly worded and seemingly personally felt sentence: "It is a sordid business, this divvying us up by race." *Perry*, 126 S.Ct at 2663. No issue concerning the constitutionality of the VRA was presented in the Texas case, and the lack of necessity for any comment on this issue suggests all the more that this sentence reflects a strongly held view. It is difficult to know how such a view, of course, would affect the Court's constitutional judgments about Section 5. But again, the cautious lawyer in me views this expression as further reason that the Senate would be wise to ensure that the structure of any race-conscious districting the renewed Section 5 requires is justified and supported by a solid evidentiary foundation in the record. Finally, Justice Scalia acknowledged that, if Section 5 were constitutional, compliance with it would constitute a

compelling interest to justify a state's use of race in redistricting. Justice Scalia also cited favorably the Court's 1966 decision upholding, as constitutional, the originally enacted Section 5. *See Perry*, 126 S.Ct at 2667 (citing *South Carolina v. Katzenbach*, 383 U.S. 301(1966)). I consider neither of these points particularly momentous. There is no controversy at all today that the original Section 5 was constitutional when enacted in 1965. Similarly, the conclusion is logically irresistible that, if Section 5 is constitutional, a state's compliance with that federal mandate must constitute a compelling interest; I do not see how any other conclusion could be reached. But none of this suggests anything about whether Justice Scalia would find a renewed Section 5 today, in the form of the proposed bill, constitutional. Indeed, I noted that Justice Scalia did *not* cite or discuss at all the *City of Rome* case, noted above, which in a 6-3 decision upheld the constitutionality of more recent versions of Section 5 that more closely resemble the bill proposed today. If Justice Scalia's refusal to cite or acknowledge the *City of Rome* case suggests his disagreement with the Court there, that would suggest he would have at least as much constitutional concern with the proposed bill.

Supplemental Testimony of Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law
In Response to Written Questions from Senator John Cornyn

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.*

I directly addressed this question in my original testimony before the Committee. I would refer you back to that testimony. I am not aware of any relevant new information that has come to light since then.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."*

   a. *Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?*

I do not believe this would be an appropriate way to update the coverage formula. In earlier years, low voter registration and turnout were viewed as proxies, though indirect ones even then, for racially discriminatory voting practices. Given much more robust minority registration and turnout today, these are no longer considered the most adequate measures or proxies. Mechanically updating the coverage formula in this way would therefore not tie coverage appropriately to where problems are occurring today. Instead, were Congress to seek to update the coverage formula, it would do better to focus on direct measures of where racially discriminatory voting practices have regularly recurred in recent years. Such a focus could center on contracting coverage from the baseline of the currently covered jurisdictions to a narrower set of jurisdictions that continue systematically to use racially discriminatory practices with respect to voting. Alternative, such a focus could lead to expanding the scope of coverage to jurisdictions not previously covered. Of course, it could also lead to both: some expansion, along with some contraction.

   b. *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to § 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

For the reasons just given above, I would not support adding 2000 and 2004. However, relying on successful § 2 litigation presents an entirely different question. Successful § 2 litigation is a *direct* measure of where VRA violations have occurred. Thus, it provides one promising means of identifying which jurisdictions continue to have VRA problems today.

There are two ways the coverage formula could reflect the facts concerning successful § 2 litigation. First, it could be *expanded* to include jurisdictions that have lost § 2 claims over some relevant time period. Second, the formula could be *contracted* from the status quo; that is, the lack of successful § 2 suits against currently covered jurisdictions could be one factor, along perhaps with others, in judgments about removing some currently covered jurisdictions from coverage going forward.

> *In* City of Boerne v. Flores, *the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."*

3. *Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?*

This raises a deceptively difficult question. In essence, the function of the 1964 date is to establish a continuing presumption, or legal rule, that jurisdictions that warranted the special coverage regime of § 5 continue to warrant it today, based in part on their practices in 1964.

A partial answer is that, the easier the bailout process is, the less problematic this presumption becomes. The bailout process is currently the way in which this presumption can be overcome. This is part of why I believe the various elements of the statute must be looked at as a whole, as I detail in later answers. The more easily rebuttable this 1964 presumption is, in practice, given the passage of time, the less significant that original date is. Conversely, the more that date, in conjunction with the way the rest of the VRA functions in practice, works as a de facto irrebuttable presumption, the more problematic, from a constitutional and policy perspective, reliance on that original date would become.

Similarly, if Congress directly developed other ways to contract the scope of Section 5, as appropriate to reflect experience over the last 25 years, that would also make the continued starting point of 1964 less problematic. For example, Congress could decide to remove certain *categories* of voting changes from coverage, based on the absence of evidence that changes in these categories have generated enough DOJ objections or requests for more information (MIRs) in recent years. Keep in mind that more than 99% of all submitted changes do not even trigger a request from DOJ for more information, let alone trigger an objection. It might be that certain types of changes, such as polling place locations or precinct changes or others – can now be removed from coverage. I have not examined the record with this question in mind, and hence I do not know which specific categories might be the best candidates. But again, if Congress is able to show that the 1964 date is just a starting point, and that the presumption it creates that any voting change in the covered jurisdictions must be subject to special federal oversight can be overcome over time through congressional changes in the statutory coverage, that would also make continuing reliance on the 1964 date less of a concern. It is also possible that more recent evidence would show that the exact coverage triggered by the 1964 date, and subsequent

amendments, remained accurately tied not just to violations 40 years ago, but to violations in more recent years.

If not, the question would become what ought to replace the 1964 trigger date. I do not believe any trigger as simple or mechanical as a substitute date would work. The date of 1964 provided a clean divide between the world before the VRA and the world after. That prior world was one of stark and massive disfranchisement in some, easily identified parts of the country. Since passage of the VRA, there is no comparable stark divide that can tied to a specific date. Instead, Congress would have to focus on more direct measures of actual discriminatory voting practices, which might be revealed by litigation results or through other data.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 § 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let § 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant § 5 coverage? Why or why not?*

Given how few formal DOJ objections there have been in recent decades, scholars have recently turned to additional, innovative means of attempting to assess the effectiveness of § 5. In particular, we are getting systematic information for the first time on DOJ's issuance of more information requests (MIRs) and the responses of covered jurisdictions to these requests. This is important information, particularly given that formal DOJ objections have become so rare. DOJ issues far more MIRs than it does formal objections. A great deal of weight concerning the effectiveness of § 5 has recently, therefore, begun to focus on these MIRs.

A recent study, the first of its kind, provides a broad initial perspective on these issues.[4] When a jurisdiction responds to a MIR either by (1) withdrawing the submitted change; (2) submitting a superseding change that replaces the original change; or (3) fails to respond or responds with insufficient information, this study counts these responses as, in essence, possible signals that DOJ has successfully deterred a voting change that would have violated the VRA (the study sometimes calls these "potentially discriminatory changes" or "MIR induced outcomes").

Work of this sort has the potential to provide critical insight on the role of the MIR process in evaluating § 5 as a whole. At this stage, though, I believe it is difficult, without further information, to draw firm conclusions from the data. We need more qualitative information on the *reasons* jurisdictions respond as they do to know what percentage of these responses in fact do signal changes that would have violated the VRA and that were stopped once DOJ issued the MIR. Jurisdictions, of course, can fail to respond or withdraw proposed

[4] *See* Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act (June 7, 2006) (unpublished manuscript submitted earlier to Senate). The Report of the National Commission on the Voting Rights Act, "Protecting Minority Voters: The Voting Rights Act at Work 1982-2005," also provides information on these MIRs. Because the Fraga and Ocampo study is more comprehensive, I focus specifically on it.

changes for various reasons, some which would signal a potential VRA violation, some of which would not. For example, when a jurisdiction fails to respond, is it because responding is more costly than not implementing the change; because the time and cost of responding is not worth it; is it due to bureaucratic incompetence; or because the jurisdiction realized the proposed change would likely violate the VRA, once DOJ had issued a MIR? I noted that in 2000, for example, this study reports that almost all of the "MIR induced outcomes" the study catalogues consisted of a jurisdiction's non-response to the MIR -- category (3) above. Thus, of 66 MIRs that produced responses (1), (2), or (3), 61 of these 66 (92%), involved the jurisdiction's failure to respond. Five more involved the jurisdiction's withdrawal of the proposed change. I am prepared to believe that some of these non-responses reflect the fact that the jurisdiction's proposed change would have violated the VRA. I also tend to doubt that all of these non-responses indicate that. But without even rough information about what percentages of these failures fall into one or other of these categories, I do not yet know what general conclusions can confidently be drawn.

Similarly, during the 1990s the Supreme Court concluded that DOJ was interpreting the VRA in overly expansive ways and also contributing to the states' unconstitutional application of the VRA. In light of that, it is noteworthy that, according to this study, two of the three peak years for DOJ issuance of MIRs include 1990 and 1991. Thus, it is possible, indeed likely, that some of these MIRs reflect the same DOJ view of the statute that the Court rejected, on statutory or constitutional grounds, a few years later. To the extent that is so, MIRs based on DOJ views of the statute that the Court holds to be illegal cannot be counted as appropriate but indirect DOJ enforcement of the VRA. Jurisdictions might have withdrawn submissions in the face of DOJ MIRs that DOJ should not have issued in the first place, in the view of the courts. Of course, to the extent Congress in turn rejects those Court decisions, which Congress can do for matters involving only statutory interpretation, it would then become appropriate to count these MIRs as indirect, proper means of enforcing the VRA.

Despite all these concerns, however, even if we add together all the responses to MIRs that fall into categories (1), (2), and (3) above, and even if we treat all of those responses as tantamount to admissions that the proposed change would have violated the VRA – which is, to be sure, unlikely – the total number of DOJ formal objections *plus* the total number of MIR "induced outcomes" comes to 0.89% of the submissions made to DOJ from 1982-2005.[5] For the last 10 years of that period, the figure drops to 0.41%. Quite frankly, while it had been widely known that the rate of formal DOJ objections had become extremely low, I was surprised that these figures for MIRs were also so low. This means that, since 1982, less than 1% of the submissions to DOJ have triggered even a request from DOJ for more information.

This study, and the central role that analysis of MIRs is playing for the first time in Congress' consideration of § 5, require more time to assess properly. Given that there are so few formal DOJ objections these days, a great deal of the weight concerning the effects of § 5 is now being placed on these MIRs. Yet the only extensive study of these questions is extremely recent; indeed, it is dated (June 7, 2006) after most of the Senate Judiciary Committee's hearings have been held. Nothing I have said is meant to be critical of this important study. I have no doubt

[5] Fraga and OCampo, *supra*, at 12 (Table 1). Aggregate figures have been generated based on the data presented in this Table.

MIRs do stymie some proposed changes that would otherwise violate the VRA. Perhaps they indirectly block many such changes. But more information, some of which would not be difficult to obtain, is needed before knowing what concrete conclusions are justified in light of the various responses of covered jurisdictions, and the reasons for them, to MIRs.

Finally, the extent to which the existence of § 5 creates an effective deterrent effect is extremely difficult, perhaps impossible, to quantify. Congress and the courts will have to make an informed judgment on that question, based on practical experience and testimony of witnesses. At the same time, the constitutionality of § 5 would be enhanced were a renewal today to be based on a clear theory or understanding of what evidence would be sufficient to determine when, if ever, the special coverage regime of § 5 had successfully realized its purposes.

5. *In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support re-authorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?*

I believe the various parts of the statute should be viewed as an integrated whole. For my view of the relationship between the coverage formula and the length of re-authorization, please see my detailed answer to the Question from Senator Specter, *infra*. Briefly, I believe that the more Congress narrowly targets the coverage formula to where problems arise distinctly today, the longer would be the appropriate period for re-authorization. Conversely, the less Congress adapts the formula to today's context of problems, the more a shorter renewal period, after which Congress could examine in more detail where coverage continues to make the most sense, would be appropriate. From a constitutional perspective, the courts are likely to assess the way the statute functions as a whole. Hence, these same considerations apply to the likelihood that a renewed VRA will be held fully constitutional.

6. *Putting aside the constitutional questions with regard to overturning* Georgia v. Ashcroft *– I want to better understand some of the practical implications. Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?*

I believe the single most important issue in this renewal process is how the bill addresses *Georgia v. Ashcroft*. In terms of the substantive effect of the bill on the actual practices of redistricting and certain other areas, such as annexations, this is where the bill will have the most effect.

I. *DOJ v. Georgia's White-Black Legislative Coalition.*

Given this importance, I want first to make sure the factual record is clear. At the time Georgia's redistricting plan was being created and defended, both the black-white legislative coalition in Georgia that supported the plan and the DOJ, which opposed it, were necessarily required to predict future election results based on past elections. But that is no longer the case. Two election cycles have since taken place. The result is that the black-white legislative

coalition turns out to have been right in their predictions. That coalition had a well-informed, grounded feel for the nature of politics and elections in Georgia today.

The dispute in the case involved three state senate districts. While preserving many other majority-black election districts, the black-white legislative coalition in Georgia sought to make small reductions in the black populations in these three districts. The purpose was to enhance the electoral prospects of Democrats in surrounding districts, which in turn would make it more likely Democrats would remain in control of the state senate. The belief of this white-black legislative coalition, including the black majority leader of the senate and the black chairman of the senate subcommittee that created the districting plan, was that these modest reductions in the black populations of these three districts would not threaten the electoral prospects of the black incumbents who held two of these three seats. At the time the Democratic Party pushed this plan through the state legislature, which it controlled, about one-third of the Democratic legislators were black, as was the state attorney general who defended the plan in court.

To put the facts in as direct a form as possible, three districting plans are relevant: (1) the prior Benchmark plan, which formed the baseline against which § 5 had to be applied; (2) the 2001 plan the Georgia legislature adopted, in this black-white legislative coalition, that was upheld in the Supreme Court but which the DOJ argued violated § 5; and (3) an alternative plan for 2002 that was actually used in the 2002 elections, that the DOJ accepted, and the courts precleared while litigation over the 2001 plan continued. These figures are for Black Registered Voters, which gives the *lowest* black percentage that might be used (as compared to Total Black Population, or Voting Eligible Black Population):[6]

	Benchmark 1990s Plan	2001 plan	2002 plan: DOJ approved
District 2	62.38%	48.5%	55.8%
District 12	52.48%	47.76%	51.58%
District 26	62.93%	48.68%	54.70%

DOJ required a plan in which the percentage of black registered voters did not fall below 50% in any of these districts.

As for the actual elections: In 2002, under the 2002 plan the DOJ required, the black incumbents in fact won in Districts 2 and 26; the first won unopposed, the second with 69.5% of the vote. In 2004, in elections under a court-drawn plan very similar to the 2002 plan, those same black incumbents won again, the first with 100% of the vote, the second with 66%. As for District 12, before any of the plans were drawn in the 2000s, that seat was held by a white incumbent in 2000. In 2002, he won with 100% of the vote; in 2004, he won again with 72.9%. Interestingly, this white incumbent did have a black challenger in the 2002 primary; the incumbent won that primary with 12,807 to 8,763 votes. But the 2002 primary is run under the 2002 plan that DOJ approved and that does not differ from the 1990s Benchmark plan in any meaningful way (the DOJ approved 2002 plan had a 51.58% black population, the benchmark

[6] These facts are taken from the three-judge court opinion, *Georgia v. Ashcroft*, 204 F. Supp. 2d 4 (D.D.C. June 3, 2002) and the Supreme Court's opinion, *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

plan a 52.48% population). Thus, the continued success of this white incumbent in District 12 was not a product of the legislative plan to which DOJ strongly objected.

In sum, DOJ believed that § 5 permitted it focus, in essence, on only one legal question: whether the minority community's ability to elect candidates of choice in these three districts had been illegally diminished by the plan the white-black legislative coalition had adopted. Factually, DOJ's position requires believing that two black incumbents winning by margins this large would have been in jeopardy had their black registered voting age population dropped by 6-7%. Factually, that is hard to credit. DOJ appears to have relied, in at least one of these cases, on the fact that one of these incumbents had initially been elected by a small margin in a low turnout special election. But with several election cycles behind us, it now seems implausible that the slightly greater reductions in minority populations that the black-white Georgia legislative delegation preferred would, in fact, have put any of these black seats at serious risk.

Of course, had there been no reason for the black-population reductions the white-black Georgia legislative coalition sought to make, then why not keep these black populations as high as possible? But there was a reason: to help elect more Democrats, in order to keep control of the senate and enable black representatives to wield effective political power on behalf of their constituents. This is where DOJ was legally wrong, according to the Supreme Court: DOJ believed reasons of that sort were legally irrelevant to the VRA. But the Court concluded that, in these circumstances, it would turn the VRA on its head to deny black elected representatives, virtually all of whom supported the plan, the same power to make legislative deals on behalf of their constituents as politicians make all the time.

II. *What is the Basis for Concerns About Georgia v. Ashcroft?*

I would clearly separate two questions. First, whether the Court's decision is right on the facts at issue in *Georgia*. Second, whether the doctrine and general principles on which the decision rests have troubling future implications. Many more people agree with the Court on the first than is sometimes recognized. Obviously, the black elected officials in Georgia who voted for the plan agree with the Court's view that the plan was legal, as does Rep. John Lewis. In their written testimony to this Committee, I believe Professors Issacharoff and Persily similarly agree with the Court's decision. Robert Bauer, counsel to the Democratic Senate Campaign Committee and the Democratic House Campaign Committee, has also recently published his agreement with the Court.[7] But even those who agree with the Court on the Georgia facts are sometimes worried about the possible implications of the decision down the road. I take that to be the position of Rep. Lewis, for example. I will therefore focus on the second of these two questions, the future implications of *Georgia v. Ashcroft.*

At times, this second concern is put in terms of the vagueness of the standards the decision announces. Indeed, the House Judiciary Committee Report accurately quotes my

[7] Robert F. Bauer, Counsel to the Democratic Senate Campaign Committee and the Democratic House Campaign Committee, Remarks at the American Constitution Society's 2006 National Convention on Democracy and the Rule of Law: Defending *Georgia v. Ashcroft* (While Supporting Renewal of the Voting Rights Act) (June 18, 2006) (transcript available at More Soft Money Hard Law, http://moresoftmoneyhardlaw.com (Jun. 16, 2006)).

scholarship for exactly this point about the decision.[8] I continue to believe this is a concern. Nonetheless, I believe it would be a mistake, and premature at the least, for this concern to lead Congress to overrule the decision and replace it with a "no diminished ability to elect" standard that spawns concerns of its own.

First, I am skeptical that the unavoidable vagueness, at this stage of development, of the doctrine in *Georgia v. Ashcroft*, is in and of itself a reason for rejecting the decision. Many legal standards can be stated only in general terms; the content of those standards requires elaboration in the traditional fashion of case-by-case application to different contexts. Rather than vagueness per se, I take the concern with *Georgia v. Ashcroft* to be more concrete. I take it to be that nothing in the *Georgia* would preclude a State from deciding, for example, to eliminate all safe minority districts and spread black voters out across many districts in which they constituted 35% of the population. Thus, the fear continues, we could see a return to the 1970s, or the early 1980s, when this pattern was typical in the South.

I believe this concern is seriously misplaced. First, we have concrete evidence from the non-covered jurisdictions, which are not constrained by any standard at all under § 5. Yet we do not see the districting plans arising in the non-covered jurisdictions that the skeptics fear will arise in the covered jurisdictions if *Georgia* is not overturned. Second, I do not believe black legislators would support plans of the sort critics of *Georgia* worry about. The black legislators who supported the plan in *Georgia* have testified, indeed, that they would not. Third, even apart from such plans lacking the necessary political support, as a doctrinal matter the *Georgia* decision gives great weight to the fact that the black delegation in Georgia supported the plan virtually unanimously. By contrast, when a black delegation rejects a plan or is divided about it, the *Georgia* decision itself creates doctrinal barriers to such a plan being lawful under § 5. Third, I view this concrete concern to fail to recognize the realities in Southern politics today, at least at the statewide level. As noted above, the plans of the 1970s and 1980s could be adopted because the South was a one-party Democratic Party monopoly at the time and there were few black officeholders. With normal two-party competition now common in the South, and with black voters and legislators such a large portion of the Democratic Party's support, the plans of the 1970s and 1980s are simply not likely to emerge as a practical matter, even if the *Georgia* decision would permit such plans, which it does not.

In any event, even if there is reason in fact to be concerned about this potential implication of the Court's decision, I believe overruling it is too extreme a response at this stage. Instead, I would recommend that the legislative history make clear that the Committee and Congress do not understand the *Georgia* decision to permit these kind of tradeoffs -- for example, tradeoffs of all safe districts for nothing but influence districts. Of course, the Court would not be bound formally by this legislative history, but I believe *Georgia v. Ashcroft* would already preclude such tradeoffs, and addressing these kind of concerns in the legislative history would send a strong signal to the Court. In addition, my comments on *Georgia v. Ashcroft* are directed solely to the critical issue of statewide redistricting plans, the context of that case. Professor Issacharoff has proposed removing statewide redistricting plans from § 5 coverage altogether. Leaving statewide redistricting covered, instead, while also leaving *Georgia v.*

[8] H.R. Rep. No. 109-478, at. 68 n. 183 (2006) (citing Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 95 (2004)).

Ashcroft in place, is a more cautious and incremental step toward building more flexibility into the § 5 process to reflect current circumstances.

The Court has never applied the case to local redistricting plans, where the relevant considerations can vary from jurisdiction to jurisdiction, nor do my comments address local districting plans.

III. *Confusions about the Proposed "No Diminished Ability to Elect" Standard.*

The precise meaning of *Georgia v. Ashcroft* is, I have noted, to some degree vague. At the same time, the standard that the bill offers to "overrule" *Georgia* is itself also vague and uncertain. If a covered state cannot modify districts in any way that "diminishes" the "ability to elect" candidates of choice of minority voters, then can a state change a 25% black district to a 20% district? Can it do so if those additional voters are used to shift a 53% black district to a 58% one? Can the state do so *only* if those additional voters are used to increase the influence of a black voting community elsewhere? On its face, any decline in minority voting population in a district might "diminish" the ability of that population to elect a preferred candidate, if voting is racially polarized. Does the new standard therefore mean that states cannot diminish such populations wherever voting is racially polarized? Apparently, some witnesses before this Committee understand that to be the case. According to the testimony of Michael Carvin, for example, the "no diminished ability to elect" standard would make illegal the Texas districting plan (with regard to the Martin Frost district) that the Supreme Court upheld in the recent Texas redistricting case.

For these reasons, I believe there is going to be inevitable uncertainty about either continuation of the *Georgia v. Ashcroft* standard or the proposed replacement standard. Justice Kennedy has recently suggested that he, at least, believes *Georgia v. Ashcroft* to reflect constitutional principles, as well as ones of statutory interpretation. Given that the *Georgia* decision is so recent and no one has identified a single case in which it has been applied in either the courts or DOJ in a troubling manner, I believe it would be better policy for Congress not to rush to address this issue at this time. In addition, given Justice Kennedy's concerns, overruling *Georgia v. Ashcroft* and the small amount of added flexibility it introduces into Section 5 might also raise the risk that Justice Kennedy, and the Court, would be troubled by the constitutionality of a renewed Section 5 that not only makes no changes from 25 years ago, but also overrules *Georgia v. Ashcroft* at the same time.

Response of Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law
to Written Questions from Senator Tom Coburn

1. *With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the § 4 trigger for coverage under § 5 still appropriate to the proposed reauthorization of the Voting Rights Act?*

2. *If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?*

3. *Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?*

4. *Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?*

5. *Please discuss how a possible broad-based "bailout" of covered jurisdictions might be implemented?*

I believe I have fully addressed Questions 1-4 in my answers to Chairman Specter and to Sen. Cornyn (if further information would be helpful, I would be pleased to supply additional answers). I will therefore begin my answers with Question 5.

The bailout element of § 5 was originally designed in the 1965 Act to be integral to the overall structure, policy, and perhaps even the constitutionality of § 5. This element was to be a principal mechanism by which the coverage formula would properly adapt over time to remain congruent to where actual violations continued to occur. Congress' intent was that the unique regime of § 5 would thus unwind itself over time. Jurisdictions would bailout where appropriate; § 5 would have a more and more targeted reach; and the scope of the Act would remain tied to where problems predominated.

In the decision upholding the original § 5, the Supreme Court acknowledged that the original coverage formula might be overbroad, but that the bailout provisions, whose burdens the Court assumed would be "quite bearable" for covered jurisdictions, made the overall coverage-bailout structure sufficiently well tailored to be constitutional. *South Carolina v. Katzenbach*, 383 U.S. 301, 329-32 (1966). The Court also understood the bailout provisions to mean that "an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination [i.e., bailout] proceedings." *Id.* at 332. As a declaratory judgment action immediately after the Act had been passed, *Katzenbach* was decided before the Court or Congress had any practical experience with the actual operation of the bailout mechanism.

Yet even by 1982, Congress recognized that, as a practical matter, the bailout mechanism had failed to perform its intended function. As of 1982, only nine jurisdictions had managed to bailout of § 5 coverage.[9] Congress concluded that this unanticipated low rate was caused, in part, by failures in the way the bailout provisions had been designed. Thus, Congress amended § 5 in 1982 in an effort to make bailout easier and more effective.[10] The DOJ estimated that 25% of counties in the major covered states would be eligible to bailout within two years of the amendments, by 1984.[11] At the time, the NAACP and MALDEF viewed this as a "greatly softened bailout standard" and "not a provision which the civil rights community wanted," based on the view that the new standard would make bailout too easy.[12]

Yet as a practical matter, these amendments have failed to have much effect. Since 1982, only 9-11 counties in the entire country, all in Virginia, have attained bailout status.[13] And even these few bailouts do not appear to have broad implications. In these counties, the black population ranges from 1.1% to 9.1%, as of the last decade, the time frame in which DOJ approved bailout for these counties. The Hispanic population ranged from 0.5% to 7.2% during this same period. That only 9-11 counties -- with minority populations this low -- have managed to bailout does not appear to attest to the practical effectiveness of bailout.

Congress should examine in more detail why bailout has continued to play such a minor role. Yet with the exception of one or two witnesses, there has been little testimony or evidence of which I am aware, in either the House or Senate hearings, from representatives of covered jurisdictions regarding the reasons the bailout process has been so ineffectual. Based on my knowledge, I believe there are four possible reasons: (1) the legal and/or financial obstacles to bailout might be excessive; (2) the elected political leaders of covered jurisdictions might fear the public and political perceptions that would result from bailout applications that could be presented as efforts to "escape the Voting Rights Act," even if the facts support the particular bailout;[14] (3) jurisdictions might simply be insufficiently aware of the bailout process and that they qualify for it; (4) jurisdictions might prefer to remain covered, either because the burdens of coverage are light enough not to be burdensome or because coverage makes it politically easier for them to maintain or adapt voting practices that they believe in on the merits but that would be

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[9] Michael P. McDonald, *Who's Covered? The Voting Rights Act Section 4 Coverage Formula and Bailout Mechanism, in* THE FUTURE OF THE VOTING RIGHTS ACT (David Epstein, Richard H. Pildes, Rodolfo de la Garza, and Sharyn O'Halloran, eds., forthcoming, Sept. 2006). For a more comprehensive examination of the history of bailouts, *see* Paul F. Hancock and Laura L. Tredway, *The Bailout Standards of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. Law. 379 (1985).

[10] For a thorough study of Congress' consideration in 1982 of, and amendments to, the bailout provisions, see Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003).

[11] *Id. See also* Hancock and Tredway, *supra*, at 412.

[12] *See id.* at 423 (quoting testimony of NAACP Executive Director and MALDEF President and General Counsel). *See also* McDonald, *supra.*

[13] *See The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing Before the H. Subcomm. on the Constitution, Comm. on the Judiciary*, 107th Cong. 88 (Oct. 20, 2005) (statement of Gerald Hebert, Esq., former acting Chief, Civil Rights Division, U.S. Department of Justice).

[14] See Winke, *supra*, at 104 ("For a covered jurisdiction, the costs of attempting bailout - both in terms of political fallout and legal fees - would be large, the chances of success small, and the benefits even smaller. A jurisdiction attempting to bail out might open itself to the charge that it was attempting to evade the force of the law. Although a successful bailout might remove the stigma that attaches to preclearance, a failed action could enhance the stigma.").

politically difficult to defend absent the argument that § 5 requires the practice. Of course, multiple causes could contribute to the absence of an effective bailout mechanism in practice, more than 40 years after the special coverage provisions first attached.

One local government official did testify that her jurisdiction preferred to remain covered for reason (4), above.[15] I am uncertain about how broadly that explanation applies. We do not, for example, see non-covered jurisdictions working to get themselves covered so that they, too, can benefit in this way. Broader testimony, such as from representatives from the states wholly covered, would be helpful. There is also testimony on bailout, which I have cited, from Mr. Hebert, whose knowledge and experience about bailout I greatly respect.[16] But since Mr. Hebert is seeking to build a legal practice around representing jurisdictions in bailout proceedings, I would prefer additional perspectives as well.

To determine whether Congress ought to modify the bailout provisions, and if so, in what ways, requires greater understanding than the record provides about why bailout has been so relatively ineffective for so long. Within the limits the current record entails, I offer specific suggestions in the next answer about how the bailout process might be modified. I consider these starting points for further analysis and discussion, given that I do not believe we understand enough yet to make firm policy judgments.

6. *Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?*

My first recommendation would be that the Senate devote a hearing to factual testimony regarding why bailout is so rare from those with direct, practical experience with the § 5 system. Given the centrality of the bailout mechanism to sound policy in this important area, as well as, perhaps, to the constitutionality of a re-authorized § 5, the development of a factual record regarding the reasons bailout is so rare justifies this level of attention. Professor Persily has made a similar suggestion.[17] Congress devoted significant effort to this question in 1982, believed it had made the bailout process substantially easier, and yet these amendments appear to have failed to achieve their intended effect.

Absent a more complete record, I can suggest several modifications, in order of importance, that might improve the bailout process:

1. Congress could require DOJ to take the initiative in identifying jurisdictions eligible or potentially eligible for bailout. Many witnesses that have addressed bailout have made recommendations of this sort. Thus, J. Gerald Hebert, the principal lawyer representing jurisdictions in bailout applications, has made a similar suggestion. In House hearings, his written submission stated: "I would recommend that when the legislation is reauthorized, Congress suggest the Department of Justice provide more information to localities about how to

[15] In the House, an official of Monterrey County so testified.
[16] *See* Hebert, *supra.*
[17] *See Time Change – Understanding the Benefits and Costs of Section 5 Pre-Clearance, Before the S. Comm on the Judiciary*, 108th Cong. 31 (June 13, 2006) (supplemental statement of Nathaniel Persily, Professor, University of Pennsylvania School of Law).

achieve bailout and encourage them to do so."[18] Professors Michael McDonald and Richard Hasen[19] have made a similar suggestion.

Shifting the initiating role in bailout to DOJ would address several possible reasons bailout has been so rare. To the extent jurisdictions are not well informed, a DOJ lead role could rectify that. A DOJ role could also reduce the financial costs to jurisdictions of the bailout process. Most importantly, to the extent elected state and local officials are risk averse about the political perceptions associated with their taking the lead in seeking to have their jurisdictions removed from § 5 coverage, shifting the initiating role to DOJ could mitigate perceptions of that sort, when those perceptions are not grounded in the actual facts. My sense is that this last factor does indeed play a significant role in explaining why so few jurisdictions have sought bailout.

2. Currently, towns, cities, and other local governmental units cannot bailout unless the entire county in which they sit can bailout as well. A better approach might well be to permit these local governmental units to bailout independently. That would bring the local government-county relationship under § 5 into the same relationship as the county-state one. Currently, a county *can* bailout even if the state in which it exists cannot. If there are policy reasons that the same relationship should not apply at the more local level, I am not aware of them. Again, the principal lawyer representing covered jurisdictions in bailout applications, J. Gerry Hebert has made this same recommendation in the House hearings.[20]

3. Congress could exclude from § 5 jurisdictions that today have populations below certain threshold levels of the minority groups protected under the VRA. The level at which that threshold should be set would require study and discussion. Perhaps populations somewhere below 5-10% would be an appropriate threshold, but I offer that only as a starting point for consideration. Among other effects, such a change would address the oddity of certain small towns in New Hampshire, for example, being swept into § 5 by the broad coverage formula. These jurisdictions might have been brought within the sweep of § 5 not because of a considered policy judgment that they warranted inclusion, but because the simple, general coverage criteria initially adopted formally applied to them.

Most importantly, I believe there can be broad-based consensus on improving the bailout process. Doing so in appropriate ways would not only be good policy. It would also indicate that the policymaking process is capable of adjusting the unique and extraordinary mechanism of § 5 to changing realities. That can only enhance the constitutionality of § 5 as a whole, particularly if Congress does not adjust the coverage formula in any way at all. § 5 does not expire until 2007. It would be quite unfortunate were Congress to rush the proposed bill through without determining whether broad consensus on bailout reform exists and without reflecting such a consensus in the bill.

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[18] Hebert testimony, *supra*, at 90.
[19] *See* McDonald, *supra, An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, Before the S. Comm on the Judiciary*, 108th Cong. 4-5 (May 9, 2006) (statement of Richard L. Hasen, Professor, Loyola Law School).
[20] Hebert Testimony, *supra*, at 91.

7. *In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice "got it right" because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?*

For my answers to all questions concerning *Georgia v. Ashcroft,* please see my response to Question 6 from Senator Cornyn.

Response of Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law to Written Questions from Senator Herb Kohl

1. *We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division testified last week that "our work is never complete" with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?*

I agree that work to protect the right to vote, perhaps the most precious right in any democracy, is likely never to be complete. That is partly why I have devoted a substantial portion of my academic career to work on democracy and voting rights, through scholarship, litigation, and service on various commissions, including, most recently, the National Commission on Election and Voting, created by the Social Science Research Council to provide expert, non-partisan information and analysis on voting and election-law issues.

The reasons that more work remains to be done are too extensive to detail here. I will note only two, long-enduring structural reasons. First, there is always the risk that election regulation and administration will be manipulated for partisan political ends. This risk is dramatically enhanced in the United States, in comparison to Western European democracies, because many election administrators at the state and local level are elected in partisan elections and/or have strong, formal relationships with political campaigns, such as serving as chairs of campaigns during elections when these administrators must then turn around and determine how to apply the law and exercise discretion in judging legal disputes involving those same campaigns. In addition, for the most part we put the power to design election districts every decade in the hands of elected, partisan political bodies, which predictably use this power to seek to promote their own interests or those of their partisan allies. Again, other longstanding democracies that use districted elections to select even a part of their representative bodies have created independent commissions to design these districts.

Second, for path-dependent historical reasons, our election system is still hyper-decentralized, even for state and national elections. Were we creating our election system on a clean slate today, I strongly doubt we would have this level of decentralization when national or state elections are involved. This excessive decentralization creates or accentuates many obstacles to improving the competence, consistency, professionalism, and transparency with which the right to vote is protected.

With regard to the connection between these issues and renewal of the VRA, three points are important. First, newspapers and other commentary often convey a misleading impression about what is at stake in the current renewal process, with the question often framed in the broad terms of whether the "VRA should be renewed." To many, that suggests that the question of whether basic protections for the right to vote should now be repealed. This misleading

impression can get in the way of careful policy analysis and discussion about the specific issues actually involved in renewal today.

To begin, it is essential to emphasize that the provisions that protect the right to vote nationwide, contained in § 2, are not at issue. The provision that does sunset, absent renewal, is § 5, the unique regime of federal oversight. More importantly, public discussion often assumes that § 5 itself is fundamentally about protecting the right to get to the ballot box and cast a vote. But that is not the case today. For a number of years, § 5 has had its most important effect in addressing issues of vote dilution, in the context of redistricting and annexation. Even going back as far as 1982, 62% of all DOJ objections in the 1982-2005 period have involved redistrictings or annexations.[21] During this 1982-2005 period, DOJ objected 1 time to a change in voting method; 7 times to changes in voter re-registration or voter purge laws; and 19 times to changes in voter registration procedures. Yet it objected to annexations 1016 times and to redistrictings 388 times.

I do believe in extremely strong legal protections for the right to cast a valid vote. Annexations and redistrictings, though, do not involve the right to participate and cast a vote. Instead, they involve issues of vote dilution, which are more complicated, in some contexts at least, than those involving the basic right to participate. The distinction between the two is important to bear in mind. My original testimony is primarily focused on the issue of vote dilution in the context of statewide redistricting plans, not on the right to participate.

Second, I believe that effective laws to protect the right to vote must be designed to respond to changing threats and changing circumstances. Measures necessary or effective to protect the "right to vote" in one set of circumstances can be ineffective or even counterproductive in another. Since Congress last deliberated about § 5, in 1982, three significant changes have taken place that must be incorporated into understanding § 5. With respect to vote dilution, the VRA is now regularly applied to single-member districting plans, in contrast to the far more common application in 1982, which was to at-large and multi-member election structures. In addition, while there were few black elected officials even in 1982, today there are vastly more such officials, in both covered and non-covered jurisdictions. Indeed, black elected state legislators range from 31% to 45% of *all* Democratic state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina.[22] Finally, in 1982, the South was still the province of a one-party political monopoly, that of the Democratic Party. Since the 1990s, however, the South has become the site of continual, robust, two-party competition, as in much of the rest of the country, but for the first time in the South in more than 100 years. For these reasons, the protections of the VRA should, in my view, be marginally adjusted in the context, at least, of statewide redistricting plans and vote dilution. Unlike in 1982, we no longer have a situation in the redistricting context, for example, where all white Southern legislatures, under the near complete domination of the Democratic Party, are in control of drawing election districts.

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[21] The data here and in the next few sentences comes from Fraga, *supra,* at 13 (table 2).

[22] These data are based on the composition of state legislatures in 2000 and are taken from J. Morgan Kousser, Whatever Happened to *Shaw v. Reno* 30 (unpublished manuscript dated Sept. 15, 2003). Kousser has long been one of the leading scholars of race and politics in the South.

In my view, when a coalition of black and white legislators today, including black legislators who occupy some of the most powerful positions in the state legislature, agree to a districting plan that is clearly designed with the aim of keeping their political party in power, which is a precondition to these representatives being in a position to exercise the most effective political power on behalf of their constituents, and when they do so by making modest reductions in the black population in a few districts while preserving numerous other safe minority election districts, it is a mistake and a confusion for the law to treat this plan as if it had emerged from a Southern legislature in 1970 or 1980. That is why I believe that the districting plan at issue in *Georgia v. Ashcroft* should have been legal under § 5, as the Supreme Court ultimately held it to be. That is why I also believe that, though the Court's decision creates a legal standard that at this stage remains vague and uncertain, it is premature for Congress to overrule that decision before the DOJ and the courts have given that standard more precise content through the ordinary processes by which legal standards are developed, which is case-by-case application in specific contexts.

Third, I want to emphasize that renewal of Section 5 should not be viewed as tantamount to providing strong protection for problems affecting the right to vote today. Most of these problems are not addressed at all by § 5. Even with respect to voting practices that § 5 does reach, it is unclear how significant the effect of § 5 is today. The record shows that DOJ objects in only an extremely small percentage of submissions, around 0.6% between 1982-2005 and a mere 0.05% between 1996-2002. There is inevitable uncertainty about the further deterrent effects § 5 has beyond these formal objections, though I am certain it has some. But in my view, the most effective national laws to protect voting rights in the coming years will be differently structured than § 5. They will be uniform laws of nationwide scope that directly protect the right to vote in general terms, as in the 2002 Help America Vote Act and the 1993 National Voter Registration Act. For the reasons I believe laws designed in this form will best protect the right to vote going forward, I refer the Committee to the article submitted with my original testimony, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, (forthcoming, Howard L. J. 2006). Thus, I do agree the VRA should be extended. I believe it should be extended in a form that is constitutional and that reflects the current nature and context of voting rights problems today. I also believe we should recognize that extending § 5 will not address many of the voting rights problems we face today.

SUBMISSIONS FOR THE RECORD

Testimony
United States Senate Committee on the Judiciary
The Continuing Need for Section 5 Pre-Clearance
May 16, 2006

Professor Theodore S. Arrington
Chair, Department of Political Science , University of North Carolina, Charlotte

Testimony of
Theodore S. Arrington, Ph.D.
On the Reauthorization of the Voting Rights Act

Before the United States Senate Committee on the Judiciary

16 May 2006
Washington, D.C.

Thank you Mr. Chairman for inviting me to testify before the Committee. Let me begin by stating that the Voting Rights Act is still needed and therefore should be reauthorized with some clarifications made necessary by the Supreme Court decisions in Georgia v. Ashcroft and Bossier Parish II. I will focus my comments on Georgia v. Ashcroft and the continuing impact of racially polarized voting on minority participation.

My curriculum vita is attached to this short summary of my opinions about the reauthorization of the Voting Rights Act. I am currently Chairman of the Political Science Department at the University of North Carolina at Charlotte. I have been a student of politics and an active participant since 1960. I have been an expert witness in more than 30 voting rights cases. In my consulting I have been retained by units of government, Republican Party affiliated groups, Common Cause, the National Association for the Ad-vancement of Colored People, The American Civil Liberties Union, and the Federal Courts. Most recently I have been retained by the United States Department of Justice in a number of both §2 and §5 cases in several states and advised them on preclearance of legislative districts in North Carolina. I have been in-volved in redistricting cases in North Carolina, South Carolina, Georgia, Florida, Mississippi, Louisiana, Montana, New York, Connecticut, Alabama, Maryland, Illinois, and Prince Edward Island Canada. Some of my cases or redistricting work has involved African-American minorities, while other cases have in-volved Hispanics or Indians.

There is no question that we have come a long way since 1965. The Voting Rights Act, National Voter Registration Act, and other statutes have removed many barriers to voter registration by minorities. However, we still have a long way to go. Substantial disparities in both registration and turnout remain for many minorities, particularly Asian and Hispanic voting age citizens. Even where those disparities may not be present, such as for African-American voters in some areas, minority vote dilution is still a problem. It is still a problem because voting throughout the country is still strongly racially or ethnically polarized, as I
have discovered in my expert testimony in voting rights cases throughout the country. When the candidates chosen by minority voters and those chosen by the majority group differ, election systems and arrange-ments must be able to provide equal opportunity for the minority voters to elect representatives of their choice. Section 5 of the Voting Rights Act requires covered jurisdictions to consider whether minority vot-ers have such an equal opportunity. Section 2 of the Voting Rights Act provides a mechanism for assuring such equal opportunity throughout America. Both parts of the Voting Rights Act are still needed because seemingly racially-neutral election procedures such as at-large voting, majority vote requirements, and anti-single-shot provisions may combine with racially polarized voting to erect effective barriers to the ability of minority voters to have an equal opportunity to participate in the political process and an equal opportunity to elect representatives of

their choice.

I enclose with this testimony a paper I presented to a roundtable at the Annual Meeting of the American Political Science Association. In that paper I discuss the effect of implementation of the Voting Rights Act on partisan gerrymandering, a subject I first broached in my testimony before the Federal Dis-trict Court in the case that became Thornburg v. Gingles in the mid 1980s. Prior to Gingles many jurisdictions with heavy minority populations had districting arrangements (e.g., at-large or countywide elections) that favored the Democratic Party. Minority populations were disbursed across many districts in such a fashion as to enable the election of white Democratic candidates, but with few or no districts having sufficient minority population for the election of representatives of choice of minority voters. Because Re-publican voters are more homogeneous in terms of race, ethnicity, and (at that time) class, Republican districts were easily packed with more Republicans voters than are needed to win. It does not matter whether this arrangement, which favored white Democrats over Republicans and minority candidates, was intentional or the result of what are often called "traditional districting principles." The effect was the same. Minority voters were denied equal participation in the political process because they did not have an equal opportunity to elect representatives of their choice, and Republican voters were underrepresented. This pattern was most clearly illustrated in the failure of six southern states (Alabama, Florida, Louisiana, North Carolina, South Carolina, and Virginia) to elect any black representatives to Congress between the end of Reconstruction and the 1990 round of redistricting.

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With the more complete implementation of §5 of the Voting Rights Act in the 1990 reapportion-ment and redistricting cycle, this Democratic Party bias was reduced or eliminated in many jurisdictions. As my paper for the APSA shows, the districts for the U.S. House of Representatives in the 1990s had greatly reduced Democratic Party bias. In short, the implementation of the Voting Rights Act in the 1990 redistricting cycle ended some de-facto Democratic Party gerrymanders, while moving us toward equal participation in the political process for minority voters. The number of African-American representatives at all levels – local, state, and national – has increased enormously since the passage of the Voting Rights Act in 1965. The enclosed article tracks this change for the U.S. House of Representatives. While direct barriers to voting began to crumble right after the passage of the Voting Rights Act, real progress in giving minority voters an equal opportunity to elect representatives of their choice began after the Gingles case, which provided a framework for §2 litigation, and the 1990 redistricting cycle when the Justice Department vigorously enforced §5. These more recent actions were necessary to deal with vote dilution.

Georgia v. Ashcroft is an unworkable standard that undermines the ability of minority voters to have an opportunity to elect representatives of their choice. In that case, a narrow 5 to 4 majority of the U.S. Supreme Court concluded that a jurisdiction could satisfy §5 (and perhaps by implication §2) by sub-stituting what are called "influence districts" to provide "substantive representation" instead of creating or maintaining districts in which minority voters have a reasonable opportunity to elect representatives of their choice. There are a number of problems with this. First, there are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in Shaw v. Reno and its progeny, we are left with no clear guidelines for drawing districts; there is no way to know how to comply with the Court's mandate. This is quite unlike the one-person-one-vote standard, which can be mathematically determined as the districts are being drawn. At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide "influ-ence"? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district in providing equal par-ticipation? The right to vote is not based on substantive representative, but an equal and meaningful right to participate and elect representatives of choice as the Congress has recognized in §2 of the Voting Rights Act.

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Second, to the extent that I can imagine what measures would be used to determine whether substantive representation or influence has been enhanced to prevent retrogression, these measures amount to simply helping Democratic Party candidates. In virtually every state legislature, in the Congress, and in many local jurisdictions, minority representatives –especially African Americans – are strongly allied with the Democratic Party. Helping Democratic Party candidates would be argued to be equivalent to increasing minority voter influence and helping minority substantive representation. In other words, influence dis-tricts, if seen as a replacement for opportunities for minority voters to elect representatives of their choice, would become simply a rationale for creating Democratic Party gerrymanders. This takes us back to the situation before Gingles when minority voters did not participate equally in the political process and Re-publican voters were underrepresented.

So far in my testimony I may have annoyed some Democratic members of this Committee. What I am about to say may annoy some Republican members. Just as failure to construct minority districts can result in a Democratic Party gerrymander, so too, the packing of minority voters can be used to create a Republican Party gerrymander. Qualified experts usually rely on court rulings that specify that minority voters in the district must have a "reasonable opportunity to elect representatives of their choice, even if their choice happens to be a member of that minority." Notice that the standard is a reasonable opportunity, not a certainty. There is no certainty in politics. Packing a district with more minority voters than are needed to provide a reasonable opportunity weakens the participation of minority voters in surrounding districts, and could be used to unfairly favor Republican Party candidates, creating a Republican Party ger-rymander. The concentration of minority voters necessary to provide a reasonable opportunity to elect varies from place to place and from office to office, and requires intense jurisdiction specific investigation.

Substantive representation is often contrasted with what is called "descriptive representation," which means that only a black person can represent African-American voters, only women can represent female voters, and so forth. The concept of descriptive representation is a straw man. The Voting Rights Act does not require the election of minorities, and I know of no competent expert or voting rights lawyer who has argued that it does. Indeed, Congress expressly rejected descriptive representation in its 1982 amendments to §2. Nevertheless, the Voting Rights Act should require that minority voters have an equal opportunity to elect representatives of their choice. The fact derived from extensive analysis of voting pat-

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terns shows that minority voters, like everybody else, usually prefer candidates who are like themselves in race, ethnicity, and partisanship. This is not descriptive representation, it is just giving minority voters the same opportunity that Anglo voters have to elect their choice. If minority voters are restricted to choosing among Anglo candidates, they cannot be said to be participating equally in the political process.

The opinion of the five-member majority in Georgia v. Ashcroft fails to clarify some important political distinctions. Experts have developed procedures for determining whether a district offers minority voters a reasonable opportunity to elect representatives of their choice – an "opportunity district" – and this can be known as the districts are drawn. In some places such a district requires that more than a majority of the voters should be members of the minority group – a "majority-minority district." In some jurisdic-tions there may be an opportunity to draw what are sometimes called a "coalition district." This is a district where a working coalition between minority voters and sympathetic whites or Anglos is a political reality. In such a district the minority voters have to make compromises, but are able to elect representatives they freely choose. These kinds of districts are distinct from "influence districts." Any reasonable interpretation of the phrase "equal opportunity to elect representatives of their choice" must mean creation of opportunity districts, where this is possible, and coalition districts in places where true opportunities to elect the minor-ity choice is not possible without coalition partners. A jurisdiction specific inquiry is necessary in order to determine

where opportunities can be found and where a real coalition among equals is possible.
Expert witnesses in voting rights cases are an essential part of the process because litigation involving §2 and the preclearance process of §5 are fact intensive efforts. In the Gingles case, the United States Supreme Court specifically authorized the use of bivariate ecological regression analysis (BERA) to measure the extent of racially polarized voting. The Court authorized this technique and the plurality opin-ion specifically rejected what is called "multivariate analysis" because the probative questions in voting rights litigation involve the extent to which minority and majority voters differ in their choice of candidates to represent them. BERA, and some newer types of bivariate analysis, give us estimates of the extent to which each race or ethnic group favors one set of candidates or another. In other words, BERA can tell us whether the voting is racially polarized and the extent to which minority voters are cohesive in their voting. Multivariate techniques do not give us that information. Multivariate analysis is an attempt to determine whether race or some other factor is the "cause" of the way people vote. The plurality opinion of the Court
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specifically, and rightfully, rejected such causal analysis even if it is possible statistically. More recently, some Circuits permit consideration of causality, especially at the phase of the hearing where the "totality of the circumstances" is being considered. The Voting Rights Act as reauthorized provided for an "effects test." Does a voting practice have the effect of preventing minority voters from having an equal opportu-nity to elect representatives of their choice? Multivariate analysis does not answer this question.
Racially polarized voting continues to be a pervasive feature of American politics. Race, ethnicity, and partisanship are inextricably intertwined, as every student in an Introductory American Politics course knows. Some experts for defendants in voting rights cases argue that partisanship or some other variable related to race or ethnicity is the "true cause" of how people vote. Or they may argue that minority voters' identification with a particular party is the "true cause" of their lack of representation. But this ignores the fact that race or ethnicity cannot be caused by any other variable. If race or ethnicity is related to socio-economic status (SES) or partisanship, then we must conclude that race or ethnicity affects SES and parti-sanship. It cannot be the other way around. Being poor or identifying with the Democratic Party cannot cause a person to have a particular race or ethnic identification. Race or ethnicity must be the root cause.
It would be absurd to conclude that the right of minority voters to have the opportunity to elect representatives of their choice does not apply if they choose to vote for Democrats while white or Anglo voters choose to vote for Republicans. According to the U.S. Supreme Court in the Gingles case, the voting must be racially polarized in order to prove a §2 violation. In order for partisan elections to be polarized, one group must favor the Democratic candidate while the other group favors the Republican. Some who comment on voting rights would like to set up a "catch 22" which would prevent enforcement of voting rights. If the general election is not polarized there would be no §2 violation. If it is polarized, then "it is just partisanship."
I will use three examples of cases in which I have consulted or testified to illustrate judicial find-ings of racially polarized voting involving three different groups of minority voters protected by §2 and § 5. Two of these examples are from §5 jurisdictions.
In DeGrandy v. Wetherell,1 I provided affidavit and courtroom testimony to the Special Master appointed to draw legislative and congressional plans for Florida following the 1990 Census. The three-
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judge court noted that "the results of Florida's legislative elections over the past ten years established the presence of racially polarized voting."2 The Court highlighted the impact that racially polarized voting had on minority success in Florida, including: the absence of African-Americans elected to Congress since the end of Reconstruction and only one Latino Congressman during that period; no African-American state senator until 1982; and no Latino state senator until 1988. Relying upon this

compelling evidence, the court observed, "The approach of fracturing the African-American community in order to create influence districts does not further Congress's intent of completely remedying the prior dilution of minority voting strength and providing a meaningful opportunity to participate in the political process."3 The court there-fore adopted a congressional redistricting plan that created two African-American and two Latino majority districts and one African-American coalition district, where there was evidence that African-American vot-ers had a meaningful opportunity to elect their candidates of choice. This finding illustrates my point that influence districts are neither a proper nor a workable solution to racially polarized voting.

I testified as an expert witness for the Department of Justice in United States v. Blaine County, Montana,4 a §2 challenge to the County's at-large method of electing its three member Board of Commis-sioners. Blaine County is not covered by §5. However, it demonstrates the impact of racially polarized voting when combined with certain election practices and why the inquiry must focus on the results of vot-ers' choices, and not reasons to explain away those choices. The court acknowledged that despite comprising over one-third of the County's population, no American Indian had served as a County Com-missioner in the County's 86-year history. The appellate court found that there was substantial evidence of white bloc voting that defeated American Indian candidates of choice.5 In reaching this conclusion, the court rejected the County's arguments that the racially polarized voting could be ignored because there was no evidence American Indians had distinct political concerns or that white voters had discriminatory mo-tives. The court reasoned:

Blaine County's at-large voting system enhances the possibility that a bloc of white vot-ers will prevent American Indians from electing candidates of their choice. In challenges

1 794 F. Supp. 1076 (N.D. Fla. 1992),

2 794 F. Supp. at 1079.

3 794 F. Supp. at 1085.

4 363 F.3d 897 (9th Cir. 2004), cert. denied, 544 U.S. 992 (2005).

to multimember districts, evidence of racial bloc voting provides the requisite causal link between the voting procedure and the discriminatory result .... Accordingly, the district court did not err by declining to inquire into the divisive and irrelevant issue of whether white voters in Blaine County are motivated by discriminatory motives.6

A contrary conclusion would "place an impossible burden on the plaintiffs" that is "contrary to the plain language of §2's results test."7 Otherwise, it invites jurisdictions and courts to overlook even the most compelling evidence of racially polarized voting as the results of politics or other reasons not germane to the question of whether minority voters have an equal opportunity to elect their chosen candidates.

I also was the testifying expert for the Department in United States v. Charleston County, South Carolina.8 In that case, the United States challenged the County's at-large partisan method of electing its nine member County Council. The evidence showed that although African-Americans comprised over one-third of the County's population, only three had been elected to the Council out of 41 members who served since 1970. All three ran as Republicans and received "overwhelming support from white voters and minimal support from minority voters."9 In the Fourth Circuit's opinion by Judge J. Harvey Wilkin-son, the court concluded that "voting in Charleston County elections is severely and characteristically polarized along racial lines."10 Judge Wilkinson rejected the County's argument that politics, not race, explained the polarized voting, observing that the County's own expert, Dr. Ron Weber, agreed that "parti-sanship and race as determinants of voting are 'inextricably intertwined.'"11 As Judge Wilkinson explained:

[L]ooking at County Council elections since the early 1990s, white Democrats have at least occasionally won, while minority Democrats have invariably lost. Although minor-ity voters give more cohesive support to minority Democratic candidates than to white Democratic candidates, the opposite is true among white voters. This is consistent with the parties' evidence that white and

minority voters are more often racially polarized in
5 363 F.3d at 900-01, 909-13.
6 363 F.3d at 912 n.21.
7 363 F.3d at 912.
8 316 F. Supp.2d 268 (D.S.C. 2003), aff'd, 365 F.3d 341 (4th Cir.), cert. denied, 543 U.S. 999 (2004).

9 365 F.3d at 349.
10 365 F.3d at 350.
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Council general elections involving at least one minority candidate. Thus even control-ling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County.12
Racially polarized voting, combined with an at-large method of election, a large county size (Charleston County is the largest county in South Carolina), staggered terms, residency districts, and the primary nomi-nating system, had a clear effect on African-American voters. Regardless of party, they could not elect their candidates of choice. I have attached copies of the opinions of Judge Wilkinson and Judge Duffy from the Charleston County case.
As these three cases demonstrate, the Voting Rights Act is still necessary to protect the opportu-nity of minority citizens to elect representatives of their choice in the face of racially polarized voting. The right of minority citizens to an equal opportunity to elect representatives of their choice is not dependent on the nature of that choice. They can choose to elect liberals, conservatives, black people, brown people, Democrats, or Republicans. Their choice is up to them.
The reauthorization of the Voting Rights Act should make it clear that influence districts and sub-stantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.
11 365 F.3d at 352.
12 365 F.3d at 353.
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Affirmative Districting
and the
Partisan Seats/Votes Relationship:
1972-2002
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Abstract of
Affirmative Districting
and the
Partisan Seats/Votes Relationship:
1972-2002

The Voting Rights Act, Supreme Court decisions, and improvements in geo-graphic information technology have changed the redistricting process. An important question is how the partisan aspects of Congressional districting changed in the three reapportionment cycles since the one-person-one-vote rul-ings of the Supreme Court. Especially interesting are changes in the 1990 cycle, as affirmative districting became an important element in the process. The 1990 redistricting cycle did not give Republicans an unfair advantage in the seats/votes relationship nationwide or in the southern states, but it reduced the previous Democratic bias nationwide and in the south.

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Affirmative Districting
and the
Partisan Seats/Votes Relationship:
1972-2002

The Voting Rights Act of 1965 (VRA), various Supreme Court decisions since the 1960s, and improvements in geographic information technology have changed and continue to change the redistricting process. An important question is how the partisan aspects of elections changed in the three reapportionment cycles since the one-person-one-vote rulings of the U.S. Supreme Court in Wes-berry vs. Sanders (376 U.S. 1, 1964). Especially interesting are changes in the 1990 cycle as affirmative districting became an important element in the redis-tricting process.

Various authors argue that the 1990 round of redistricting was "maximiza-tion whatever the cost" (Cunningham 2001). They contend that the Republican administration of President George H.W. Bush used the Voting Section of the Civil Rights Division of the Department of Justice in combination with some black politicians, Republican operatives in the states, and G.O.P. judges to create the maximum number of minority packed districts. This effort, in turn, helped create a Republican gerrymander in an era when the Republicans were putting forth re-newed efforts in the southern states and had greater control of the redistricting process in the north.

The question of whether such concentration of minority voters in some dis-tricts hurts Democrats is widely studied (e.g., Brace, Grofman and Handley 1987; Hill 1995; Petrocik and Desposato 1998). The theory is quite simple. Minority

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voters, especially blacks, are the most reliable Democratic voters. Therefore, the concentration of minority voters in a district assures the election of a Democrat in that district. But it "bleaches" the surrounding districts, making them more likely to elect Republicans.

Shotts (2001, 2002) presents a theoretical model of the effects of affirma-tive districting on partisan outcomes. He concludes that VRA requirements have varying effects depending on which party controls the redistricting process. Eng-strom and Ulbig's (2001) data point to the same conclusion. If Shotts, Engstrom, and Ulbig are right, then fair and responsive districts are compatible with affirma-tive districting. A comparison of the seats/votes relationship in the 1970, 1980, and 1990 redistricting cycles should provide a test of this contention.

Many authors have examined the redistricting cycles in the 1970s, 1980s, and 1990s using a variety of methods.1 Some of these authors made assess-ments of the partisan effects of the districts without complete data on the five elections held after each cycle. No authors have used a consistent methodology to compare the results of all three post-Wesberry cycles using five elections for each decade.

How Should the 1990 Redistricting Cycle
Change the Seat/votes Relationship?

The VRA, as interpreted by the Supreme Court, produced an increase in the number of minority districts. The number of majority-minority districts more

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than doubled in the 1990 round of redistricting, and did not decline after the 2000 round despite changes in Supreme Court policy in Shaw v. Reno (509 U.S. 630, 1993) and its progeny (Table 1).

Districts in which minorities were more than 55% and 60% of the population also more than doubled after the 1990 redistrict-ing round. The surprising lack of retrenchment in the 2000 districting cycle, despite Shaw, is a reflection of the increase in Latino districts (shown in Table 2).

Given the scholarship on the racial and partisan aspects of redistricting, what should we expect to have happened after the 1990 round of redistricting, which would be different from the 1970 and 1980 rounds?

First, we would expect that the number of unopposed Congressional con-tests in both parties would go up after the 1990 round. The process of concentrating minority voters (especially in the supermajorities common in 1991-2) would produce minority districts in which the Republicans would be noncom-petitive. The surrounding districts would be bleached of the most reliable Democratic voters and therefore uncompetitive for the Democrats. This changer should quickly be seen by both parties, potential candidates would not run, and unopposed elections will result. This effect could be offset, however, by the con-scious effort of the Republicans to contest more elections in the south during the 1990s. So we might expect an increase only in unopposed Republicans.

Second, we would expect that the swing ratio would be lower after the 1990 round of redistricting. The creation of more districts, which are heavily De-mocratic (minority districts) and more districts which are heavily Republican

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(bleached districts) would necessarily reduce the swing ratio because a healthy swing ratio requires that more districts be constructed in the competitive range.

And, third, we would expect that the 1990 redistricting cycle would pro-duce a Republican bias. While the creation of minority districts creates "sure-fire" Democratic districts, it also creates heavily Republican districts. Many scholars have argued that the latter will outnumber the former. Moreover, the Republicans controlled the redistricting process in more states in the 1991-2 cycle, and should have been able to design the districts to their advantage, especially in conjunc-tion with affirmative districting.

Methods

To determine how the Congressional election system as a whole trans-lates votes into seats between the parties requires an examination of the seats/votes relationship (Kendall and Stuart 1950, Linehan and Schrodt 1978, Schrodt 1981, Taagepera 1973, Theil 1969). As Niemi (1990, 171) asserts ". . . if the Supreme Court is to consider squarely the question of gerrymandering sooner or later it will have to take a position on the significance of the relationship between votes and seats won by each political party" (see also Niemi 1985, 191).

Tufte (1973) advocated using simple OLS regression as a technique to relate the percentage of the votes that a party wins to the percentage of the seats won. (Also see Grofman 1983; Cain 1985; Niemi and Deegan 1978; and Niemi and Fett 1986 for related techniques.) Two measures are obtained from this kind of analysis. First, the slope of the regression line is called the "swing ratio." It tells us the extent to which the distribution of seats is responsive to changes in the

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vote. King and Browning (1987) formalize the theory of how seats and votes can be related. They point out that a swing ratio of 1.0 would mean that the districting system was producing proportional representation. A swing ratio greater than 1.0 is a majoritarian system giving a bonus to the majority party.

Secondly, the OLS regression can also tell us whether the system has a partisan bias, which can be taken to mean that it is a gerrymander. To determine the bias, one simply computes the value of the dependent variable (percentage of seats) when the independent variable (percentage of votes) is 50% using the regression equation. An unbiased system would be one where the regression line crosses 50% on both the X and Y axis.

One problem is that the theoretical relationship of seats and votes is an "S" curve, not a line (Campagna and Grofman 1990; Theil 1969, Taagepera 1973, Grofman 1983, King and Browning

1987). An examination of the possible curves presented by King and Browning (1987), however, shows that in the re-gion where real competition actually occurs -- 40% to 60% on each variable -- the possible "curves" straighten out. Thus, OLS regression should provide unbiased estimates within this competitive range.

To use the procedure, however, requires "numerous elections over at least a decade to make a confident determination about the degree of bias and type of representation" (King and Browning 1987, 1267). While it is possible to estimate the seats/votes relationship before votes are cast for the new districts (e.g., Gary King's Judgeit software provides one method for doing so), the most valid measure of bias and swing ratio requires examination of the results of ac-

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tual elections held using the districts. Therefore, analysis of the impact of the 1990 redistricting round is only possible now that we can look at the entire dec-ade from 1992 to 2000.

Much of the literature appropriately concentrates on comparisons of the redistricting process using states as the units of analysis. But redistricting for the Congress should also be examined for what it is: the creation of a national legis-lature. In this paper I will look at the seat/votes relationship for the entire country with years as the units of analysis and then do separate analyses for the eleven states of the old confederacy and the states covered under the pre-clearance re-quirements of §5 of the VRA. A list of the data sources used for this paper is in the appendix.

The dependent variable in the regression is the Democratic percentage of the seats held by the two parties. Candidates who ran as independents are not counted as belonging to either party, even though they may later caucus with one party or the other.

Determining the percentage of the two-party votes received by each party (the independent variable) requires attention to two questions. The first question is how to count Louisiana elections. If there was no run-off election between a Democrat and a Republican in a Louisiana district, I counted the first election in the district (normally held in October, but held in November of 2002) as the elec-tion. The Democratic vote in such elections is the total vote for all Democratic candidates, and the Republican vote is the vote for all Republican candidates. If

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there is a run-off election between a Democrat and a Republican, I counted that as the election.

A second question is what to do with unopposed contests. I define an op-posed contest as one in which there was both a Republican and a Democratic candidate. If the vote in unopposed elections is included, it inflates the total for the party that had the most unopposed candidates because an opponent would have received at least some votes. If the vote of the unopposed candidate is ex-cluded, the vote of the party with the most unopposed candidates is understated because an unopposed candidate would undoubtedly receive a substantial ma-jority of the votes if he/she were opposed.

One solution to this problem is to substitute the vote of some other set of candidates in districts where the Congressional candidate is unopposed. But on a nation-wide basis the only office available for that job is the Presidency, and that is only available in half the Congressional elections. Moreover, this is exactly the wrong office to use. The presidential contest is the most unlike any other elec-tion. People know more about presidential candidates, care more about them, and often vote for president contrary to their Congressional party inclinations. Votes for U.S. Senate or Governor could be substituted into unopposed races, but this also has problems. Voters typically also know more about candidates for these offices, only 33 or 34 of the states have a Senate election in any year, and most governors now have four-year terms.

My solution to this problem is to estimate the vote that each party would receive in unopposed contests and add this to the vote in the opposed races.

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The formula for the adjustment of the vote for each party is in Figure 1. Tables 3 and 4 give the figures for each of the variables used in the formula nation-wide for each election from 1972 to 2002. The logic here is that we can vary the per-centage of the vote that we would expect unopposed

candidates would have received, on average, if they had been opposed. This would certainly be well above 50%. The presumed strength of the unopposed candidate is what con-vinces potential candidates in the other party not to run. I assume that the turnout in unopposed districts would be the same as the average turnout in opposed contests. I present a number of models using various estimates for the vote divi-sion and report data for both these models and unadjusted vote totals of various kinds. If the results I obtain are consistent in the various models, I would have strong evidence that the findings are reliable.

Table 5 shows analysis in which the proportion of the vote candidates in unopposed elections would have received if they had been opposed (v) is varied from .55 to .85 to test various models. The 80% model (v = .8) gives the best cor-relation between seats and votes for the entire 1972-2002 period (R2 = .914), but all of the correlations are quite high.

Data Presentation

Table 4 presents evidence on the expectation that unopposed Congres-sional candidacies will increase in the 1990 redistricting cycle. In comparison to the 1970 and 1980 cycles, the number of unopposed contests actually declined in the 1990s. The number of unopposed Democrats was reduced by more than half (from about 53.2 in the 1980s to 23.4 in the 1990s), however, the number of

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unopposed Republicans rose from an average of 18.4 in the 1980s to an average of 30.8 in the 1990s. We could take the increase in the number of unopposed Republicans to be a result of the creation of more bleached districts, and the de-crease in the number of unopposed Democrats could be the result of Republican recruitment activity especially in the south. In any case, affirmative districting was not incompatible with an overall increase in opposed elections.

Table 4 also shows why it is so important to have a reliable procedure for dealing with unopposed races. The number of unopposed candidates in each party varies widely. The number of unopposed candidates ranged from ten to 58 unopposed Democrats and eight to 54 unopposed Republicans. There is only a slight, insignificant negative relationship between the number of unopposed con-tests in each party (R2=.113, significance = .102).

The swing ratio increased as a result of the 1990 cycle and was substan-tially greater than following either the 1970 or the 1980 cycles (Table 6). The swing ratio was at its lowest in the 1980 period. There are very few differences in the swing ratio between the various kinds of unadjusted figures and the various estimation models. No matter what assumptions we make about the unopposed candidacies, we find that the swing ratio increased after the 1990 redistricting cy-cle. More opposed contests and higher swing ratios equals more party competition at the same time that affirmative districting became a factor in the process.

An examination of changes in bias is also shown in Table 6. Did the 1990 round of redistricting help the Republicans? Yes. Did it provide an unfair advan-

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tage? That is, did the 1990 process, including a tremendous increase in majority-minority districts, produce a Republican bias (which would indicate a G.O.P. ger-rymander)? No. The Democratic bias that is apparent in the 1970s and 1980s is reduced after 1990. In some of the models tested a slight Democratic bias re-mains, and in others a slight Republican bias is present. But none of these biases is very large, except in the unrealistic model in which unopposed results are included without any adjustment (Democratic bias = 6.163). I conclude that there was no "severe" bias in the 1990 redistricting cycle as required by the Su-preme Court in Davis v. Bandemer (478 U.S. 190, 1986).

Although this article focuses on the Congressional districting system at the national level, it is useful to examine the same data for the southern states. This is the region, which has experienced the greatest change in partisan and racial politics in the last 30 years. Moreover, the majority of the affirmative districting in the 1990 round focused on this region, and most of these states are covered by the pre-clearance provisions of §5 of the VRA. Of the 69 districts in the 2002 elections which had more than 50% minority population, 31 of them were in the eleven states of the old Confederacy; of

the 57 districts with more than 55% mi-nority population, 28 were in the south; and of the 47 districts with more than 60% minority population, 24 were in the southern states.

Table 7 shows the number of unopposed contests in the eleven states of the old Confederacy. Throughout this period (1972-2000), the majority of unop-posed contests in the nation were in the south. The pattern of change is the same as in the nation as a whole. The number of unopposed Republicans in-

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creases four-fold from the 1970s to the 1990s, and the number of unopposed Democrats decreases to almost one-third of the 1970s level. But the total number of unopposed elections in the south declines from a mean of 35 in the 1970s to 31.8 in the 1990s.

The swing ratios and bias estimates for the Confederate states are given in Table 8. Again, we see the national pattern repeated. The 1990 cycle clearly increased the swing ratio, and reduced the Democratic bias that existed in the 1970s and 1980s. No matter which model we use, a Democratic bias remained in Congressional elections in the south after the 1990 cycle.

I performed the same analysis using those states covered by the pre-clearance provisions of §5 of the VRA.1 The results were indistinguishable from the results presented here for the old Confederacy. Affirmative districting in the 1990s was compatible with increases in competition, districts which are more re-sponsive to changes in voter sentiment, and reduced partisan bias.

Discussion

Republicans may use the fig leaf of affirmative districting to cover a naked gerrymander, especially if they are allowed to pack minority districts with higher concentrations of minority voters than is necessary for minority citizens to elect a representative of their choice. However, there is nothing about affirmative district-ing which is necessarily incompatible with responsive, competitive, fair districts or even a Democratic gerrymander. The 1990 redistricting did not create a Republi-can gerrymander for the U.S. Congress as a whole or in the south where the activity of the Voting Section of the Department of Justice was concentrated.

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Lublin and Voss (1998, 769) note: ". . . racial redistricting not only made it possible for the Republicans to win more seats with the same number of votes, but it actually caused the Republicans to win a larger share of the vote." Lublin adds (1999, 186): "Thus racial redistricting alters not only the aggregation of votes but also the quality of candidates presented, such that it indirectly boosts the Republican share of votes and seats by undercutting Democratic prospects." Downs (1957 mentions the hypothesis that quality candidates and other re-sources will gravitate to the party that is most likely to win the district.

It may be, as Lublin argues, that the 1990 redistricting cycle gave Republi-cans a boost in winning votes. Did it give them an unfair advantage? The assumption -- and this is a necessary assumption -- is that when we draw the districts in such a fashion as to fairly translate votes into seats, this will produce a level playing field in terms of partisan advantages and disadvantages that are sensitive to district composition. Both parties will be equally enabled or impeded in their campaigns by the district lines.

The 2000 round of districting, however, may be quite different. Analysis of the 2000 redistricting cycle is just beginning to be made based on the 2002 elec-tion or on voting data from the 1990s. One early reporter (Hirsch 2003) argues that the 2000 round gave the Republicans an unfair advantage. He argues that this is due to the greater Republican control of state legislatures in several large competitive states. He also notes that this latest round of redistricting was the most incumbent-friendly in history. Given the Republican bias evident in Michi-gan, Pennsylvania, and now Texas, it is possible that the data for the first decade

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of this century will show a marked Republican bias in Congressional districts. But this cannot be blamed on affirmative districting provisions of the Voting Rights Act.

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Endnotes

1. For the pre-1970 period see: Cox and Katz (1999). For the 1970 redistricting cycle see: Glazer, Grofman and Robbins (1987) and Squire (1985). For the 1980 cycle see: Squire (1995), Campagna and Grofman (1990), King and Browning (1987). For the 1990 cycle see: Cannon (1999), Grofman and Handley (1998), Lublin and Voss (1998), McDonald (1995), McDonald, Neimi and Abramowitz (1994), Swain, Borrelli, and Reed (1998), Hill (1995).

2. The list of states included in the §5 analysis is slightly from the states of the Old Confederacy. Arkansas and Tennessee are not covered by §5, and were ex-cluded from this separate analysis. Arizona is covered by §5 and is included in this analysis. North Carolina and Florida are included in the §5 set, although only some counties in these two states are covered. In practice, these covered coun-ties cause entire Congressional district plans from these states to be affected by pre-clearance. Other states that are partially covered are excluded from this separate analysis. These states have only one Congressional District (Alaska, New Hampshire, South Dakota, and Wyoming), or have such limited coverage that pre-clearance does not affect entire Congressional district plans (California, Colorado, Connecticut, Hawaii, Idaho, Massachusetts, Michigan, and New York).

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The Continuing Need for Section 5 Pre-Clearance

Testimony of Anita S. Earls
Director of Advocacy, University of North Carolina Law School Center for Civil Rights

Senate Judiciary Committee
May 16, 2006

Mr. Chairman and Members of the Committee:

I am honored to be invited to testify concerning the continuing need for the Section 5 preclearance process[1] to protect the voting rights of minority citizens. Throughout the 16 states that are covered in whole or in part by the preclearance requirement, minority voters continue to face intentional and unconstitutional barriers to full and equal participation in the political process. Section 5 review of changes affecting voting is a bulwark against further erosion of minority voting rights and works in tandem with Section 2 of the Voting Rights Act to prevent the use of voting practices or procedures that make it harder for minority voters to have an equal voice in local, state and national governments.

My perspective on the value of Section 5 preclearance review comes from a total of eighteen years' experience with voting rights cases, including representing minority voters primarily in the south, and from two and a half years as a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, with responsibility for the Voting Section, among others. Most recently, I helped conduct public hearings in North Carolina and Virginia, to gather information about the impact of the Voting Rights Act at the local level in those states. The experiences of minority voters who came and testified at those hearings is the most persuasive evidence of the continuing need for Section 5.

First, in those hearings we heard what racially polarized voting really means. John W. Boyd of Mecklenburg County, Virginia, an African-American, testified that recently he was a candidate for Congress in Virginia's Fifth Congressional District. While campaigning, he attended a political function in the southwest part of the state. He encountered a white woman at the function who told him "It's a pleasure to meet you. You speak very well. You would have done a lot better if you had not made an appearance here because you have a white last name, which is Boyd, and we're all voting for those candidates."[2] Her polite advice was that he would get more votes if he didn't campaign in person because once people saw that he was black, they would not vote for him. In her world "those candidates" mean white candidates. Mr. Boyd was

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[1] 42 U.S.C. § 1973 (c) (2002).

[2] Testimony of John Boyd, Public Hearing on Reauthorization of the Expiring Provisions of the Voting Rights Act, p. 20, lines 8-11, p. 24, lines 22-25 (Raleigh, N.C. Jan. 26, 2006).

a serious candidate who won 30.7% of the vote in the general election in 2000.[3] But he could not overcome the barrier of his race for many voters.

Ralph Campbell, the only African-American to win a non-judicial statewide election in North Carolina knew well what this Virginia voter was saying. In his election campaigns for state auditor, he used a label from a Campbell's soup can rather than his photograph, in his election materials. These examples are from recent times, not the distant past. Racially polarized voting is a current reality that minority voters and the candidates they support must confront when they try to have a role in the democratic process. The Supreme Court has identified the presence of racially polarized voting as important circumstantial evidence of intentional discrimination in the electoral process.[4] The continued prevalence of racially polarized voting in the covered jurisdictions is one of the most significant indicators of the continued need for the preclearance provision.

Second, we heard evidence about the deterrent value of Section 5. For example, Ms. Bobbie Taylor, President of the Caswell County NAACP explained how the views of minority voters on issues ranging from polling place location to the composition of election districts were taken into account because of the requirements of Section 5. She testified that because she is "considered one of the leaders in Caswell, I've been contacted on several occasions when they have anticipated changes, i.e., the voting precincts. In one instance we were trying to get it moved because it was in a dangerous location. So when they finally decided to look into that, ... they contacted me."[5] When asked if local officials would still involve minority community leaders without the Voting Rights Act coverage, Ms. Taylor replied: "No. I think we still need it and I think we've been able to accomplish what we have accomplished because it's there. Just like when the plans for the redistricting were being considered, it was because of the Voting Rights Act that the county commissioners contacted me, that he made sure that I was at those meetings. Now, some people might say it was because he was a nice guy, which he was ... but I think it went deeper, in terms of the Voting Rights Act requiring that this be done ... if we had not known about it, they would have passed it, and we rejected all of them."[6] During the preclearance process jurisdictions must indicate whether they have conferred with minority community representatives. That requirement is one important way that changes having a harmful effect on minority voters are stopped before they ever reach the stage of an official objection or judicial determination.

This example is only one of many instances where the fact that a proposed change must be precleared results in a different outcome by decisionmakers. The deterrent impact of Section 5 can be hard to quantify because often such conversations about the potential for an objection occurred in closed sessions when local governing bodies confer with their legal counsel. Nevertheless, advocates and activists are well aware of how presenting information about the likely Section 5 analysis of a proposed redistricting plan or the failure to annex a predominantly

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[3] See http://www.sbe.state.va.us/web_docs/election/results/2000/nov/nov2000/

[4] *Rogers v. Lodge,* 458 U.S. 613, 623 (1982).

[5] Testimony of Bobbie Taylor, Public Hearing on Reauthorization of the Expiring Provisions of the Voting Rights Act, p. 41, Lines 19-25, p. 42, line 1, (Greensboro, N.C., Nov. 14, 2005).

[6] Id., p.52, lines 8-24.

black community, for example, can make a difference. Significantly, none of the witnesses at the three hearings we conducted testified that Section 5 was no longer needed.

At a broader level, the available evidence supports the testimony of local leaders that Section 5 is still needed. There are several types of evidence that are relevant. First, the very record of Section 5 objections since 1982 demonstrates that purposeful discrimination continues to occur in matters affecting voting. When the preclearance provisions were last extended in 1982, Congress optimistically expected that not only would the number of objections decrease over time, but that numerous and perhaps all of the covered jurisdictions would eventually be eligible for bailout, [7] which, among other things, requires that no change submitted by the jurisdiction be the subject of an objection for the previous ten years.[8]

In fact, the record has been exactly the opposite. In many of the covered jurisdictions, including North Carolina, the number of objections since 1982 is actually greater than the total number from 1965 to 1982.[9] In states that are substantially covered (that is, where more than a handful of counties are covered), there were a total of 481 Section 5 objections prior to August, 1982, and 682 objections from August 1982 – 2004. Many of these post-1982 objections included evidence that the change was motivated by a discriminatory intent. In a comprehensive review of all Section 5 objection determination letters, authors Peyton McCrary, Christopher Seaman, and Richard Valelly concluded that evidence of discriminatory purpose were significant in well over half the objections. For example they report that "[i]n the 1990s, fully 151 objections (43 percent) were based on purpose alone. Another 67 objections (19 percent) relied on a combination of purpose and retrogression, and 41 (12 percent) on both purpose and the need to comply with Section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade. In contrast, a determination of retrogressive effect was involved in only 40 percent of objections in the 1990s and Section 2 in only 14 percent."[10] Since *Reno v. Bossier Parish School Board*[11] substantially changed the purpose prong of Section 5 in 2000, to narrow the intent standard, fewer objections based solely on discriminatory purpose have been issued. However, the numerous objection letters from every covered jurisdiction document an extensive record of local officials seeking to change dates of elections, election district boundaries, city boundaries, and other election procedures out of a desire to suppress, diminish or negate the effect of minority voters. These are compelling evidence of continued purposeful discrimination.

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[7] S.REP.NO. 97-417, at 75 (1982) *as reprinted in* 1982 U.S.C.C.A.N. 177, 254.
[8] 42 U.S.C. § 1973b
[9] See Appendix 1, "Voting Discrimination in States Covered Statewide by Section 5 Post-August, 1982". The data is from: National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982 – 2005. (February 2006). This table was compiled by James Tucker.
[10] Peyton McCrary, Christopher Seaman, and Richard Valelly, "The End of Preclearance as We Knew It: How the Supreme Court transformed Section 5 of the Voting Rights Act (unpublished manuscript, February 2005). Three of their tables, summarizing their analysis of Section 5 objection determinations are attached as Appendix 2.
[11] 528 U.S. 320 (2000).

A second source of evidence of intentional discrimination are the forty-two cases in which jurisdictions have unsuccessfully sought preclearance of a change affecting voting in the three-member U.S. District Court for the District of Columbia.[12] Jurisdictions covered by Section 5 always have the option of seeking a declaratory judgment from a three-judge D.C. federal court that a proposed change does not have the purpose or effect of making minority voters worse off. A total of twenty-five of the cases in which the Court considered the change on the merits and refused to issue such a judgment occurred after 1982.[13]

A third compelling source of evidence of purposeful and unconstitutional discrimination comes from judicial findings of intentional discrimination in litigation brought under Section 2 of the Voting Rights Act. Unfortunately many of these findings are in unreported decisions.[14] Indeed, the discrepancy between the number of reported opinions finding Section 2 violations and the total number of successful Section 2 cases is huge. In North Carolina, for example, there have been nine reported cases finding Section 2 violations since June 29, 1982 and 41 unreported cases.[15] Over the same time period, in the nine states that are substantially covered by Section 5, there have been 66 reported cases finding a Section 2 violation and 587 unreported cases.[16] Thus, any review of reported cases alone seriously understates the findings.

Nevertheless, while limited to only reported cases with published opinions, brought under Section 2 of the Voting Rights Act, a study published by the Voting Rights Initiative of the University of Michigan Law School concluded that since 1982 there have been 137 cases nationwide in which a court found a history of official discrimination in voting and in 107 of those cases, the court further found that the history of official discrimination impacted the present-day ability of members of the minority groups to participate in the political process.[17] In Katz' analysis, twenty-four lawsuits since 1982 identified more than one hundred instances of intentionally discriminatory conduct in voting. Eight of these twenty-four lawsuits were in jurisdictions covered by Section 5, fourteen were in non-covered jurisdictions.[18]

Judicial findings of intentional discrimination are only one type of evidence that such discrimination is occurring. Many cases involving allegations of unconstitutional, intentional discrimination are resolved on the more narrow statutory grounds because courts always avoid constitutional questions if at all possible. Typical is this statement by the court in a Georgia case: "[a]s for plaintiffs' additional constitutional claims, the court finds that the proposition set

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[12] See National Commission on the Voting Rights Act, *supra* note 9, at 57-58 & n.197.
[13] *Id.* at 58.
[14] See, e.g., *Sanchez v. King*, No. 82-0067 (D. N.M. 1984) (reciting extensive evidence of recent intentional discrimination against Native American voters).
[15] See National Commission on the Voting Rights Act, *supra* note 9, at Table 5.
[16] *Id.*
[17] Ellen Katz, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 20 (Final Report of the Voting Rights Initiative, University of Michigan Law School, November 10, 2005).
[18] Id. at 20-21. There are fewer Section 2 lawsuits finding intentional discrimination in covered jurisdictions because Section 5 objections have blocked those discriminatory changes from taking effect in the first place.

forth in Justice Brandeis' opinion articulated in *Ashwander v. TVA,* which suggests that federal courts should avoid ruling on constitutional issues when non-constitutional grounds for a decision exist, is now applicable. Accordingly, the court declines to rule upon plaintiffs' constitutional claims."[19] Thus, the general record of Section 2 violations is some further evidence that unconstitutional discrimination is also occurring, short of a judicial finding of a Fourteenth Amendment violation.

In a similar vein, there are frequently allegations of unconstitutional conduct in litigation under Section 2 that is resolved by consent decree. While Defendants in such cases often must admit liability under Section 2 in order for a court to have jurisdiction to order a new method of election,[20] typically they are not willing to admit to unconstitutional conduct and there is no need for them to do so in order for Plaintiffs to obtain a remedy. Thus, the record of many cases resolved under Section 2 of the Voting Rights Act by consent decree is also some evidence that unconstitutional discrimination in matters affecting voting may have occurred.

Another indirect source of evidence concerning unconstitutional conduct by local officials is the record of Section 5 submissions that are withdrawn by the jurisdiction before the Department of Justice makes its determination. The National Commission on the Voting Rights Act obtained information concerning all "more information" letters written by the Department of Justice from 1982 through the end of 2004 under the Freedom of Information Act. Those records revealed that during that period, 501 proposed changes affecting voting were withdrawn by jurisdictions after receipt of a "more information" letter. In these instances Section 5 review by the Department of Justice resulted in the abandonment of potential voting changes with discriminatory impact or purpose before an objection was issued. The fact that jurisdictions were willing to abandon their proposed changes in 501 instances rather than seek a judicial determination that the change is valid under the Voting Rights Act is some evidence of an acknowledgement of a discriminatory purpose or effect.

Thus, there are numerous sources of evidence that discrimination in voting, whether by diluting minority voting strength, or by manipulating voting procedures to disadvantage minority voters has occurred in circumstances that meet the *Arlington Heights*[21] and *Washington v.*

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[19] *Johnson v. Hamrick*, No. Civ. 2:91-CV-002, (June 10, 1998) 1998 WL 476186, (*citations omitted*); see also, *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (declining to decide whether at-large system violates the constitution because the Court affirms judgment under Section 2 of the Voting Rights Act); *White v. Alabama,* 74 F.3d 1058, 1071 n. 42 (11th Cir. 1996) ("Because we dispose of the district court's judgment on the ground that it violates the Voting Rights Act, we need not, and indeed should not, discuss whether the judgment violates the Equal Protection Clause by setting aside race-based seats on Alabama's appellate courts." See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

[20] See *Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Commissioners,* 142 F.3d 466 (1997).

[21] 429 U.S. 252 (1977).

Davis[22] standards for demonstrating constitutional violations. Fortunately for many minority voters, a significant percentage of those new laws and practices never went into effect because the Department of Justice issued an objection. The fact that so many significant objections have been issued since 1982, and the continuing prevalence of racially polarized voting, are powerful indicators of the continued need for Section 5 preclearance.

Some may suggest that the permanent provisions of Section 2 are sufficient to protect minority voting rights. The record in North Carolina is particularly instructive on this point because it makes clear how Section 5 operates to protect the gains that plaintiffs obtain through Section 2 litigation. In Pasquotank County, for example, after black voters and the NAACP filed suit opposing Elizabeth City's at-large method of election, the City agreed in a consent decree to implement single-member districts.[23] Ultimately, however, the City adopted a plan with four single-member districts and four at-large residency districts. The plaintiffs to the suit opposed continued use of such extensive at-large voting, because it unnecessarily diluted black voting strength. When the City applied for preclearance, the Attorney General interposed an objection, explaining that the City had chosen a plan that would elect half the governing body "in a manner identical to that which the decree was designed to eliminate." Though the use of limited at-large voting might be acceptable, the plan chosen contained "the very features that characterized the plan abandoned by the consent decree" and was adopted over readily available alternatives that would allow some at-large representation without "unnecessarily limiting the potential for blacks to elect representatives of their choice to office." The plan was, in fact, enacted "with knowledge of the disparate impact" it would have.[24] Elizabeth City has since adopted an election scheme with four wards that each elect two council members. There are currently four black members on the Council.[25] In the case of Elizabeth City, and elsewhere, Section 5 has provided a long-term guarantee that the promises made in Section 2 suits are actually implemented.

This example is only one of many. In Florida, following the November 2000 election, the NAACP brought litigation under the Voting Rights Act to address many of the election practices that had a discriminatory impact on minority voters in that election.[26] It was only through Section 5 review, however, that enforcement of key aspects of the settlement agreement in that case remained in place for subsequent elections.[27] In South Carolina, the Department of Justice and private plaintiffs recently proved that the county's at-large election method of electing the county council violated Section 2.[28] The County Council spent more than $2 million and three years defending its at-large system, and ultimately paid private plaintiffs' attorneys

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[22] 426 U.S. 229 (1976).

[23] *See NAACP v. Elizabeth City*, No. 83-39-CIV-2 (E.D.N.C. 1984).

[24] Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, to M.H. Hood Ellis (March 10, 1986) (Section 5 objection letter regarding the Elizabeth City City Council, Pasquotank County, North Carolina).

[25] Information on the current Elizabeth City City Council and method of election available at http://www.cityofec.com/.

[26] See *NAACP v. Harris*, No. 01-120-CIV-Gold (S.D. Fla. July 6, 2001).

[27] See JoNel Newman, Voting Rights in Florida: 1982-2006, 13-15, 36-37 (March 2006).

[28] See *United States v. Charleston County,* 316 F. Supp. 2d 268, (D.S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004), *cert. Denied,* 125 S.Ct. 606 (2004).

fees.[29] When, in 2003, the South Carolina General Assembly enacted a law that would have changed the method of electing the Charleston County School Board to the one successfully challenged in the County Council case, the Department of Justice objected to the change on the ground that it would decrease minority voting strength.[30] In Mississippi, the experience with dual registration requirements that were implemented intentionally to disadvantage minority voters involved Section 2 litigation,[31] a Section 5 enforcement action,[32] and an objection under Section 5.[33] In these and many other instances, while litigation plays a role, the Section 5 preclearance requirement is a powerful and necessary supplement to prevent discriminatory voting changes.

Since only 40 of North Carolina's 100 counties are covered, the contrast between covered and non-covered counties there is instructive. Recently a number of counties and one city previously sued under Section 2 of the Voting Rights Act and required by court order to abandon at-large systems have filed motions seeking to dissolve the consent decrees or court orders that currently bind them. In the case of *Montgomery County Branch of the NAACP v. Montgomery County,* No. C-90-27-R, (E.D.N.C.), the plaintiffs and the county ultimately negotiated a new settlement. The Court's Supplemental Order, issued July 2, 2003, provides a new method of election that moves from a 4-1 system, with one commissioner elected at-large, to a 3-2 system that retains one majority black district, but has two at-large seats. The Order also provides that the case will be dismissed after five years, thereby dissolving any court order that there must be a majority black district for the board of county commissioners. Montgomery County is not covered by Section 5 of the Voting Rights Act. A similar motion was granted in November, 2004 to terminate the Consent Order in *NAACP v. City of Thomasville,* No. 4:86CV291 (M.D. N.C.). In two other counties, Beaufort County and Columbus County, efforts are underway to dismantle court orders requiring majority-black districts but no motions have been filed in court. Of all these local jurisdictions, only Beaufort County is covered by Section 5. There, the minority voters have the added protection of the non-retrogression requirement. Any new method of election adopted in Beaufort County will need to afford minority voters the same opportunity they now have to elect candidates of their choice. Thus, Section 5's non-retrogression principle is an important protection to safeguard the court orders and consent decrees that have been obtained to provide non-dilutive, fair and non-discriminatory methods of election under Section 2 of the Act.

It is also important to recognize that Section 5 review is well adapted to prevent new forms of discrimination in elections. In February of 2005 the North Carolina Supreme Court ruled that approximately 12,000 ballots cast on Election Day by voters outside their home

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[29] National Commission on the Voting Rights Act, *supra* note 9, at 55-56.
[30] Letter from R. Alexander Acosta to C. Havird Jones, Esq., 26 Feb. 2004, available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_022604.pdf.
[31] *Operation PUSH v. Allain,* 674 F. Supp. 1245 (N.D. Miss 1982), *aff'd* 932 F.2d 400 (5th Cir. 1991).
[32] *Young v. Fordice,* 520 U.S. 273 (1997).
[33] Letter from Isabelle Katz Pinzler to Sandra M. Shelson, September 22, 1997, available at: http://www.usdoj.gov/crt/voting/sec_5/ltr/l_092297.pdf.

precincts would not be counted.[34] The ballots under question were cast disproportionately by black voters. Statewide, the estimates are that 36% of the ballots cast out of precinct on election day were cast by black voters although they were just 18% of the electorate. In some counties the disparity was even greater. For example, 41% of Wake County's provisional ballots were cast by black voters. Many of these voters were never notified where to vote by the state, due to a backlog of new registrants. In addition, many voters were advised by local election officials that provisional ballots votes cast outside their home precincts would count. As one researcher reported, out-of-precinct voting in North Carolina "especially helps working class, young and minority voters. Our research shows that black voters cast more than one third of the state's out-of-precinct ballots, while less than one fifth of all votes in November's elections came from African-Americans." Additionally, black voters disproportionately live in low income neighborhoods without access to transportation or flexible work schedules that might allow them to get to their home precincts.[35] While this case was ultimately resolved by legislative action, Section 5 of the Voting Rights Act would be a bar to any change in voting rules that rejects a disproportionate number of ballots cast by black voters.

Finally, there is a particular aspect of state law in North Carolina that makes the non-retrogression principle especially important for that state's minority voters. Following enactment of the state legislative redistricting plan in 2001, a lawsuit was filed in state court seeking to enforce a provision of the State Constitution that previously had been found to be in conflict with the Voting Rights Act, namely the "whole county provision" which requires legislative districts to be made up, to the extent possibly, by whole counties.[36] As a result, the only counties that can be divided in drawing legislative districts are those covered by the non-retrogression requirement of Section 5 of the Voting Rights Act, or where there is potentially a Section 2 violation. Dividing counties is generally necessary to draw majority-black districts.

In 2004 the Fourth Circuit held that in order to show a potential violation of Section 2 of the Voting Rights Act, plaintiffs must demonstrate that they constitute 50% or more in a single-member district, foreclosing the possibility of influence or coalition district claims.[37] If Section 5 is not reauthorized, application of the whole county provision may result in the loss of eleven of the state's twenty-one districts that elect an African American to the North Carolina General Assembly.

While the Voting Rights Act has been enormously successful in overcoming the overt and violent suppression of the black vote that occurred prior to 1965, subtle and persistent forms of intentional discrimination continue to disadvantage minority voters. Section 5 remains an important and powerful tool to combat that discrimination. Levels of registration of minority voters do not begin to tell the complete story of political participation, particularly at the local level. Without the non-retrogression principle in place, many covered jurisdictions would revert

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[34] *James v. Bartlett,* No. 602P04-2, (N.C. February 4, 2005).
[35] Bob Hall. "Voters Disenfranchised by N.C. Supreme Court." 11 Feb 2005 <http://minorjive.typepad.com/hungryblues/2005/02/voters_disenfra.html>
[36] *Stephenson v. Bartlett,* 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*) and *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004), (*Stephenson II*).
[37] *Hall v. Virginia,* 385 F.3d 421 (4th Cir. 2004).

to at-large election methods and other schemes that dilute the voting strength of minority voters. With racially polarized voting remaining a barrier to the effective political participation of minority voters in numerous areas and with the recent record of objections documenting the need for the Act, it is imperative that Congress reauthorize Section 5 and restore it to the force it had in 1982.

APPENDIX 1

Post-August 1982 Voting Discrimination in States Covered Statewide by Section 5

State	Pre-August 1982 Section 5 Objections*	August 1982 - 2004 Section 5 Objections*	August 1982 - 2004 Section 5 Withdrawals	August 1982 - 2004 Successful Section 5 Enforcement Cases	August 1982 - 2005 Successful Section 2 Cases	August 1982 - 2004 Number of Elections with Observer Coverage
Alabama	59 (12)	46 (7)	15	22	192	67
Arizona†	6 (3)	19 (5)	5	3	2	40
Georgia	97 (11)	83 (16)	38	17	69	55
Louisiana	56 (8)	103 (13)	22	5	17	15
Mississippi	65 (15)	120 (11)	29	15	67	250
North Carolina	26 (13)	43 (10)	10	3	52	6
South Carolina	52 (6)	74 (6)	20	10	33	23
Texas†	96 (7)	105 (10)	54	29	206	10
Virginia	18 (5)	15 (2)	4	1	15	0
TOTALS	**475 (80)**	**608 (80)**	**197**	**105**	**653**	**466**

Source: National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005 (summarizing DOJ statistics).

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* The number in parentheses indicates the number of statewide Section 5 objections for the period noted.

† Statewide Spanish Heritage coverage under Section 4(f)(4). Alaska, which is covered statewide for Alaska Natives, is not included because of lack of enforcement activities.

APPENDIX 2

TABLE 1: CHANGE TYPES TO WHICH OBJECTIONS WERE INTERPOSED, BY DECADE

Change Type	1970s	%	1980s	%	1990s	%	Totals
Annexations	34	(7%)	47	(11%)	24	(6%)	105
At-large Elections	110	(22%)	57	(13%)	31	(8%)	198
Enhancing Devices	182	(37%)	93	(22%)	73	(18%)	348
Districting	86	(17%)	165	(38%)	209	(52%)	460
Ballot Access	77	(15%)	64	(15%)	56	(14%)	197
Other Changes	9	(2%)	5	(1%)	9	(2%)	23
Totals:	498	(100%)	431	(100%)	402	(100%)	1331

Note: In this and the following tables, the column headed "1970s" is actually the period 1968-1979, but few objections were interposed until 1970. The number of change types to which objections were interposed is greater than the total number of objections, because numerous objection decisions affected two or more change types. *See* Note 155, *supra*.

TABLE 2: LEGAL BASES FOR OBJECTION DECISIONS, BY DECADE

Legal Basis	1970s	%	1980s	%	1990s	%	Total
Exclusive Categories							
Intent	9	(2%)	83	(25%)	151	(43%)	243
Dilutive Effect	34	(9%)	-		-		34
Retrogression	297	(77%)	146	(44%)	73	(21%)	516
Technical	17	(4%)	15	(5%)	1	(0%)	33
Section 2	-		2	(1%)	6	(2%)	8
Minority Language	2	(1%)	2	(1%)	5	(1%)	9
Combined Categories							
Intent/Retrogression	22	(6%)	73	(22%)	67	(19%)	162
Intent/Dilution	5	(1%)	-		-		5
Intent/Section 2	-		6	(2%)	41	(12%)	47
Other	-		3	(1%)	5	(1%)	8
Totals:	386	(100%)	330	(100%)	349	(100%)	1065

TABLE 3: LEGAL BASES FOR OBJECTION DECISIONS, REDISTRICTINGS

Legal Basis	1970s	%	1980s	%	1990s	%	Total
Exclusive Categories							
Intent	7	(11%)	75	(44%)	122	(58%)	204
Dilutive Effect	23	(27%)	-		-		23
Retrogression	37	(40%)	35	(23%)	20	(10%)	92
Technical	10	(12%)	9	(5%)	1	(0%)	20
Section 2	-		1	(1%)	1	(0%)	2
Combined Categories							
Intent/Retrogression	5	(7%)	40	(24%)	34	(16%)	80
Intent/Dilution	2	(2%)	-		-		2
Intent/Section 2	-		4	(1%)	30	(14%)	34
Other	2		-		1	(0%)	3
Totals:	86	(100%)	165	(100%)	209	(100%)	460

On the Need for Renewal of Section 5 of the Voting Rights Act

Remarks prepared for presentation to the United States Senate Committee on the Judiciary

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On the Need for Renewal of Section 5 of the Voting Rights Act

Remarks prepared for presentation to the United States Senate Committee on the Judiciary

Chairman Specter, Senator Leahy, and distinguished Senators: my thanks for the invitation to appear before this panel to discuss the renewal of the Voting Rights Act. I am honored to appear before you today.

My name is Ronald Keith Gaddie. I am a professor of political science at the University of Oklahoma. Your former colleague now the President of the University of Oklahoma, David Boren, with whom I have the privilege of teaching with in the Political Science Department, has asked me to give the members of the committee his best wishes.

Since 2001 I have worked as a litigation consultant and expert witness in voting rights and redistricting cases in several states, including Texas, Oklahoma, Wisconsin, New Mexico, Virginia, South Dakota, and Georgia, for jurisdictions, plaintiffs, Democrats and Republicans. I have authored or coauthored eight books on aspects of American politics. Currently, with my colleague Charles S. Bullock III of the University of Georgia, I am completing an analysis of the progress on minority voter participation and elections in the jurisdictions covered by Section 5 of the Voting Rights Act. This study is supported by the American Enterprise Institute, through the Blum-Thernstrom Project on Fair Representation.

The Voting Rights Act has framed American electoral politics for forty years. The Act stands as the enforcement mechanism for one of two "superior" redistricting principles of voting rights, that of racial fairness (the other principle being the one-person, one-vote guarantee). The most proactive tools of the Voting Rights Act are up for renewal. This periodic review and renewal of legislation gives us the chance to ask, "what have we done and how far have we come?"

This statement will highlight trends in minority participation in the seven states originally covered by the Act. I will then frame some topics for discussion as we move toward the renewal of the Act, with some attention paid to the history and prospects for minority voter participation in the states originally covered by Section 5.

The Problem

The initial concern of the Voting Rights Act was access to the political process. Political scientist V. O. Key, writing over a half-century ago in his classic *Southern Politics: In State and Nation*, observed that "the South may not be the nation's number one political problem . . . but politics is the South's number one problem." (1949: 3) Participation was necessary to a functioning democracy, for Key, who observed that the problem of participation in South, like every other problem, could be traced to the status of blacks.

What was the status of Southern blacks? Well, depending on where you went in the South variations were in evidence, but southern blacks were generally disfranchised, generally discriminated against, and generally held at a distance from white society –specifically the prosperous part of white society -- by public policy. Key observed that "whites govern and win for themselves the benefits of discriminatory public policy" and further noted that "discrimination in favor of whites tends to increase roughly as Negroes are more completely excluded from the suffrage" (1949: 528). Exclusion from the vote did not cause discriminatory treatment, but it most certainly reinforced the status of Southern blacks. Key observed in a clinical fashion what Martin Luther King, Jr. argued passionately in 1965, "give us the vote and we will change the South." It was only by the exercise of political power through ballots that politicians would change policy in the long run.

We have the opportunity for a frank, informed conversation about the shape of the Voting Rights Act for the future. And I thank the chairman and committee for holding these hearings in order to advance this conversation. What should take place in this conversation?

Context: The "Then and Now" of the Adoption of Section 5

In 1964, there was one black state legislator in the seven states originally covered by Section 5. The South lumbered under an archaic and outdated political and social culture that clung to the past at the possible cost of the future. There was no viable competition to the Democratic Party, which was locally a contrary adjunct to the national party, opposed to the Democrats in the rest of the nation on most every dimension of social policy politics.

The contemporary South is vibrant, the most populous and fastest-growing region of the nation. Southern children are more likely to attend integrated schools than in the rest of the nation, and an African American is more likely to have black representation in the South than anywhere else in the nation. Education and income differences across the races are matters of degree rather than orders of magnitude. Southern blacks are registered and voting at rates comparable to black voters in the rest of the nation. There is a two-party system in the South which fosters black political empowerment and office-holding. However, that empowerment comes as the party of choice for most African-Americans, the Democratic Party, has been relegated to minority status in the legislature of three of the original Section 5 states and also in the covered states of Texas and Florida.

Race still divides the South, but southern blacks are not helpless in the pursuit of political, social, and economic goals when compared to five decade ago. The context of race relations and the status of minorities in the South are dramatically changed from four decades ago.

The times, they change. But the times do not change at the same pace in every place. The law too must change, so that it might address the prevailing circumstances of the times, with respect for the past. Every renewal of the Voting Rights Act has brought some change, some evolution of the law to address the circumstances of the present with respect for the past.

Minority participation in the Political Process and How Section 5 Advanced That Cause

In my previous testimony to the US Commission on Civil Rights and before the Judiciary Committee of the U.S. House of Representatiyes, I used as a starting point Table 1, which contains information from Earl and Merle Black's *Politics and Society in the South.* This table shows the growth of black voters in the South. By 1984, South Carolina and Mississippi ranked at the top of proportion black electorate. Mississippi and Alabama registered the largest proportional gain of size in the black electorate, though Mississippi simultaneously ranked "high" and "low" because the baseline for minority participation was so very low, large proportional gains were inevitable. Georgia and Louisiana conversely rank near the bottom of proportional gain in part because of having the highest rates of black registration of any state originally covered by Section 5. By 1984, the black percentage among registrants tracks closely with the black percentage in the voting age population, evidence of the success of the Voting Rights Act in eliminating obstacles to participation. The states with the largest *potential* black electorates (Mississippi and South Carolina) had the most-heavily African-American voter registration rolls.

The Black brothers' analysis informs us as to the proportionately largest black electorates in the South. Tables 2 and 3 present Census Bureau estimates of black voter registration and participation since 1980 for the seven states originally covered by Section 5. Black registration lags white registration for most of the time period in the seven covered states analyzed (as it does in nonsouthern states throughout the time series). But, for the last four elections for which there are comparative data, black registration in six of the seven states (all but Virginia) exceeds black registration rates in the nonsouthern states. In three of the states (Georgia, South Carolina, Mississippi), black registration rates exceeded white registration rates within those states for at least two of the last four elections.

Black turnout rates are less consistently above the national average. As indicated in Table 3, three of the original Section 5 states – Alabama, Mississippi, and Louisiana – have black turnout consistently above the national average for black turnout. Every covered state except Virginia reports higher black than white turnout rates at least once since 1990, and Georgia reports higher black than white turnout in three of the last four general elections. Differences in racial registration and participation have become differences of degree rather than of magnitude.

These votes are generally translated into seats. Figure 1 presents time-lines, since 1964, of the percentage of state legislative seats held by black incumbents in the state

legislatures of the seven original Section 5 states. Of these states, Alabama has achieved proportionality in the legislature relative to their respective citizen voting age populations, while Georgia, Mississippi, and North Carolina are approaching proportionality (data for this graphic appear in Table 4).

At the congressional level, the 1990s saw significant advancement of descriptive African-American representation. The number of southern, African-American members of Congress tripled. In the states covered by Section 5, the number increased from three in 1991 to a current eleven (one from Virginia, two from North Carolina, one from South Carolina, four from Georgia, one from Alabama, one from Mississippi, and one from Louisiana) -- 18% of all congressmen from these states are African-American, compared to 25% African-American citizen voting age population. If we also add the black congressmen elected from the other two Section 5 southern states – Texas and Florida – we total seventeen black MCs, or 15% of all MCs from nine states that are collectively 18.9% black by citizen voting age population.[1] Black representation in the Section 5 states is not proportional to the black citizen voting age population. But, black descriptive representation is as high as it has ever been in southern legislatures in modern times, and is approaching proportionality to the extent that the geographic placement of black voters and the tendencies of electorates in general elect black candidates who seek legislative office (see Table 5). As is widely recognized, in single-member, plurality political systems like in the US (in contrast with the proportional systems used in most of Europe), the majority group gets a disproportionate share of the legislative seats and the minority groups gets less than its proportional share.

What is Retrogression?

A change in election law that results in an adverse effect on opportunities for a racial (or protected language minority) group to participate in the electoral process constitutes retrogression. More precisely, legal retrogression occurs when a jurisdiction covered by Section 5, reduces the opportunity for minorities to participate effectively. The law firm of Bickerstaff, Heath, Smiley, Pollan, Kever, & McDaniel LL of Dallas describes a retrogressive change as follows:

> The preclearance inquiry examines whether a proposed voting change is retrogressive compared to the legal benchmark . . . For example, a change from a single-member district system in which a minority group consistently has been able to elect candidates of its choice, to an at-large system in which the minority group has such small numbers that it will always be outvoted for all elected

[1] The nine Southern states that are Section 5-covered contain one-fourth of the citizen voting age population in the United States. Those states are 18.9% African-American citizen VAP, and contain 43.9% of all citizen VAP blacks in the United States. The original seven Section 5 states are 24.9% citizen VAP by population, and contain 30.8% of all citizen VAP black in the United States.

> positions by the larger non-minority population, would be retrogressive and unlikely to receive preclearance. This is an extreme example, of course; there are other instances involving less obviously adverse changes that might be considered retrogressive.[2]

The benchmark is the last legally-enforceable plan; preclearance alone does not guarantee status as the benchmark, as is evident from cases such as *Miller*.[3] How jurisdictions address retrogression became a source of political and legal confusion in the first decade of the 21st century. Until July 2003, retrogression occurred if the ability of a minority group to elect its candidates of choice was reduced. Retrogression, when applied to redistricting, is measured for the entire proposed plan relative to opportunities under the new plan.

Assume, for example, an existing thirty-district state legislative map had three majority-minority districts, all of which elected candidates of choice of the minority group. The new map eliminates a minority districts and does not create an offsetting one elsewhere.

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[2]See *Beer v. United States*; quote from "Frequently Asked Questions on DOJ and Preclearance." http://www.votinglaw.com/dojfaq.html#13, accessed September 30 2005. Bickerstaff et al assert that the last precleared plan is the benchmark, which is incorrect. In *Young v. Fordice* (520 U.S. 273 (1997).), the State of Mississippi had administratively implemented a new "provisional" registration system in order to comply with the Motor Voter Act (the provisional plan) this plan was represented by state election officials as the plan that would be passed by the legislature and this plan was subsequently precleared by the Department of Justice even though it was not in conformance with Mississippi statutory law. Contrary to the representations of elections officials, the legislature refused to pass the provisional plan and created a dual registration system for federal and state elections. The Department of Justice asserted that since the provisional plan had already been implemented and precleared, it became the benchmark for measuring the system created by the legislature. The Supreme Court, in a unanimous opinion, rejected this argument and held that the provisional plan was not the benchmark, and that the old system, prior to the Motor Voter Act was the benchmark for the measurement of retrogression. In *Abrams v. Johnson* (521 U.S. 74 (1997)), after the redistricting plan for the Georgia congressional districts had been found unconstitutional by the District Court, various parties asserted a variety of benchmarks under §5. The Department of Justice proposed that the redistricting plan "shorn of its constitutional defects" was the appropriate benchmark. Other appellants asserted that the 1992 redistricting plan passed by the Georgia Legislature, signed by the Governor and submitted but objected to by the Department of Justice constituted the benchmark under §5. The Court rejected both proposals and stated unequivocally that the "appropriate benchmark is, in fact, what the district court concluded it would be, the 1982 plan." As the Court noted "there are sound reasons for requiring benchmarks to be plans that have been in effect; otherwise a myriad of benchmarks would be proposed in every case, with attendant confusion."

[3] See also 42 U.S.C. § 1973c; *Beer v. United States*, 425 U.S. 130 (1976); *Miller v. Johnson*, 515 U.S. 900 (1995).

The new map retrogresses against existing minority opportunities. Were a new district plan to eliminate a minority district while creating a new one, the number of minority opportunities for access would be unchanged, and retrogression would not have occurred.[4] The submitting jurisdiction rather than the Department of Justice (DOJ) bears the burden of proof for demonstrating non-retrogression. Another facet of the retrogression standard generally prohibited the reduction in the minority concentration in an existing majority-minority district.

The US Department of Justice may not apply other standards in addition to retrogression when determining whether to preclear new districting plans. The Supreme Court has ruled out standards that go beyond the charge to the agency under Section 5 which only sets the floor of ensuring no loss of political ground by minorities.[5]

Georgia v. Ashcroft altered the retrogression standard.[6] Georgia lowered the black percentage of the voting age population in a number of state legislative districts and redistributed this population to craft more districts that were competitive for Democratic candidates. In majority-white districts with increased numbers of blacks it would be possible for a biracial coalition to elect Democrats. In reviewing the Georgia plan, the Supreme Court held that evidence of non-retrogression can include coalition districts – identified by plaintiffs as districts between 30% and 50% black by population. This offered to jurisdictions two avenues for satisfying the non-retrogression: fewer, safer minority districts, more less-safe minority districts and coalition districts, or some combination. The second option offered in *Ashcroft* permits reducing the concentrations of minorities in majority-minority districts – which may result in less certainty of minority candidates being elected -- in exchange for a greater number of districts in which minorities may be able to coalesce with white voters to elect candidates preferred by the minority voters. In other words, with less certainty comes greater opportunity to spread influence, assuming one were willing to pull, trade, and haul. Such districts were deemed more permissible if the elected representatives belonging to the minority community supported the creating of access and influence districts in the political process. As stated by Justice O'Conner, writing for the majority:

> the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." Post, at 19. The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.[7]

So there are multiple avenues to satisfy Section 5. Does this broadening of solutions also broaden the scope of districts protected from retrogression? To understand the means by

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[4] Retrogression is assessed using the old district plan as a baseline, but applying the most recent census data to the previous (old) boundaries.

[5] *Reno v. Bossier Parish School Board,* 520 U.S. 471 (1997).

[6] *Georgia v. Ashcroft,* 539 U.S. ____ (2003).

[7] 539 U. S. ____ (2003), at page 20.

which one satisfies nonretrogression, we need to consider the nature of Section 5. Has it become so blurred by recent litigation that the provision is emerging as a vehicle for the pursuit of partisan advantage rather than ensuring minority group access to the political process?

Republican administrations, specifically the first Bush Administration, used the Voting Rights Act as a lever to encourage the creation of majority-minority districts, and to limit the opportunities to create cross-racial coalitions in support of Democrats. White Democrats in turn preferred districts with sizeable (but not majority) minority populations because of the biracial coalitions that could command more seats. In the 1980 and 1990 rounds of redistricting, African-American Democrats preferred districts with black majorities sufficient to elect an African American.

The aggressive use of Section 2 of the Voting Rights Act to create majority-minority districts in the early 1990s resulted in an electoral map that shifted one-third of all southern congressional districts to the GOP in a three-election period. That these newly acquired Republican districts were largely bereft of minority voters and next-door to majority-minority districts is more than coincidence. These districts were urged by the Justice Department as part of a "maximization strategy", using preclearance as a policy lever.[8] Congressional plans which maximized minority seats and had been approved (in some cases demanded) by the Justice Department were overturned by courts in Georgia, Louisiana, North Carolina, Virginia, and Texas. A quote from John Dunne, assistant attorney general for civil rights in the first Bush Administration Justice Department, taken at deposition in *Miller v. Johnson*, is instructive in acknowledging the political dimension to the use of preclearance:

> You know, I can't tell you that I was sort of like a monk hidden away in a monastery with only the most pure of intentions. I am a Republican. I was part of a Republican administration. And to tell you that at no moment during the course of my, the discharge of my responsibilities, was I totally immune or insensitive to political considerations, I don't think would justify anybody's belief. But I can't really tell you much more than that.

The consequence -- concentrating the most loyal Democratic voters into the fewest districts possible -- paid political benefits. The number of congressional districts with between 20 and 40% African-American population southwide – districts especially likely to elect white Democrats -- fell from 50 seats to 22, and within two elections the number of Republicans from southern states nearly doubled.

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[8] An example of the judicial eye recognizing this strategy comes from the Georgia litigation, wherein the court concluded "[i]t is clear that a black maximization policy had become an integral part of the Section 5 preclearance process . . . when the Georgia redistricting plans were under review. The net effect of the DOJ's preclearance objection[s] . . . was to require the State of Georgia to increase the number of majority black districts in its redistricting plans, which were already ameliorative plans, beyond any reasonable concept of non-retrogression." 929 F. Supp., at 1540–1541

Another effect was the shape of the new congressional constituencies. Described as bizarre, tortured, irregular, and non-compact, many of the new congressional districts created by states to comply with Justice Department efforts – combined with the pursuit of other political goals such as incumbency protection -- stretched the credibility of the terms "compact" and "contiguous." This "spiral down" effect on compactness resulted from the meeting of the policies of the Department of Justice and the determination of the legislatures in the jurisdictions to protect incumbents.

> DOJ refused to enforce any compactness rule asserting that compactness was a state policy and therefore the level of compactness in districts was an issue outside of the scope of the preclearance process. As stated in its preclearance letter for the Texas congressional redistricting scheme [w]hile we are preclearing this plan under Section 5 the extraordinarily convoluted nature of some of the districts compels me to disclaim any implication that our preclearance establishes that the proposed plan is otherwise lawful or constitutional...Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to section 5.[9]

DOJ's policy that "reductions in the minority percentages in one district might be effectively counterbalanced by increases in others" essentially meant that jurisdictions did not have to be geographically specific when attempting to remedy the dilution of a minority community's voting strength. In jurisdictions such as North Carolina, Georgia, and Texas, mapmakers responded by drawing far less compact minority districts than might have been possible, in order to ameliorate the political effects of drawing the compact majority minority district.[10] This "new" standard of compactness was then used to prompt the crafting of additional majority minority districts, which could not be drawn under the original standard of compactness advocated by the jurisdiction. The result was a downward spiral of demands for crafting minority districts, lowered compactness, and sparring to protect incumbents, which in turn led to the least compact plans, but with more majority minority districts than ever before.

So, we see two political dimensions of the implementation of voting rights creating further legal and political conflict: the effort by southern legislatures to protect incumbents and facilitate (possibly) politically-motivated Justice Department demands to create new minority opportunities, results in the torturous shape of the legislative districts challenged in the Shaw/Reno-styled cases of the 1990s.

Partisan goals and the role of minority voters continue to define redistricting. Most recently, Georgia and Texas offer opposite perspectives on the effort to seize electoral advantage while playing politics that affect or relate to the Voting Rights Act.

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[9] Letter of John Dunne to Texas Attorney General Morales, Nov. 18, 1991.

[10] Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (1987) (commentary to the rule) (codified at 28 C.F.R. §51 et seq.)

In 2001 Georgia Democrats moved to retain control of the state legislature while also expanding their foothold in the state's congressional delegation. This was accomplished through the efficient allocation of black, Democratic voters in a fashion partially opposed by the Justice Department, and which required litigation to establish. This efficient allocation reduced minority majorities particularly in some state Senate districts and was considered retrogressive by the Justice Department. Because the elected representatives of the community of interest approved of the strategy, and because minority choices could prevail in most of the coalition districts, the Supreme Court held that the use of coalition districts as an alternative to less heavily-minority districts was permissible (though not required) to satisfy Section 5.[11]

This change in the definition of retrogression occurred during the recent Texas redistricting. In Texas, plaintiffs challenged the mid-decade congressional redistricting on several dimensions. One claim was that districts lacking a majority of a minority, but electing candidates preferred by minority voters, were protected from change under Section 5. One Plaintiff's expert testified that districts as low as 5% minority population might be protected from change under the Voting Rights Act, unless agreed to by the minority community's leadership. This reasoning was rejected by both the Justice Department, which precleared the new Texas map and the Federal district court in Austin, which explicitly rejected the argument that there is an obligation to create coalition districts under federal law.

The use of Section 2 as incorporated into Section 5 reviews was a powerful lever for concentrating instead of spreading minority populations in creating minority-majority districts and accompanying, largely white districts that presented electoral opportunities for Republicans. From the perspective of the Republican Party, it has been successfully used, given the dramatic realignment of southern congressional delegation in the early 1990s. The redistricting compelled by the Justice Department under Section 5 is not solely responsible, but when combined with the departure of incumbents and wedge issues, the redistricting facilitated the doubling of Southern Republican congressional strength. The interpretation under *Ashcroft* facilitates the reintroduction of coalition constituencies, with the approval of the representatives of the minority community, or, in other words, allows in theory for the crafting of constituencies of the sort that once contributed to the Democratic southern congressional majority until 1994.

This latest change raises a question that I first articulated in 2003 at the Texas State Senate redistricting hearings, of how one establishes a baseline for evaluating retrogression. My perspective is that of a social scientist charged with conducting analyses to inform those who make and interpret the law, rather than from the perspective of a legal thinker, and should be taken as such. If retrogression is evaluated in the context of an entire map, and constituencies in which a white legislator relies on biracial

[11] The Justice Department did approve of 53 of 56 proposed Georgia Senate districts, indicating the relatively narrow scope of objection to the total map.

support are among the districts protected from retrogression, then how are those districts to be treated in subsequent efforts to baseline minority access and evaluate retrogression?

My concern with efforts to use retrogression to maintain coalition districts is that it sets up a circumstance where part of the legislative map becomes immune to political change under redistricting. Why? Because, with the exception of Dade County Cubans, the minority populations covered by the Voting Rights Act are Democratic constituencies. If districts where a cohesive minority electorate is not in a position to control the election of consequence are counted among protected districts, then party bias is introduced. Any district, anywhere, in which minorities, no matter how small a percentage of the electorate, vote for the Democratic candidate, conceivably becomes immune from change. In this instance, Democratic districts are locked in as part of the district format. One party gets a guarantee of protection for its seats, but the other does not.

The use of the Ashcroft retrogression standard also presents an empirical problem for the people who measure the baseline. When coalition districts are part of the baseline for measuring retrogression, a question that arises is "how much representation do minority voters get out of these coalition districts?" Is a district where minority voters are a quarter of the electorate as effective for those voters as one where minority voters control the electoral process? Is it half as effective? A quarter as effective? Do we compute the expected utility of different districts, based on the probability of the minority group to control the respective districts, and compare the expected utility of different maps? While Justice O'Connor's decision does not explicitly advocate an algorithm to ascertain the performance of coalition districts, it certainly invites the use of an algorithm by virtue of its logic.

If minority representation guarantees can be achieved through coalition, another question arises. If minority candidates and candidates of choice can be elected from districts with minority percentages of the voting age population of under a majority, say as low as 44.3%, or even as low as the hypothetical 30% coalition district advanced by plaintiffs and noted by the court in *Ashcroft*, then is there a need to have Section 5 coverage of the jurisdiction? In order to have an "even chance" at winning a 44.3% voting age population district, and we assume equal turnout with 90% minority voter cohesion, a candidate of choice will need to capture 18.1% of the Anglo vote. To have an even chance at winning a 40% minority-turnout district requires 23.3% of the Anglo vote. And, to have an even chance at 30% minority-turnout and 90% cohesion requires 32.8% of the white, Anglo vote. These thresholds for white crossover voting increase as the rate of minority turnout falls.

If candidates are capable of winning in less-than-majority districts (as Sanford Bishop, Cynthia McKinney, David Scott, and, in the past, Andrew Young have done)-- or can exercise control of seats under circumstances where the minority of white voters coalesced with the cohesive minority vote to create winning coalitions -- is Section 5 coverage still necessary? If the prevailing candidate is not just a candidate of choice, but a candidate of color, is Section 5 coverage still necessary? The circumstances that favor the use of coalition districts – sufficient white cross-over vote and political support from

minority elected officials – seem to satisfy the notion and circumstances that Section 5 coverage is no longer necessary.

We need to revisit the need to continue Section 5 in all covered jurisdictions

Virginia offers evidence that local circumstances can change in order to allow jurisdictions to "bail out" from under Section 5. Efforts should be made to explore how the Justice Department can further work with jurisdictions that have made real strides in improving their racial political climate, in order to remove the footprint of federal oversight where it is no longer required. The existing rules for bailing out from Section 5 set high evidentiary standards for jurisdictions to attain. Do those standards impede the removal of the preclearance mechanism in states where recent evidence of progress is overwhelming?

A state in which this question is relevant is Georgia. The fastest-growing of the original Section 5 states offers real evidence of voting rights progress in the last decade. African-American candidates run as well or better than white candidates for statewide office of the same party. The work of Professor Epstein indicates that African-American legislative candidates are capable of winning non-majority black districts on an even basis. There are currently two black Republicans in the Georgia Legislature, from heavily-white Gwinnett County and Middle Georgia Houston County. The state has the most-heavily black congressional delegation in the US House (31% of seats). Georgia's African-American Attorney General Thurburt Baker asserted that:

> The State (sic) racial and political experience in recent years is radically different than it was 10 or 20 years ago, and that is exemplified on every level of politics from statewide elections on down. The election history for legislative offices in Georgia - - House, Senate and Congress - - reflect a high level of success by African American candidates [Post-trial brief of the state of Georgia, *Georgia v. Ashcroft* C.A. No. 01-2111 (EGS) (D.C., DC 2002), p. 2].

The current rules governing bailing out from under Section 5 preclude Georgia's departure, due to recent objections by the Justice Department. And, many local jurisdictions have a history of Section 5 objections. At the highest levels of government, Georgia accomplished more than any other state covered by Section 5. However, given the numerous jurisdictions in Georgia that have not been subject to a Section 5 objection for the last ten years, and the generally high rate of voter participation in the state, many localities may wish to explore this option.

Then there are other jurisdictions where one must wonder why Section 5 coverage continues. Certainly, outside the South, the continued coverage of ten townships in New Hampshire defies logic. These ten townships are all at least 96% Anglo white by population. In the 2000 election these ten townships averaged over 50% voter participation as a share of voting age population. One township – Pinkham's Grant – has no people residing in its borders. No Section 5 objection has ever been registered against

a New Hampshire township. Two townships in Michigan are subject to preclearance, and the Department of Justice has issued no objection in Michigan in over three decades of coverage. Yet still Michigan submits its congressional and state legislative plans for preclearance because the Section 4 trigger picked up two townships containing a total of six voting precincts.

In Alaska native voter turnout lags that of whites, Native Americans and Aleuts are represented well in excess of their popular proportions in the legislature, and according to the preclearance analysis submitted for the Alaska legislative districts in 2001, Native and Aleut candidates have a fair chance of winning districts as low as 35% Native/Aleut population.[12] The Alaska state constitution contains provisions for diversity of representation that extend beyond the guarantees of retrogression arising from Section 5.

A careful examination of the need to continue coverage under Section 5 could pay tremendous benefits in terms of defining the appropriate scope of the application of the law. The Lawyers Committee on Civil Rights Under the Law offers an efficient description of the conditions to be met by a jurisdiction seeking to bail out from under Section 5 coverage. The jurisdiction must show that, for the previous ten years: it has not used a test or device that has a discriminatory purpose or effect as a precondition to registering or voting; not have had a US court issue a final judgment against the city or county for voting discrimination; show full compliance with section 5 -- including timely submission of voting changes and no implementation of objectionable changes before final resolution; not had a proposed voting change objected to by the attorney general and no declamatory judgment denied under section 5 by the US District Court for the District of Columbia; no Federal examiners were assigned to the city or county under the Voting Rights Act. In addition, a jurisdiction must show that it has not engaged in other discriminatory practices prohibited by the law; must show that it has taken constructive steps to increase minority access to the political process; and show that there has been an increase in minority political participation. [13]

Three Different Cases from the South

My colleague Charles S. Bullock, III, and I engaged in an extended analysis of the progress in voting rights in Section 5-covered jurisdictions, as such progress pertains to congressional elections. We completed analyses of all Section5 covered states. In this section I illuminate the results in three states – Georgia, Louisiana, and South Carolina.

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[12] 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.

[13]http://www.lawyerscomm.org/2005website/projects/votingrights/bailout.html.

Our analysis in Georgia reveals a state where substantial progress on voting rights for African-Americans has been made. Black Democratic candidates are little distinguished from white Democratic candidates in elections. African Americans have made significant gains in voter participation, voter turnout, the election of candidates, and recent political science research shows that black candidates and candidates of choice can usually prevail in legislative constituencies as low as 44% African-American. African-American candidates win statewide elections, and the congressional delegation is better than proportional to the black population. John Lewis (GA-5) noted the change in Georgia in his affidavit in *Georgia v. Ashcroft:*

> 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 think in - - it's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.[14]

Change is afoot in Georgia, and throughout the South. Circumstance and politics have changed, and both black political empowerment and white acceptance of black politicians is part of that New South. Part of this change is the ability of black politicians to pull, haul, and trade, and the willingness of sufficient white voters to pull the lever for those politicians. Again, as observed by Representative Lewis:

> 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. And they have seen people deal with issues as, I said before, that transcend race: economic issues, environmental issues, issues of war and peace. . . 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 altogether a different world that we live, really.[15]

In South Carolina, significant progress has been made in terms of participation and in the election of black candidates to legislative office, and analysis indicates that African-American candidates of choice can prevail in less-than-majority black districts on an even basis. While black candidates enjoy no success statewide, this lack of success is more a function of the fall of the South Carolina Democratic Party than of race of the candidate. Black and white candidates perform similarly poorly with white voters in major contests in the Palmetto State, the notable recent exceptions being Rep. John Spratt and Inez Tenenbaum's bids for Superintendent of Education (but not the US Senate).

Then, in Louisiana, we see evidence of black progress in voter participation through registration and voting. Black legislators are elected to Congress and the state legislature, though not in proportion to their numbers. Louisiana voting is such that black candidates running statewide have failed in their efforts. Racial polarization is insufficient to deny

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[14] Affidavit of John Lewis in *Georgia v. Ashcroft*, 539 U. S. ____ (2003), February 1, 2002, p. 18.
[15] *Ibid*, pp. 15-16.

the election of Democrats in general, who are very successful in statewide elections, but African-American candidates fare less well among white voters. However, some black candidates are not candidates of choice of the black electorate, and in Democrat versus Republican head-to-head elections, cohesive black voting plus a minority of the white electorate can elect Democrats who are preferred by black voters. The current domination of statewide offices by Democrats indicates that, at least as previously constituted, the Louisiana electorate afforded circumstances where black voters act as critical partners in crafting statewide majorities for constitutional office. However, especially in south Louisiana, the effects of Hurricanes Katrina and Rita in dislocating the predominantly black population on the electoral process and the continuity of black representation opportunities are currently unknown.

Of the nine Southern states covered in whole or in part by Section 5, there is evidence of substantial progress in minority voter participation and minority representation in nearly every state. Minority electoral opportunities in many of these states have become part of a general partisan structure of a state's politics. Minority electoral progress is constrained in some states by a partisan preference for Democrats, in others by distinctions made between minority and other candidates by voters. Of the states where Democratic prospects are bleak and there is no distinction made among Democratic candidates by race, Texas stands out, along with South Carolina. Among those states where Democratic candidate prospects are further hindered by a minority candidacy, Louisiana, Mississippi, and to a lesser degree Virginia come to mind. A further description of the relative progress of these states is found in our reports for American Enterprise Institute, and also in a recent paper by Professor Bullock and me, submitted as a supplement to this testimony.

Conclusion

Progress in minority representation and voting rights is substantial compared to the time of the creation of the Voting Rights Act and continues to this day. The political environment in which the Act operates has evolved substantially too. Vibrant two-party competition and a politics where minority and white Anglo Democratic candidates are largely undifferentiated exists in much of the South covered by Section 5. The question of whether Section 5 will be renewed is not in question. However, the question of how Section 5 should be renewed merits careful scrutiny. As originally designed, Section 5 assured that a state would not reduce the existing opportunities for minority participation, and as a consequence minority participation and representation have flourished. Should an updated Section 5 only address old ills, subject to an old diagnosis of symptoms from four decades ago? Or, should a Section 5 reflect both our success and our challenges, while protecting the gains made over four decades? Ideally, good public policy would reflect the latter, with respect for the former.

TABLE 1: THE CHANGING SIZE OF THE BLACK SHARE OF THE ELECTORATE FROM 1960 TO 1984

State	%Black Among Registered Voters 1960	1984	Proportion Gain
South Carolina	11	28	2.54
Mississippi	4	26	6.50
Alabama	7	22	3.14
North Carolina	10	19	1.90
Louisiana	14	25	1.79
Virginia	10	17	1.70
Georgia	15	22	1.47

Source: From Table 6.2 of Earl Black and Merle Black, 1987. *Politics and Society in the South.* Cambridge: Harvard (at page 139).

TABLE 2: VOTER REGISTRATION BY RACE, SEVEN ORIGINAL SECTION 5 STATES VERSUS NON-SOUTHERN STATES

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Alabama													
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8	66.3	69.2	74.3	72	67.6	72.9
White	73.3	70.2	77.2	74.3	75	74.9	79.3	73.3	75.8	74.1	74.5	73.7	73.8
Georgia													
Black	59.8	51.9	58	55.3	56.8	57	53.9	57.6	64.6	64.1	66.3	61.6	64.2
White	67	59.7	65.7	60.4	63.9	58.1	67.3	55	67.8	62	59.3	62.7	63.5
Louisiana													
Black	69	68.5	74.8	71.9	77.1	72	82.3	65.7	71.9	69.5	73.5	73.5	71.1
White	74.5	67.5	73.2	71.4	75.1	74 1	76.2	72.7	74.5	75.2	77.5	74.2	75.1
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	75.2	72.2	70.7	72.3
North Carolina													
Black	49.2	43.6	59.5	57.1	58.2	60.1	64	53.1	65.5	57.4	62.9	58.2	70.4
White	63.7	62.5	67	65.8	65.6	63.6	70.8	63.9	70.4	65.6	67.9	63.1	69.4
South Carolina													
Black	61.4	53.3	62.2	58.6	56.7	61.9	62	59	64.3	68	68.6	68.3	71.1
White	57.2	54.5	57 3	56.4	61.8	56.2	69.2	62.6	69.7	67.9	68.2	66.2	74.4
Virginia													
Black	49.7	53.6	62.1	66.5	63.8	58.1	64.5	51.1	64	53.6	58	47.5	57.4
White	65.4	60.8	63.7	63.3	68.5	61.9	67.2	63.6	68.4	63.5	67.6	64.1	68.2
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63	58.3	62	58.5	61.7	57	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	na

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

TABLE 3: VOTER TURNOUT BY RACE, SEVEN ORIGINAL SECTION 5 STATES VERSUS NON-SOUTHERN STATES

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Alabama													
Black	48.9	41.5	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3	63.9
White	59.2	52	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7	62.2
Georgia													
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4
White	56	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	44.8	53.6
Louisiana													
Black	60.1	32	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46	63.2	46.9	62.1
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51	64
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
North Carolina													
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1
South Carolina													
Black	51.3	38.9	51.4	42	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5
White	51.7	37	47.9	41.3	52.3	42	61.6	49.4	56.2	48.8	58.7	45.1	63.4
Virginia													
Black	42.9	44.3	55	42.5	47.7	32	59	33.8	53.3	23.8	52.7	27.2	49.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63
NonSouth													
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	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	na

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

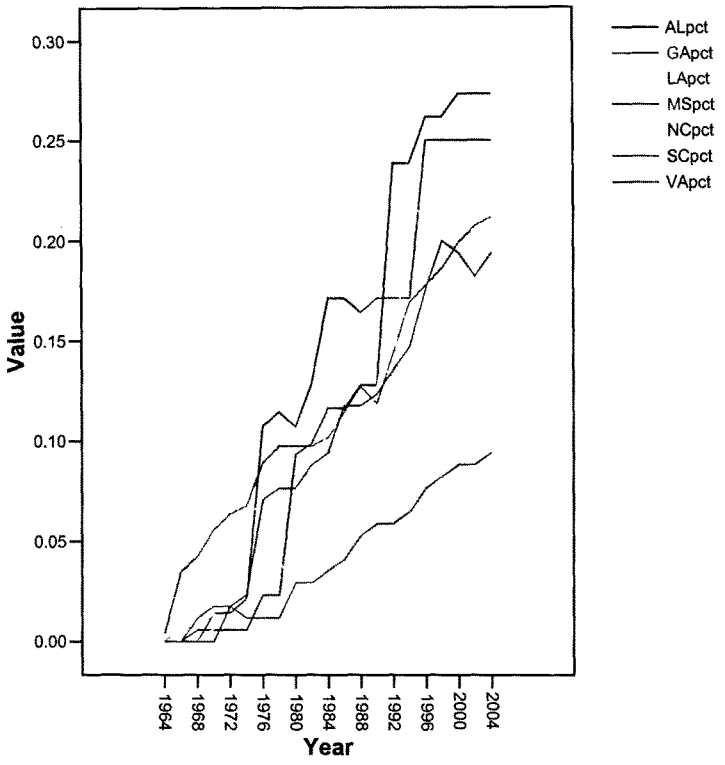

FIGURE 1: PROPORTION OF STATE LEGISLATORS WHO ARE AFRICAN-AMERICAN, SEVEN STATES COVERED BY SECTION 5

TABLE 4: DATA ON BLACK LEGISLATIVE OFFICE HOLDING FROM FIGURE 1

Year	Alabama	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Virginia
1964	0	1	0	0	0	0	0
1966	0	9	1	0	0	0	0
1968	0	11	1	1	0	0	2
1970	2	14	2	1	1		3
1972	2	15	9	1	2	3	3
1974	3	16	9	1	3	4	2
1976	15	21	10	4	6	12	2
1978	16	23	10	4	6	13	2
1980	15	23	12	16	4	13	5
1982	18	23	12	17	12	15	5
1984	24	24	13	20	16	16	6
1986	24	27	18	20	16	20	7
1988	23	30	19	22	15	20	9
1990	24	28	20	22	19	21	10
1992	24	34	19	41	25	23	10
1994	24	40	32	41	24	25	11
1996	35	42	30	45	24	30	13
1998	35	44	33	45	24	34	14
2000	35	47	31	47	25	33	15
2002	35	49	31	47	24	31	15
2004	35.	50	32	47	26	33	16
N	140	236 (GA: N=259 until 1971, 251 in 1971, 236 since 1973)	144	172	150	170	140

Source: Charles S. Bullock III and Mark J. Rozell, Forthcoming. *The New Politics of the Old South.* Boulder: Rowman and Littlefield.

TABLE 5

AFRICAN-AMERICAN REPRESENTATIVES AND AFRICAN-AMERICAN CITIZEN VOTING AGE POPULATION, ORIGINAL SECTION 5 STATES AND OTHER STATES

State	Citizen VAP	Black CVAP	African-American Proportion: CitizenVAP	Representatives	
United States	193,376,975	22,614,559	.12	.092	(ratio = .76)
Alabama	3,276,570	791,752	.24	.143	(ratio = .60)
Georgia	5,675,210	1,564,032	.28	.308	(ratio = 1.10)
Louisiana	3,198,079	957,771	.30	.143	(ratio = .48)
Mississippi	2,049,386	684,233	.33	.250	(ratio = .77)
North Carolina	5,820,423	1,199,611	.21	.154	(ratio = .73)
South Carolina	2,939,606	811,761	.28	.167	(ratio = .60)
Virginia	5,051,517	955,503	.19	.091	(ratio = .48)
Seven Original Covered Southern States					
	28,010,791	6,964,663	.25	.18	(ratio = .72)
Florida	11,081,542	1,365,175	.12	.12	(ratio = 1.00)
Texas	13,299,845	1,606,131	.12	.094	(ratio = .78)
US, Outside Seven Original Covered Southern States					
	165,366,184	15,649,896	.095	.078	(ratio = .82)
US, Outside Nine Covered Southern States					
	140,984,797	12,678,590	.089	.073	(ratio = .82)

Source: Data compiled by author from the U.S. Census and Michael Barone and Richard E. Cohen (2005). *The Almanac of American Politics 2006.* Washington, DC: National Journal.

Testimony of Pamela S. Karlan

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Before the Senate Committee on the Judiciary

May 16, 2006

Thank you for giving me the opportunity to testify today. The Voting Rights Act of 1965 is rightly celebrated as the cornerstone of the Second Reconstruction that, a century after the Civil War and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, finally began the full integration of black Americans into the political life of this nation. But it is critical to remember that the Voting Rights Act was part of the *Second* Reconstruction: the *First* Reconstruction, which at one point saw levels of voter turnout among black men that would be the envy of any state today[1] and numbers of black state legislators in the south that exceed the number elected in the decade after this Court last amended the Voting Rights Act,[2] ultimately gave way to cynical political compromises within Congress, judicial indifference to minority voting rights and a complete disenfranchisement of black Americans in the south that ended only after the massive struggle of a Civil Rights Movement whose veterans, many of whom bear physical scars from their attempts to help fellow citizens register to vote, are among the current Members of Congress.

So the history that gave rise to the Voting Rights Act of 1965 is not *ancient* history. It is far closer to current events. I have not yet, I hope, reached the midpoint of my career as a voting rights attorney, and I have represented individuals, in cases since Congress last amended and extended the Act in 1982, involving claims of discriminatory registration practices, poll taxes, voter purges, registration requirements, majority-vote requirements, apportionments, criminal prosecutions for voting rights activism, and the like.

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[1] See J. Morgan Kousser, The Shaping of Southern Politics, Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910 (1974).

[2] See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 19 (1999).

I know that the record before Congress is replete with examples of the continuing denial of the ability to participate effectively and fully, not only to African Americans but also by Latinos, Native Americans (for whom political conditions in South Dakota, a jurisdiction partially covered by section 5, are disturbingly reminiscent of the pre-1965 Deep South), and citizens with limited English proficiency. I strongly support renewal of the expiring temporary provisions of the Voting Rights Act. In my testimony, rather than focusing primarily on the evidence of the continuing effectiveness of, and need for, section 5, I shall focus on a set of largely legal questions, regarding the constitutionality of the proposed extension of section 5's preclearance requirement and the proposed amendments to section 5 that respond to the Supreme Court's decisions in *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (*Bossier Parish II*), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). In brief, my conclusions are:

1. Congressional power is at its constitutional maximum when Congress acts to protect the voting rights of minority citizens, particularly when legislation resolves otherwise difficult and contested questions about the best means for achieving political equality.

2. A congressional conclusion that the extension of section 5 serves an important deterrent function need not rest on what has been referred to as "trial-type" evidence of current constitutional violations.

3. The amendment of section 5 to overturn the Supreme Court's interpretation in *Bossier II* of which sorts of racially tainted "purpose" are impermissible causes no constitutional difficulty whatsoever, since the amendment only forbids states from making changes that would themselves violate the Fourteenth or Fifteenth Amendments.

4. It is well within Congress's power to decide, with respect to the question how section

5 ought to be construed that preclearance authorities should focus on the ability of minority citizens actually to elect candidates of their choice rather than on more nebulous factors such as their ability to influence the post-electoral governance process.[3]

I. Congressional Power Is At Its Constitutional Maximum When Dealing With the Issue of Providing Minority Voters With Full, Equal, and Effective Access to the Political Process, Broadly Understood

Each time that Congress has taken up the Voting Rights Act of 1965, it has relied on its powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments.[4] Those amendments recognized a special role for Congress, as opposed to the courts, in protecting individual rights. As then-Professor Michael McConnell has explained:

> Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power. . . . As Republican Senator Oliver Morton explained: "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[5]

The Supreme Court has continued to recognize that special role when it comes to the

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[3] For the benefit of the Committee, I have appended to this testimony two articles that I have published, the first addressing the question of congressional power regarding voting rights under the Reconstruction Amendments' enforcement clauses (Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725 (1998)) and the second analyzing the Supreme Court's decision in *Georgia v. Ashcroft* (Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 Election L.J. 21 (2004)).

[4] In 1965, Congress relied expressly on its powers under section 5 of the Fourteenth Amendment (as opposed to under section 2 of the Fifteenth Amendment) only with respect to the suspension of literacy tests with respect to the voting eligibility of citizens educated in U.S.-flag schools where the language of instruction was not English. In later years, however, Congress has made clear that it is relying on its "14/5" enforcement powers with respect to the entire Act.

[5] Michael McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 182 (1997) (quoting Cong. Globe, 42d Cong., 2d Sess. 525 (1872)).

protection of fundamental rights and traditionally excluded groups. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court observed that a distinction exists between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *Id.* at 519. And it recognized that "Congress must have wide latitude" with respect to measures that fall in the first – remedial *or* prophylactic – category.

In *Boerne* itself, the Court pointed to the Voting Rights Act of 1965 – and, in particular, Congress's decision to suspend literacy tests (first, only in section 5-covered jurisdictions, and then nationwide) – as appropriate legislation under the Fourteenth Amendment, even though the provisions clearly "prohibit[ed] conduct which [was] not itself unconstitutional and intrude[d] into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

The Term before *Boerne*, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court held that Congress lacks the power to use its Article I powers (such as the commerce power) to abrogate the sovereign immunity states enjoy against lawsuits by private citizens.[6] In the decade since *Seminole Tribe* and *Boerne*, the Supreme Court has frequently revisited the question of congressional power, and although it may be somewhat premature, even now, to say that the dust has settled completely, the following principles articulated in the decided cases may be helpful in understanding the scope of Congress's power to amend and extend the Voting Rights Act.

First, the Court has drawn a sharp distinction between the scope of Congress's *regulatory*

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[6] There is a voluminous academic criticism regarding the Court's reliance on the eleventh amendment to preclude suits based not on diversity of citizenship but rather on the presence of a federal question, and at virtually every point over the last forty years, the Court has been divided on this question 5-4 despite a nearly complete turnover in its membership.

power, to which it continues to give broad effect, and Congress's *remedial* arsenal, which *Seminole Tribe* and its progeny have narrowed. In cases such as *Board of Trustees v. Garrett,* 531 U.S. 356 (2001), *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and *Alden v. Maine*, 527 U.S. 706 (1999), the Court expressly noted that Congress *could* bind the state officials and agencies involved and require them to follow federal law. What it could *not* do was enforce those constraints by authorizing private damages actions. The *Alden* Court explicitly compared private damages lawsuits, which it held foreclosed by the Eleventh Amendment, to lawsuits brought by the United States to enforce individuals' rights, noting that "[s]uits brought by the United States itself require the exercise of political responsibility," 527 U.S. at 756, which brings them within the "plan of the [Constitutional] Convention" and "subsequent constitutional amendments" regarding the relationship between the federal and state governments.

Second, with respect to Congress's power under the Fourteenth and Fifteenth Amendments, the Court has not only continued to recognize the vitality of *Fitzpatrick v. Bitzer*, but has further held that congressional remedial and prophylactic power is at its strongest when Congress acts to remedy or prevent the kinds of practices that the Court has subjected to heightened judicial scrutiny. Put in simple terms, when Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are broader than when it acts to promote equality more generally. Thus, in *Tennessee v. Lane Tennessee v. Lane*, 541 U.S. 509 (2004), the Court upheld Congress's abrogation of states' sovereign immunity under Title II of the Americans with Disabilities Act with respect to the fundamental right of access to the courts, and in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), it upheld Congress's abrogation of states' sovereign immunity under the Family and Medical Leave Act

because the act was intended to prevent sex discrimination.

Third, in a case whose bearing on the constitutionality of the Voting Rights Act has so far received little attention, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Justice Scalia suggested that even when judges find equal protection clause-based challenges to political gerrymanders nonjusticiable – because they cannot discern a manageable judicial standard for analyzing such claims – Article I, § 4 (the "elections clause")[7] empowers Congress to deal with such issues. 541 U.S. at 275-76 (plurality opinion). Part of the reason the Supreme Court has grappled with the justiciability of political gerrymandering claims for nearly forty years is precisely because the issue calls on courts to decide among hotly contested principles of political philosophy. To give just one example that bears on the proposed amendment to section 5 responding to *Georgia v. Ashcroft*, people active in and knowledgeable about politics differ vociferously about whether, in crafting electoral districts, political fairness is better ensured by drawing each district to be as competitive as possible (which increases both the chances that any individual voter will cast a decisive ballot and the risk that small changes in electoral preferences can produce grossly disproportionate legislative bodies) or by drawing districts that are predictably controlled by identifiable blocs of voters (which can produce proportional representation of the blocs within the legislative body but which results in larger numbers of voters casting essentially meaningless, or "wasted," votes).

Taken together, these decisions suggest that congressional power is at its apogee when Congress acts to protect fundamental rights, to protect suspect or quasi-suspect classes, to deal

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[7] Article I, § 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

with issues relating to politics and political value judgments that are relatively unamenable to judicial resolution under the Constitution alone, and does so through mechanisms that "require the exercise of political responsibility" by the federal government.

All four of these factors apply to the bill now before Congress. First, the Supreme Court has recognized, for over a century, that the right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Harper v. State Board of Elections*, 383 U.S. 663, 667 (1966). Second, discrimination against the groups protected by the Voting Rights Act is subject to strict scrutiny. Third, the Act involves an area – regulation of the political process – that both raises important issues of political fairness that are not fully determined by the sweeping commands of sections 1 of the Fourteenth and Fifteenth Amendment and that are particularly within the expertise of politicians.

Finally, the preclearance regime of section 5 represents a quintessential exercise of political responsibility. In replacing case-by-case adjudication directly under the Constitution with an administrative regime designed to deter as well as to remedy denials of the right to vote, Congress (and ultimately the executive branch in the course of administrative preclearance) finally exercised the power it had been given by section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment to enforce the voting rights of racial minorities.

Nor does the preclearance regime run afoul of general federalism concerns. First, the Supreme Court has repeatedly turned aside constitutional challenges based on the structure of the preclearance regime itself. See, e.g., *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of*

Rome v. United States, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In *Lopez*, the Court stated that while "the Voting Rights Act, by its nature, intrudes on state sovereignty[, t]he Fifteenth Amendment permits this intrusion." 525 U.S. at 284-85. And the permissible intrusion involves not only the requirement of preclearance, but also the imposition of the burden of proof on the covered jurisdiction *and* the further substantive requirement that the jurisdiction prove not only the absence of a discriminatory purpose, but also that it prove that the proposed change will have no discriminatory effect. See *id.* at 283.

Second, and more generally, the Fourteenth and Fifteenth Amendments, by their very nature, intrude on state sovereignty. Indeed, that is precisely what they were intended to do, as the late Chief Justice explained in his opinion for the Court in *Fitzpatrick v. Bitzer*, the amendments marked a profound "shift in the federal-state balance." While decisions such as *South Carolina v. Katzenbach* have "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States," that "expansion of Congress' powers - with the corresponding diminution of state sovereignty - [was] intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments." 427 U.S. at 455-56.

Third, with respect to the application of the Voting Rights Act's procedural and substantive commands to the states' conduct of elections to federal office, Congress' power under Article I is plenary, and states have no countervailing constitutional sovereignty interest at all. As the Supreme Court explained in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), the states' power here derives entirely from power delegated to them by Article I of the Constitution.

The elections clause has long been interpreted to give Congress wide-ranging power over

congressional elections. In its most recent decision discussing the elections clause, *Cook v. Gralike*, 531 U.S. 510 (2001), the Supreme Court stated, "in our commonsense view [the] term ["manner of holding elections"] encompasses matters like 'notices, *registration, supervision of voting, protection of voters*, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Id.* at 523-24 (emphasis added) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The list of practices that the Supreme Court and the lower federal courts have found within the scope of Congress' election clause power is broad indeed. See, e.g., *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *In re Coy,* 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with a federal contest); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections).

The elections clause assumes, in the first instance, that states will enact these regulations themselves. But as the Court explained in *Foster v. Love*, 522 U.S. 67 (1997):

> The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices. Thus it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States. The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.

Id. at 69 (internal quotation marks and citations omitted). As the *Foster* Court went on to say, the clause gives Congress "'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which

experience shows are necessary in order to enforce *the fundamental right* involved.'" *Id.* at 72 n.2 (emphasis added) (quoting *Smiley v. Holm*, 285 U.S. at 366)). See also *Cook*, 531 U.S. at 522 ("The federal offices at stake aris[e] from the Constitution itself. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States. . . . No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.") (internal quotations and citations omitted). This congressional primacy is reflected in recent decisions uniformly rejecting tenth amendment-based challenges to congressional action that asserted that the expansive voter registration practices of the Motor Voter law unconstitutionally commandeered state resources. See, e.g., *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

A long series of cases, mostly involving statutes that criminalize various forms of election-related misconduct, state that Congress' power under the elections clause extends to regulation of all aspects of an election conducted even in part to select members of Congress. In the most recent reported case to address this issue, *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999), the Court of Appeals upheld the convictions of two men charged with vote buying in primary elections for county commission and sheriff that appeared on the same ballot as *uncontested* primaries for United States Senate and House of Representatives. The Court of

Appeals' language in rejecting the defendants' claim that there was no federal jurisdiction is fairly typical of the genre:

> [T]he federal election fraud statutes were implemented to protect two aspects of a federal election: the actual results of the election and the integrity of the process of electing federal officials. In the present case, we agree with the government that McCranie's and Jones' fraudulent conduct corrupted the election process, if not the election results.
>
> Moreover, the government maintains, and we agree, that the Constitution's Necessary and Proper Clause, (Art. I, § 8, cl.18), along with Art. I, § 4, empowers Congress to regulate mixed elections even if the federal candidate is unopposed.

Id. at 727. This ability to regulate "mixed" elections gives congressional regulation some extra leverage in protecting voting rights in elections for state and local office as well. Thus, for example, the federal anti-intimidation statute, 42 U.S.C. § 1971, that was part of the pre-1965 Voting Rights Act, protects voters even if the real motive or effect of intimidating them has to do with elections to non-federal offices.

II. Extension of Section 5 Constitutes Appropriate Legislation Under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments

Under *City of Boerne*, legislation constitutes appropriate enforcement of the provisions of the Reconstruction era amendments if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520. As far as I am aware, the questions that have been raised with respect to whether extension and amendment of the Act is within Congress's power fall largely into two categories. First, section

5 goes beyond prohibiting changes made for discriminatory purposes[8] to reach changes that will have a retrogressive effect. Some individuals have questioned whether the prohibition of conduct that is not itself unconstitutional is congruent and proportional. As I have already shown in the prior section, however, the Court has squarely upheld the use of "effects tests," both under the Voting Rights Act itself in *Lopez* and *City of Rome* and in post-*Boerne* cases such as *Tennessee v. Lane* and *Nevada v. Hibbs* where Congress is trying to prevent infringement of fundamental rights or discrimination against protected classes. Thus, nothing about the continued imposition of an effects test raises any new constitutional questions.[9] Particularly because the Supreme Court has held, expressly in the context of constitutional voting rights cases, that the effects of a challenged practice are powerful evidence of the intent with which it was adopted or maintained, see *Rogers v. Lodge*, 458 U.S. 613 (1982), evidence of the continued use of voting practices and procedures that have the effect of denying minority citizens equal access to the political process is relevant to assessing the continued *risk* of constitutional violations in the absence of strong prophylactic measures such as section 5. And this conclusion is reinforced by a point of which Congress was well aware when it amended section 2 of the Voting Rights Act in 1982 to embrace an effects test: requiring findings of purposeful race discrimination in order to remedy the continued political exclusion of minority citizens can actually *exacerbate* racial tensions. Thus, one reason for the enactment of section 2 was to avoid

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[8] Under section 5 as construed by the Court in *Bossier Parish II*, the Act prohibits only those changes undertaken for a racially retrogressive purpose, but does not reach other racially discriminatory purposes, such as a racially driven desire to perpetuate the existing level of minority exclusion. The proposed amendment would make section 5 reach all purposeful racial discrimination. Since, as I explain below, all purposeful discrimination violates either the Fourteenth or Fifteenth Amendment, the proposed *Bossier Parish II* "fix" raises no serious constitutional questions.

[9] I explore this point at greater length in the attached article.

requiring the kind of judicial findings that would undermine political progress. Thus, Congress has made the eminently sensible judgment that the best way of combating the lingering effects of past, unconstitutional racism in the political process is *not* to require name-calling and condemnation in the litigation process but to simply bring about the effective integration of minority citizens into the political process.

Second, some individuals have suggested that extension of section 5 raises questions of congruence and proportionality because it leaves in place for another significant period of time a preclearance regime that applies to only a selected group of covered jurisdictions that are defined in terms of a triggering formula developed in the 1960's and 1970's.

The contours of section 5's coverage are a product of principle mixed with pragmatic politics. To be sure, not every jurisdiction with a history of pervasive racial discrimination in voting was originally covered. For example, the trigger rested on use of a literacy test, and not a poll tax, even though there was substantial evidence of the discriminatory purpose and effect of poll taxes.[10] Thus, section 5 provided protection to blacks on the Mississippi side of the Delta but not on the opposing shore in Arkansas. And Texas became a covered jurisdiction only in 1975, as a result of its discrimination against language minorities. Still, the trigger did a reasonably good job of picking up most, if not all, the places with a history of pervasive violations of the Fourteenth and Fifteenth Amendments. See *South Carolina v. Katzenbach*, 383

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[10] The year before the Voting Rights Act was passed, the Twenty Fourth Amendment forbid conditioning the right to vote in elections for federal office on payment of "any poll tax or other tax," and the next year, in striking down Virginia's attempt to circumvent the amendment by imposing a certificate of residency requirement on citizens who sought to register without paying the commonwealth's poll tax, the Supreme Court stated that "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro." *Harman v. Forssenius*, 380 U.S. 528, 543 (1965). In *Harper*, the Supreme Court struck down imposition of a poll tax in *any* election as a violation of the fundamental right to vote.

U.S. at 331 ("Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.").

"Bailout" under section 4 of the Act has been available to jurisdictions brought within the triggering formula that can show their compliance with both the Act and with the underlying constitutional commands for fair and inclusive political processes. I know you will hear testimony on this legislative incentive for compliance from many individuals with far more expertise on this question than I.[11] But it is important to note that under section 3(c) of the Act, "bail-in" – that is, judicial orders bringing jurisdictions that were not covered by the trigger within the special provisions of section 5 – has also been available. I was involved in one such case in the late 1980's. In *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991), a three-judge federal district court ordered that the state of Arkansas seek preclearance of any new majority-vote (or runoff) requirements before putting them into place, because it found that the state had "committed a number of constitutional violations of the voting rights of black citizens" related to such requirements. *Id.* at 586; see *id.* at 601-02. See also *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. Dec. 17, 1984) (three-judge court) (requiring preclearance of any new redistricting plan for a period of ten years); *McMillan v. Escambia County*,559 F. Supp.720, 727 (N.D. Fla. 1983) (referring to the Fifth Circuit's imposition of a preclearance requirement on the country under section 3(c)). Thus, beyond periodic renewal, the Act provides two routes for tailoring which jurisdictions ought to be covered that give jurisdictions and courts the opportunity to consider the Act's coverage more surgically.

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[11] Indeed, I understand that extensive evidence about the scope, operation, and effectiveness of section 4 bailout has been presented during hearings before the House Judiciary Subcommittee on the Constitution, and incorporated into this Committee's record.

The question whether Congress can continue coverage of the already covered jurisdictions as part of an extension of the Act does *not* require that Congress conclude that if it were writing on a completely clean slate today, it would choose the original triggering formulas.[12] Rather, it depends on whether continuing to subject the covered jurisdictions to the preclearance regime is congruent and proportional to preventing future constitutional injury.

It is critical to understand that section 5 operates in two distinct ways. First, as a formal matter, section 5 empowers the Department of Justice or a federal district court in the District of Columbia to block a covered jurisdiction from implementing discriminatory changes it proposes to make in its voting-related laws. Second, and ultimately more important, section 5 deters jurisdictions even from *seeking* to implement such laws by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. at 328. Congress has recognized that individual minority voters, and even minority communities, may not have the expertise or financial resources to effectively challenge discrimination in the political process.[13] But when a jurisdiction must justify its changes, and bear the burden of justifying those changes, it is likely to think hard about whether its changes

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[12] Nothing about *Boerne* and its progeny address directly the question whether appropriate remedial and prophylactic measures – adopted on the basis of a record of a century's worth of unconstitutional conduct and ineffectual judicial and legislative attempts to resolve the problems by other means – must be abandoned at some particular moment. As I have already suggested, the record before Congress is sufficient for you to conclude that that moment has not yet arrived. But there is no general doctrine of constitutional desuetude that requires abandonment of section 5.

[13] This is especially true at the local level, where communities can be relatively small and where discriminatory changes are likely to escape scrutiny from either national civil rights organizations or – particularly when the changes involve nonpartisan elections – the organized political parties that often litigate issues involving state-level or congressional redistricting. Thus, to conclude that section 5 is unnecessary because minority voters are electing candidates of their choice at the state or national level would be a serious mistake. And it is worth noting in any event that the record before Congress contains evidence of statewide redistricting examples of section 5 violations post-2000 Census. See *LCCR: Voting Rights in Louisiana 1982-2006 describing Louisiana House of Representatives. et al. v. Ashcroft.*

are nonretrogressive. My own experience, helping to ensure that California's state legislative redistricting after the 2000 census complied with section 5, reinforces my sense, garnered from discussions with state and local officials and their lawyers in other jurisdictions, that section 5 has a salutary effect in making the political participation of minority voters a central consideration, rather than an issue relegated to an afterthought.

If section 5 worked perfectly, there would therefore be no section 5 objections, because covered jurisdictions would simply be deterred. This creates an apparent difficulty because opponents of section 5, or parties that challenge its constitutionality, will argue that the decline in the number objections shows that the statute has outlived its usefulness. But the difficulty is only an apparent, and not an actual, one. It is entirely within Congress's expertise, as a body composed entirely of elected officials with a sense of how politics actually operates on the ground, to conclude that section 5 is still necessary to deter future violations, particularly given a voluminous record of problems that minority voters have continued to face in covered jurisdictions. The fact that: many of the problems were resolved prior to litigation, that not all of the e problems are themselves constitutional violations, or that there are other, perhaps equivalently troubling issues in some non-covered jurisdictions, does not undermine the continued usefulness of section 5 as one quiver in Congress's arsenal for ensuring equal political opportunities for minority citizens.

As to when section 5 may become unnecessary, I cannot now give an answer. At least given current political realities, there would be substantial risks, particularly with respect to changes within local jurisdictions where racial tensions are often far sharper than at the statewide or national level, that unconstitutional or illegal discrimination could recur.

The effective political integration of minority citizens remains, in many jurisdictions, a relatively newfound phenomenon. It was really not until after the 1982 amendments to the Act that minority voters began to elect significant numbers of representatives to many public bodies. When faced with a claim in 1971, *by the Bossier Parish School Board*, that it should be released from various aspects of a desegregation decree because the schools in the ironically named locality of Plain Dealing had been unitary for a semester, the Fifth Circuit observed that "One swallow does not make a spring." *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400, 1401 (5th Cir. 1971). The fact that Bossier Parish *still* had not managed political integration a quarter century later is stark evidence that it may take more time for the advances the Voting Rights Act has so far produced really to take root. As *Georgia v. Ashcroft* recognized, one key purpose of the Voting Rights Act is "to encourage the transition to a society where race no longer matters." 539 U.S. at 490. But we are not yet there. And it is critical to remember that the gains minority voters have achieved over the last forty years by "pull[ing], haul[ing], and trad[ing] to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), have all occurred in the shadow of section 5, which has given minority voters and their representatives an invaluable bargaining chip. Our long, bitter, and all-too-recent history of covered jurisdictions' pervasive indifference and hostility to minority citizens' political aspirations demands something more than the triumph of hope over experience.

III. The *Bossier Parish II* and *Georgia v. Ashcroft* "Fixes" Represent an Entirely Appropriate Exercise of Congress's Enforcement Power

In *Bossier Parish II*, the Supreme Court construed section 5's prohibition on the implementation of changes unless a jurisdiction can show that the change does not have a

"discriminatory purpose" to forbid only changes that have a retrogressive purpose. That is, changes that are purposefully discriminatory, but that do not leave minority citizens worse off, do not violate section 5.

Such changes do, of course, violate the Constitution. So, for example, a jurisdiction which currently uses electoral districts from which black voters are unable to elect candidates of their choice that chooses, after the census, to redraw its districts with the purpose of ensuring a continued lack of minority electoral success would violate the equal protection clause. A jurisdiction that prevented minority citizens from voting by locating polling places in inaccessible locations that then introduced a voter identification procedure designed to keep any minority voters who managed to find the polling place from actually casting a ballot would violate the Fifteenth Amendment as well.

Amending section 5 to prohibit *all* unconstitutional discrimination with respect to the right to vote, rather than only the subset of unconstitutional discrimination that is also retrogressive poses no constitutional difficulties under any conceivable theory of congressional power.

The *Georgia v. Ashcroft* "fix" responds to a different sort of problem. In that case, the Supreme Court held that section 5's current language "gives States the flexibility to choose one theory of effective representation over the other." 539 U.S. at 482. Thus, the Court recognized that the decision about how best to protect minority voters' right to fair, equal, and effective representation involves a choice among very different theories.

It is not my aim here to explain why Congress should embrace the theory that minority voters are most effectively represented when they can actually elect candidates of their choice –

a theory that groups with control over the redistricting process almost always adopt for themselves – rather than simply having some "influence" over the election of candidates sponsored by, and beholden to, other communities. To some extent, Congress has already embraced that theory in section 2 of the Voting Rights Act, which protects the right both to "participate" and to "elect." Other witnesses before this Committee will lay out in far greater detail this issue, and the House Judiciary Subcommittee on the Constitution has heard substantial evidence on this question. I want simply to highlight one point to which I have already adverted. Once we recognize that this is a choice among theories, Congress has the constitutional power to make that choice. Congress, and not the courts, decided in 1842 that congressional elections should be conducted from single-member districts – and has since then neither retreated to permitting elections at large nor adopted any of the systems of proportional representation used by most other Western democracies – thereby embracing a particular "theory of representation" from among the constitutionally available ones. So too, Congress can choose, particularly in the context of ensuring equal political opportunity for historically excluded groups, to impose a standard that looks at changes in the groups' ability to elect candidates of their choice rather than a more nebulous and speculative standard that poses a threat of once again relegating minority voters' political aspirations to an afterthought. Particularly in light of *Vieth*'s invitation to Congress to address difficult questions of fair representation, the *Georgia v. Ashcroft* "fix" lies well within your constitutional competence.

from the office of

Senator Edward M. Kennedy

of Massachusetts

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May 16, 2006 (202) 224-2633

STATEMENT BY SENATOR EDWARD M. KENNEDY AT VOTING RIGHTS ACT HEARING

(AS PREPARED FOR DELIVERY)

I commend the Chairman for holding this hearing on the key question of whether Section 5 is still needed today.

President Lyndon Johnson said these words in his message to Congress on the 1965 Voting Rights Bill:

"In our system, the first right and most vital of all our rights is the right to vote. Jefferson described the elective franchise as the ark of our safety. . . . Unless the right to vote be secured and undenied, all other rights are insecure and subject to denial for all our citizens."

Section 5 of the Voting Rights Act has been one of the most effective defenses of that basic right.

For over 40 years, this provision has helped to sustain to the progress that was made by those who risked their lives and livelihoods in the Civil Rights Movement. It's an essential protection against backsliding by jurisdictions with a history of discrimination in voting. It prevents these jurisdictions from changing their voting rules without first showing that the proposed changes have neither a discriminatory purpose nor effect. As the Supreme Court stated in upholding Section 5 in South Carolina v. Katzenbach, "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims."

The issue of whether Section 5 is still needed today has come up many times in these hearings. Although we bring different perspectives to this issue, each Member of the Committee wants to ensure that any legislation passed in this area gets it right.

We are mindful that the Supreme Court will carefully review the legislation we are considering under the standards it has applied in reviewing other civil rights laws in the past. In recent years, the Court struck down a key part of the Age Discrimination in Employment Act because it found the Congressional record insufficient. [Board of Regents of Florida v. Kimel] It also struck down one part of the Americans with Disabilities Act. [University of Alabama v. Garrett] The Court based its decisions in both those cases on its view of the sufficiency of evidence in the hearing record.

Congress has a special role in enforcing the Fifteenth Amendment, which prohibits racial and ethnic discrimination in voting. As the Supreme Court has noted, we have broader leeway in this area than in others, because of the close link between the need to prevent discrimination in voting and the special goals of the Fourteenth and Fifteenth Amendments.

In the 1999 case of Lopez v. Monterey – which was decided after the Court made clear the need for a specific record to support legislation under the Fourteenth and Fifteenth Amendments – the Court acknowledged that "the Voting Rights Act, by its nature, intrudes on state sovereignty," but noted that "the Fifteenth Amendment permits this intrusion" to remedy discrimination in voting.

Despite having greater latitude in this area than in others, there's no question that we must make a clear record on any legislation to extend the expiring provisions of the Act.

So I thank the panel in advance for helping us evaluate the evidence, and I look forward to today's testimony.

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U.S. SENATOR PATRICK LEAHY

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Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on the Continuing Need for Section Five Pre-Clearance
May 16, 2006

This morning we are convening our fourth hearing in the Senate Judiciary Committee on the Voting Rights Act. These are important hearings and I thank the Chairman for continuing to move forward during this busy time. I trust we will keep to our plan of concluding hearings this week and reporting our bill before we break for the Memorial Day recess at the end of the month. The House Judiciary Committee reported the bill last week by a vote of 33 to one. If we are to fulfill our commitment to reauthorizing this important measure this year we need to stay on schedule and push forward to make progress.

Today's hearing is focused on the continuing need for the provision of the Voting Rights Act that requires covered jurisdictions to "pre-clear" changes to voting before they go into effect. This provision has been a tremendous source of protection for the voting rights of those long discriminated against and also a great deterrent against discriminatory efforts cropping up anew. Our country is changing, thanks in no small part to the Voting Rights Act and to Section 5's pre-clearance requirements.

In the past several hearings, we have discussed the constitutional standard that we expect the Supreme Court will apply when reviewing an extension of the expiring provisions of the Voting Rights Act. It is a question about the power of Congress, and this is *not* a "gray area." Under the specific words of the Constitution, Congress has the power to remedy discrimination under the Fourteenth and the Fifteenth Amendments, and Congress is at the zenith of its power when giving enforceable meaning to these Amendments by enacting laws that address racial discrimination in connection with voting. The Fourteenth and Fifteenth Amendments have not changed. As long as these Amendments are in the Constitution, Congress has the authority to enforce them, especially on matters of racial discrimination in connection with the right to vote.

I believe the Supreme Court will again uphold congressional authority in this regard. We would all agree that Justice Sandra Day O'Connor was a vigorous defender of state's rights. And as recently as 1999 -- over three decades after the initial passage of the Voting Rights Act -- Justice O'Connor considered the continuing constitutionality of Section 5 in her *Lopez v. Monterey County* decision, and explicitly affirmed its constitutionality in accordance with the Fifteenth Amendment. Justice Antonin Scalia is also a vocal defender of state's rights. He has not only agreed that federal measures designed to stop racial discrimination are permitted, but also argued in his *Tennessee v.*

Lane dissent that Congress should be subjected to lesser constitutional scrutiny on anti-discrimination laws that deal specifically with racial discrimination. This is entirely consistent with the widely-held belief that Congress is at the zenith of its lawmaking power when it is addressing our nation's historic struggle with racial discrimination.

A few witnesses have mentioned the *City of Boerne* decision, which invalidated an act of Congress aimed at stopping religious discrimination because that law was not tied closely enough to the problem it was intended to solve. Yet, in the *City of Boerne* decision, the Supreme Court went out of its way to recognize that the Voting Rights Act is an example of a law where Congress acted with authority and got it right. In his opinion in that case, Justice Anthony Kennedy declared that anti-discrimination laws such as the Voting Rights Act do not require termination dates or geographic tailoring in order to survive judicial review. Nonetheless our bill includes those limitations and shows, in Justice Kennedy's own words, aspects that "tend to ensure that Congress's means are proportionate." Similarly, in the *Morrison* case, which struck down the Violence Against Women Act, the Supreme Court again pointed to the Voting Rights Act as an example of Congress acting appropriately under its constitutional authority. In fact, since upholding the law in 1966, whenever the Supreme Court has reviewed or even cited to the Voting Rights Act, it has affirmed it as a valid exercise of congressional authority.

Some academic witnesses have suggested that Section 5 should be a victim of its success. In my view abandoning a successful deterrent just because it works defies logic and common sense. Why risk losing the gains we have made? When this Committee finds an effective and constitutional way to prevent violations of the law, we should preserve it.

I welcome the witnesses who have traveled to be with us here today. Ted Arrington was elected as a Republican to the Mecklenburg County Board of Elections, which he chaired from 1985 to 1991. He currently serves as Chairman of the Department of Political Science at the University of North Carolina at Charlotte, where he specializes in elections and voting systems and behavior. Anita Earls is currently a professor at Duke University, specializing in civil rights litigation topics for the African and African-American Studies Department. She co-authored the Voting Rights State Reports for Virginia and North Carolina. Pam Karlan is a Public Interest Law Professor and the Associate Dean for Research and Academics at Stanford University, as well as a Supreme Court practitioner. I look forward to receiving their testimony.

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Testimony of Professor Richard H. Pildes
Sudler Family Professor of Constitutional Law, NYU School of Law
Visiting Professor of Law, Harvard Law School

On The Continuing Need for Section 5 Pre-Clearance
Senate Judiciary Committee
May 16, 2006

I consider it an enormous honor and responsibility to be called to testify on the Voting Rights Act ("VRA"), a statute I have called a "sacred symbol of American democracy." I also consider it a painful moment, because I have been asked to testify on concerns I have raised in my scholarship about adapting Section 5 to the circumstances of the present, circumstances that differ dramatically not just from 1965, but from 1982 as well, when Congress last re-visited the Act. These concerns have put me at odds with some members of the civil rights community, including my close friend and co-author, Professor Karlan, who is also testifying today.

I will limit myself to two particular concerns. Both address tensions between the fundamental philosophy of Section 5 and the nature of voting rights problems today. First, the bill proposes to overrule the Supreme Court's recent decision in the redistricting case, *Georgia v. Ashcroft*.[1] I consider this a mistake, one that will harm the long-term interests of minority voters, frustrate the formation of interracial political coalitions in the South, and be damaging to American democracy.

Let me remind you of the context of that case, which also illustrates powerfully and concretely the changes between 1982 and today. At the time of the 2000 round of redistricting, about 20% of Georgia's state legislators were black, and with their virtually unanimous support, a coalition of white and black Democratic legislators sought to unpack slightly three "safe minority districts" that the Act had been thought to require in the 1990s.[2] With the rise of robust two-party competition in the South – a dramatic contrast from 1982, whose ramifications for the VRA should not be underestimated – this coalition of white and black Democrats agreed to maximize the possibility that Democrats would maintain control of one of Georgia's central political institutions, the state senate. Black legislators agreed to put a few of their seats modestly more at risk for the purpose of having a Democratic senate in which black legislators, through control of committee chairs and the like, would be more effective in serving their constituents' interests. Not a single Republican voted in favor of this redistricting plan. Yet the Department of Justice (DOJ) and a lower court divided 2-1 believed that Section 5 precluded a black-white coalition of legislators from

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[1] 539 U.S. 461 (2003).

[2] In the three districts at issue, the black voting-age population was dropped from 60.58% to 50.31%, from 55.43% to 50.66%, and from 62.45% to 50.80%. In all three the percentage of black registered voters dropped to just under 50%. Testimony indicated that these differences were likely to have only marginal effect on the candidates elected. For more extensive detail on the case, see Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 88-96 (2004).

slightly unpacking three districts, and putting their incumbents marginally more at risk, for the purpose of building an effective, winning political coalition.

Had the Supreme Court not rejected this view, this rigid understanding of the VRA would have completely inverted the Act's policies. Here were black and white legislators, willing to make their seats more dependent upon interracial voting coalitions. Yet the Act would have imposed on them more racially homogenous constituencies. Here was a large contingent of black legislators who, having entered the halls of legislative power, determined that they and their constituents would have more effective power as part of a Democratic senate. Yet the Act would have required them to become the minority in all state representative institutions, for the sake of a marginal potential gain, at best, in formal black representation in the senate. Here was Congressman John Lewis, his life risked in the Selma march to help get the VRA enacted, his seat not at stake, testifying after nearly twenty years in Congress that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made" and that the South has "come a great distance" since a generation ago. And here were black legislators, not demanding safer sinecures for themselves, as officeholders typically do, but taking risks, cutting deals, and exercising political agency to forge a winning coalition. Yet the Act would have denied these political actors the autonomy to make the hard choices at issue, even with partisan control of state government at stake.

The Court's decision permitting this deal instead recognizes room in the statewide redistricting context for modest flexibility in Section 5, given the changes between today's circumstances and those in the 1970s and early 1980s. Indeed, Georgia's plan involved a modest amount of flexibility in circumstances about as compelling as I can envision. If Congress overturns *Georgia v. Ashcroft*, it will make even this limited amount of flexibility illegal.

Some who advocate overturning *Georgia* agree that the Court's decision was right on those facts, but worry that the decision has introduced a vagueness – a more anxious word for flexibility – of unknown and potentially worrisome scope. To those worries, however, I would say two things. First, the Court's decision dates to only 2003. We simply do not know how DOJ and the courts will apply the principles and standards of the case. As far as I am aware, there is not a single court decision that has relied on *Georgia* to preclear a plan, nor has DOJ withdrawn any pre-*Georgia* objection in light of the *Georgia* decision. I would not rush to overrule a decision that is right on the facts and whose future application is unknown. At this stage, we have only abstract speculation to invoke. But such speculation is just as possible in both directions. Congress adopts the standard – no "diminishment in ability to elect" is legal, no matter what the context, reasons, or process involved – then The anti-*Georgia* standard proposed in the bill might, for example, lead DOJ and the courts rigidly to lock the covered states into not reducing minority populations in districts to any extent at all if doing so , even when coalitions of black and white legislators believe black voters will be more effectively represented by some tradeoffs that enable more powerful white-black coalitions. Indeed, Rep. Robert Scott of Virginia expressed exactly this concern in the House

hearings if *Georgia v. Ashcroft* were overruled.[3]

Second, redistricting plans in covered jurisdictions remain subject to Section 2. A redistricting plan that involves impermissible vote dilution will be illegal, in covered as well as non-covered states. To the extent there is concern about the flexibility *Georgia* provides for Section 5 review of redistricting, Section 2 remains a safety net. There is no shortage of litigation challenging districting plans in the non-covered states. Nor is it clear why a districting plan that does not involve illegal vote dilution under Section 2 should be impermissible in a covered jurisdiction. It is premature to know whether the courts and DOJ, in applying *Georgia*, will make sound case-by-case decisions about the contexts in which Section 5 permits some degree of flexibility, and if so, how much. At this stage, some degree of experimentation with how best to apply Section 5 to statewide redistricting, overseen by DOJ and the federal courts, is desirable. In this context, I would also encourage a shorter renewal term for Section 5. A shorter term would enable Congress and others to judge how courts and the DOJ actually apply *Georgia* in specific contexts. Locking in any system for 25 years, in the midst of so much demographic change and other uncertainties, is problematic, particularly with respect to issues like redistricting.

I said I had two major concerns with the proposed bill. The rejection of *Georgia* is the first. The second is a fundamental constitutional and policy concern regarding whether the evidence in the record is sufficient to justify re-authorizing Section 5 in its current form, as the bill proposes to do. I am not aware that this particular concern has been addressed in any detail in the hearings here or in the House. Yet this evidentiary concern affects both sound policymaking and, perhaps, the constitutionality of a renewed Section 5.

The assumption thus far seems to be that it is sufficient to identify continuing problems *in the covered jurisdictions*, such as racially polarized voting, in complete isolation from consideration of whether similar problems exist in non-covered sites. But Section 5 is a unique law precisely because it singles out particular areas for a form of federal receivership not imposed on other areas. The relevant evidence, it seems, should therefore be tied, to some extent, to the Act's pattern of selective geographic targeting. It is one thing to base *uniform* national law on evidence from less than all states. It is another to base a geographically selective national law on a record that does not account for why some areas are covered, others not. The Supreme Court has been receptive to the

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[3] Voting Rights Act: The Continuing Need for Section 5, Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 109th Cong., First Session, October 25, 2005, Serial No. 109-75, at 92-93:

> Rep. Scott: There are a lot of areas where you may, for political reasons of effective participation in the Government and the City Council, whatever, may want to reduce the percentage from a 70, say, to a 55, in order to create a more accommodating council, and unless you count the influence districts, you're stuck. If you go from 70 to 55 but create a good council where you might actually be able to take over, you don't want to foreclose that as a possibility, ever; and if you don't consider the totality of the circumstances, how do you do that?

former.[4] It is not clear how receptive the Court would be to the latter.[5]

Yet little evidence in the record examines whether systematic *differences* exist between the currently covered and non-covered jurisdictions. Indeed, the evidence that does exist suggests the opposite: the problems identified, such as racially polarized voting, are similar in many places throughout the country where sizable minority populations exist. Given that Supreme Court doctrine now requires that congressional remedies in this area be "congruent and proportional" to identified violations, the absence of such evidence raises concerns about whether the Court will be able to find that the proposed bill meets these requirements – particularly the requirement that coverage be "congruent" to the violations. This concern also raises larger questions about whether the underlying philosophy of Section 5 continues to provide the model for national legislation protecting the right to vote that is best suited to the problems of today, and about what an alternative model of federal voting rights legislation might look like instead.

Let me first be concrete about the evidentiary concern. I believe I have read all the major studies referenced in the House and Senate hearings to date. I will rely here only on studies offered *in support* of renewal. The most comprehensive of these is, perhaps, the report of The National Commission on the Voting Rights Act.[6] Of the three chapters devoted to marshaling the evidence in support of renewal, one relies on judicial findings of continuing racially polarized voting. Yet the report itself notes that these findings are similar in court cases throughout the country. Of the 23 cases involving statewide redistricting plans since 1982 that have found racially polarized voting, half came from covered jurisdictions – and half from non-covered ones.[7] The report quotes judicial language in cases from South Carolina and Louisiana – but also virtually identical language from Maryland, Massachusetts, and Florida.[8] Similarly, an experienced voting rights lawyer testified at one hearing that "there are politically significant statistical levels of racial polarization between Anglos and Latinos, as between whites and blacks, in almost every locale which I have experienced."[9] This testimony is offered to justify renewal of Section 5, yet he was testifying about cases in Texas and Maryland – the former covered, the latter not.

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[4]The Court upheld the constitutionality of the Family and Medical Leave Act of 1993 on this ground. Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 731 (2003). Similarly, the Court upheld the nationwide ban on literacy tests, which Congress added to the VRA in 1970, on this ground. Oregon v. Mitchell, 400 U.S. 112 (1970). The Court has recognized a national interest as such in nationally uniform legislation. *See, e.g., id.*, 400 U.S. at 283 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., and Blackmun, J.) ("Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country."). The Court has not recognized a national interest as such in national laws that are geographically selective, nor is it evident what such a national interest would be, absent problems arising differentially in different areas of the country.

[5]*See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

[6]*See* LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005 (Feb. 2006) ("LAWYER'S COMM. REPORT").

[7]*Id.* at 95 and n.308. These cases come from 16 states, including Colorado, Maryland, Massachusetts, Montana, Ohio, and Tennessee.

[8]*Id.* at 95-96.

[9]*Id.* at 90.

Another often-cited study examines all published cases since 1982 in which courts have found violations of the nationwide ban in Section 2.[10] Yet, once again, these violations are not overwhelmingly or systematically concentrated in Section 5 areas; this report itself documents that these violations arise in many places with significant minority populations.[11] There is a deep reason these geographic similarities emerge in contemporary studies, a reason tied to the nature of voting-rights problems today. The *type* of problem central to the VRA today is different than in the past. Earlier, the primary issue was exclusion of minority voters from the polls. While some problems of intimidation and harassment unfortunately remain, today the vast majority of VRA cases and violations instead involve vote dilution.[12] And to the extent vote dilution is the issue of this era, that issue arises in many (perhaps most) areas with significant minority populations. It is not concentrated in any one discrete part of the country. Since 1990, for example, there are as many judicial findings of Section 2 violations in Pennsylvania as in South Carolina – and more in New York.[13]

Congress could adapt Section 5 in either of two directions to reflect this reality. It could expand Section 5 to reach all areas with findings of vote dilution or racially polarized voting. Or, Congress could more narrowly target Section 5 to areas that, in addition to such findings, evidence additional voting-rights problems that justify singling out those areas. I have no doubt there are some areas in which voting-rights problems are uniquely concentrated, particularly if a renewed Section 5 focuses on the county level. But simply re-adopting a triggering formula that is based on a state's use of a literacy test in 1964, and voter registration and turnout below 50% in 1972, or similar trigger criteria, leaves a renewed Section 5 vulnerable to constitutional challenge.

These evidentiary issues are not just legalistic concerns. They point to more profound questions about what the fundamental basis ought to be for national policy going forward on voting rights. The most significant legislative initiatives to bring national consistency and uniformity to American elections – since the short-lived post-Civil War era of Reconstruction – have been the 1965 Voting Rights Act (VRA) and its amendments, the 1993 National Voter Registration Act

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[10] Ellen Katz and the Voting Rights Initiative, *Documenting Discrimination in Voting Under Section 2 of the Voting Rights Act*, Voting Rights Initiative Database (2005), www.votingreport.org. ["Michigan Study"].

[11] For example, the Michigan study identifies 209 lawsuits that ended in a liability determination under Section 2; of these, 53.1% came from non-covered jurisdictions. Id. at 8. Similarly, there were 117 published decisions involving successful Section 2 lawsuits since 1982. Of these, 67 were in covered jurisdictions, 50 in non-covered ones. Id. The study identifies 24 reported Section 2 cases since 1982 in which courts found intentionally discriminatory voting conduct; of these, 13 cases were in non-covered jurisdictions, 11 in covered ones. Id. at 21.

[12] Of the 322 reported cases since 1982 in which a Section 2 claim was resolved, the "great majority" challenged vote dilution, including 108 of 117 of the cases that were successful. *See* LAWYER'S COMM. REPORT, *supra* note 6, at 82-83 (data compiled in part from findings reported there).

[13] Michigan Study, *supra* note 10, Report Addition: List of Locations Nationwide Where Courts Found Section 2 Was Violated (Feb. 24, 2006), http://sitemaker.umich.edu/votingrights/files/violationlocations.pdfat. This is not to say that there are not major differences between these states of relevance to the VRA; I certainly believe there are. It is only to say that, on the facts of this study, judicial findings of Section 2 violations do not distinguish between these particular states. The Michigan Study reports on only published judicial decisions. I am not aware of a study that provides similar comparative information of covered and non-covered jurisdictions for unpublished judicial decisions or settlements of Section 2 claims.

(NVRA), and, in response to the 2000 election, the 2002 Help America Vote Act (HAVA). Though not widely appreciated, however, these statutes embody radically different philosophies regarding when and why national oversight of elections is needed.

The original VRA, enacted in 1965, has never protected the right to vote as such. Instead, it protects voting rights in two more selective and narrowly targeted ways: it targets selected regions, through Section 5, and it targets racially-discriminatory barriers to voting, rather than unjustified barriers of any sort to voting. By contrast, HAVA and the NVRA are not selectively targeted in either sense: these more recent statutes provide uniform, national protection for the right to register and cast a legal vote as such. These statutes protect all citizens in all parts of the country. The profound question for policymaking today is whether the model of the VRA, or the alternative model represented by HAVA and the NVRA, should provide the blueprint for the future of national legislation to protect the right to vote. Although I do not expect that question to be a major focus of these hearings, I believe it essential to recognize this issue and to put the more specific questions concerning Section 5 in that broader perspective.

In singling out certain areas for unique federal oversight, Section 5 of the VRA rests on the philosophy that national policy can identify, in advance, areas of the country in which voting rights problems (that is, minority voting rights problems) are considerably more likely to arise systematically. In addition, Section 5 locates the threat in *changes* to existing voting rules and practices; it is only these changes, rather than the status quo baseline practices, that the federal government must, in certain areas, preclear. In earlier periods, these narrow targeting features were exceedingly easy to apply: the Act was aimed centrally at the states of the Old Confederacy, which had systematically denied black citizens (and poor whites) the vote for decades, in part through changing voting rules and practices to frustrate federal oversight. Even in 1982, blacks were still virtually invisible in elective offices; the South remained, for state and local elections, the virtual one-party monopoly it had been throughout the 20th century; and the focus of the 1982 process was eliminating at-large and multi-member election structures that effectively excluded blacks from elective office. Constitutional doctrine, recognizing these facts, was also more hospitable to the geographic singling out Section 5 entails.

But consider the kinds of voting issues we face today. As noted above, not only is it that, with the end of formal political exclusion, these issues are not as obviously unique or confined to any particular region. In addition, it is not easy for national legislation to predict in advance of actual elections where such problems are likely to emerge in coming years. A statutory model based on identifying in advance where those problems are likely to arise is increasingly difficult to adapt. Indeed, for similar reasons, such a model will underenforce minority voting rights. In the 2004 presidential election, for example, the most significant voting rights issues arose in the battleground state of Ohio.[14] Yet in 1982, when Congress last legislated, there would have been no way to anticipate that Ohio would be the place where the major voting rights controversies of the 2004

[14] *See* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220-39 (2005).

presidential election would emerge. Similarly, in the 2000 presidential election, controversy centered on Florida, most of which, like Ohio, Section 5 does not reach. To some extent, the VRA did anticipate Florida as a potential problem area, based on its past history, for Section 5 does reach five counties in Florida.[15] Nonetheless Section 5 was of no relevance during the 2000 post-election legal disputes: none of the covered counties included those that spawned the major conflicts in 2000. The same structure of the problem arises if we look more generally at the 2004 election cycle: the most intense post-election litigation over state and local elections took place over the governorships of Washington and Puerto Rico and the mayor's office in San Diego[16] – none of which the VRA's geographic-targeting approach reaches.

Ohio, Florida, Washington, Puerto Rico, and San Diego do, however, share one feature – all had exceptionally competitive elections and small margins of victory. This reveals part of the difficulty with trying to tailor modern voting-rights protection to specific areas picked out by federal law in advance: the incentive to manipulate voting rights will be greatest today where elections are extremely competitive and close. Similarly, complaints and perceptions of large-scale deprivations of voting rights, including minority voting rights, are most likely to emerge in such elections. But there is little way to base national regulation on ex ante predictions regarding where close contests for electoral votes, the Senate, the House, or state and local offices are likely to arise over the next generation. In contrast, when the geographic targeting approach of Section 5 was adopted, distinct areas existed that systematically, election after election, denied minority voting rights, whether or not elections were competitive.

Second, as partially noted above, the *nature* of voting-rights issues today also is less geographically concentrated in a distinct way than in the past. Consider the kinds of problems that have received the greatest attention in recent years. These include concerns about voting technology; lack of clear standards for what counts as a valid vote; ballot-design confusions; corrections to the provisional balloting system established in HAVA; long lines at polling places; partisan administration of election laws; sheer incompetence in election administration at the precinct level; burdensome voter-registration requirements, such as the need to re-register upon moving; and felon-disfranchisement laws.[17] These problems arise in many different parts of the country, sometimes only in some elections. It is difficult to conclude that they systematically and uniquely arise in particular areas that federal law can accurately pre-identify.

The emerging controversy over whether voter identification requirements should be tightened up and if so, what forms of identification should be required, illustrates this point. The

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[15]The five covered Florida counties are Collier, Hardee, Hendry, Hillsborough, and Monroe. *See* Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited April 26, 2006). The 2000 election disputes centered on Palm Beach, Miami-Dade, Broward, Volusia, and Nassau counties, none covered by Section 5. *See* Bush v. Gore, 531 U.S. 98, 101 (2000).

[16] For details of these election disputes, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 199-205 (rev. 2d ed. Supp. 2005).

[17] For excellent general discussion of these issues, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

most visible of these laws so far was enacted in Georgia. The federal district court enjoined that law as a violation of the fundamental right to vote under the Constitution (after the DOJ had precleared the law through the Section 5 process).[18] To some, that might confirm the need for continuing the geographical targeting of Section 5. Georgia was one of the states initially designed to be put under Section 5's federal receivership regime; it remains a covered state today. But voter ID requirements are being adopted and considered elsewhere, including many non-covered jurisdictions. Indiana, for example, recently adopted such a law.[19] And the bipartisan, Carter-Baker Commission recommended a national voting ID requirement (over the dissent of some members).[20] To be sure, debates now taking place over voter ID requirements in several state legislatures have an overwhelming *partisan* dimension. But there is not an obvious *geographic* dimension to the issue, particularly not one that easily correlates with other voting-rights issues to suggest that certain states or areas are systematically infringing on voting rights.

Third, recall that Section 5 selectively targets only *changes* in voting rules and practices. Yet here too, today's problems differ from those that generated this statutory focus on voting changes. Laws that disfranchise ex-felons and felons, for example, are among the most significant barriers today to African-American suffrage, in terms of the number of otherwise eligible voters affected. But these laws are typically not recent enactments, nor do they reflect recent changes in state law. These laws spawn novel issues today precisely because they were enacted long ago, in eras of much lower incarceration rates. They have remained unchanged even as their effect, including their racially-disparate effect, has mushroomed in tandem with convictions. Yet because these are not recent "changes in state law," they are completely beyond the reach of Section 5. Nor could such laws be brought within the scope of Section 5 through modest amendments. For recall that the entire approach of Section 5 is premised on the assumption that federal oversight should be targeted most aggressively on *changes* in voting practices and rules. Similarly, when it comes to problems with voting technology, such as pre-scored punch-card ballots, or partisan election administration and incompetence, the problem is not recent changes in law or practice. Indeed, the problem is the opposite: it is preservation of the status quo – the failure to update old voting technology, the failure to create non-partisan election administration structures, the failure to train election officials properly – that is the problem. Far from suspicious, change is precisely what policy should aspire to in these areas.

For these three reasons at least, the narrow targeting model of Section 5 – its effort to single out particular *areas* and *changes* in voting rules – is less well suited to the voting rights problems of today than was the original Section 5 to its day. Section 5 is narrowly targeted in another way as well: it singles out minority voting rights for federal protection, as opposed to voting rights per se. The most general question the VRA renewal process should ask is whether this is the right or

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[18] *See* Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

[19] A federal district court recently upheld Indiana's new law. *See* Ind. Democratic Party v. Rokita, No.1:05-cv-00634-SEB-VVS (S.D. Ind. filed Apr. 14, 2006).

[20] CARTER-BAKER COMMISSION, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 21 (2005).

exclusive model – I call it the antidiscrimination model – for the future. Put another way, the broad question is whether the model of HAVA and the NVRA, which redefine the problem from an antidiscrimination model to protection of voting rights as such, should represent the future of voting rights.

There are reasons to believe that such a shift would enhance the protection of voting rights, including minority voting rights. First, it is important to bear in mind that Congress had historically limited national voting-rights protections to the context of race (and later, certain other minority groups) not only because the problems were most severe in this domain, but partly because constitutional understandings and doctrine were thought to limit Congress' power over voting issues to the prevention of racially discriminatory voting practices.[21] But since 1965, it has become clearer that Congress has constitutional power to directly protect the right to vote itself. Whatever else the Supreme Court's decision in *Bush v. Gore*[22] does, it further confirms this point: the Constitution protects the right to vote from being arbitrarily infringed, for any reason at all, whether or not race is involved. The Court now recognizes the right to vote as a fundamental constitutional right in all general elections, whether national, state, or local.[23] Simply because earlier Congresses believed themselves constitutionally limited to protecting voting rights in the context of racial discrimination is not a reason to remain locked into that model today. Indeed, the Supreme Court today might well be *more* accepting of (and deferential to) congressional power to protect the right to vote as such than of congressional power to single out regions of the country or voting practices that disadvantage minorities, without a discriminatory animus, for unique voting-rights protection.

Second, in the context of modern politics, it is often difficult to attempt to separate racial considerations from partisan ones when voting rights are at stake. In the voter ID controversies of the moment, for example, Republican legislators are the initiators of efforts to adopt ID requirements; Democratic legislators typically resist. Some charge that these requirements are adopted for racial reasons. But to those who believe these requirements unjustified, are they being adopted for partisan or racial reasons? And should it matter, assuming we could answer the question? The same is true of national legislation that might, for example, ban the intimidation of voters. Would it be better (for minority voters, as well as others) for such legislation to target intimidation "based on race" or simply illegal intimidation per se?

The VRA model of selectively focusing on racially-discriminatory voting practices requires courts to determine whether race or partisan politics is the cause (or the predominant cause or, perhaps, a cause) for the adoption of certain voting practices. But such an inquiry is often intractable, for courts or other actors. As long as black voters remain overwhelmingly Democratic, race and partisanship will remain intertwined, perhaps inextricably so. National legislation based on separating the two elements will always, therefore, be problematic, at the least. This problem can lead to underprotection of minority voting rights themselves. The more difficult it is for courts to

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[21] *See* United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1876).

[22] 531 U.S. 98 (2000).

[23] *See, e.g.*, Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (local elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (state elections).

separate racial from partisan or other considerations, the greater the risk that courts will reject voting-rights challenges on the ground that partisan considerations, not racial ones, account for the practice at issue. Put another way, the voting rights of all citizens, including minorities, are most threatened today by partisan attempts to manipulate election regulation for self-interested reasons. Isolating one dimension of that threat for national legislation addresses only part of the problem and might make it more difficult effectively to address even that part. Perhaps paradoxically, the more general the form of voting-rights protection, the more minority voting rights will be effectively protected.

Thus, there is reason to believe that both the selective targeting features of the VRA model of voting rights – the singling out of certain places and of certain subcategories of voting rights for federal oversight and protection – represent the past of voting rights, but not the future. This is not to say that racially-discriminatory voting practices are no longer a problem. But racially discriminatory voting practices are a subset of a more sweeping set of challenges to full and fair political participation in American democracy. The most effective way of providing legal protection for voting rights, including minority voting rights, might increasingly be less through an anti-discrimination vision than through a vision focused directly on the substantive right to vote itself.

Perhaps national policy will need to reflect both visions: uniform national voting-rights protections as well as protections selectively targeted both geographically and on certain groups of voters. But at the least, voting-rights policy should not remain so embedded within the model of the past as to preclude looking beyond that model to consider whether different visions, such as those reflected in the NVRA and HAVA, ought to become more dominant as we move forward.

To sum up, I have two major concerns with the specific bill proposed. First, a rush to overrule *Georgia v. Ashcroft* at this stage is, in my view, a mistake. Second, I am concerned that Supreme Court doctrine will not permit Congress simply to re-authorize Section 5, with exactly the same scope of coverage as in 1982 (itself based partly on a formula from 1965), unless evidence adequately shows that problems of race, ethnicity, and voting rights today differ significantly between those jurisdictions targeted and those regulated only by Section 2 of the Act.

More generally, debate over renewal of Section 5 need not remain locked within the models of the past. I append to my testimony a forthcoming article that elaborates on that point. I would suggest that much of the work the Voting Rights Act so powerfully began might today best be taken up by building on the models of the Help America Vote Act and the National Voter Registration Act and basing national legislation on protection of the right to vote as such.