

Promises to Keep

The Impact of the Voting Rights Act in 2006

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Renew the Voting Rights Act

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INTRODUCTION

August 7, 2006 will mark the 41st anniversary of the Voting Rights Act of 1965 (VRA). The VRA has been one of the most effective civil rights laws in eliminating discrimination and granting access to the ballot box for minorities. By tearing down the barriers to equal opportunity for racial and language minorities in voting, the Act removed the political mechanism that was essential to maintaining the legal structure of segregation. As the Supreme Court has said, the equal right to vote is fundamental because it is “preservative of all rights.”¹

Most of the provisions of the VRA are permanent, but some will expire in 2007 if they are not renewed. The expiring sections include Section 5, which bars certain states or portions of states from changing their election procedures without the advance approval of the U.S. Attorney General or the District Court for the District of Columbia; Section 203, which requires election officials to provide written and oral assistance for certain citizens who have limited English proficiency, and Sections 6–9, which authorize the U.S. Attorney General to appoint examiners and send federal observers to monitor elections when there is evidence to suggest voter intimidation at the polls. This report will examine these provisions, their constitutionality, and their real life impact, as well two U.S. Supreme Court decisions that conflict with congressional intent on Section 5 and severely weaken the effectiveness of the statute.

The VRA not only abolished literacy and other tests, which had been used to deny African Americans and other minorities the right to vote, it also prohibited “covered jurisdictions,” now nine states and portions of seven others, from implementing new voting practices without first preclearing them with federal officials. And when the Act was expanded and strengthened in 1975 to include protections for language minorities who had suffered systematic exclusion from the political process, Latinos, Asian Americans, Native Americans and Alaskan Natives also gained new tools to ensure fundamental fairness in the voting process.

As effective as it has been against the discrimination that precipitated its passage, the VRA was never meant to only address those types of barriers to voting. Recognizing that many

¹ *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

states and local governments have continued to erect new barriers to minority political participation, Congress has extended Section 5 coverage three times: in 1970 (for five years), in 1975 (for seven years) and in 1982 (for 25 years). The language minority protections of Section 203 were adopted in 1975 and extended and amended in 1982 and again in 1992. Moreover, Presidents Johnson, Nixon, Reagan, Ford, and George H.W. Bush have supported the enactment or reauthorization of key parts of the law. Most recently, President George W. Bush stated that “many active citizens struggled hard to convince Congress to pass civil rights legislation that ensured the rights of all – including the right to vote. That victory was a milestone in the history of civil rights. Congress must act to renew the Voting Rights Act of 1965.”²

The VRA has made a tremendous difference in providing representation for previously disfranchised communities. In 1964, there were only approximately 300 African Americans in public office, including just three in Congress. Today, there are more than 9,100 African American elected officials nationwide, with 42 Representatives and one Senator in Congress.³ The Act has also opened the political process for many of the approximately 6,000 Latino public officials who have been elected and appointed nationwide,⁴ including 263 at the state or federal level, 27 of whom serve in Congress. And Native Americans, Asian Americans and others who have historically encountered harsh barriers to full political participation also have benefited greatly.

In the 41 years since the passage of the VRA, it has guaranteed millions of minority voters a chance to have their voices heard in federal, state, and local governments across the country. These increases in representation translate to vital and tangible benefits such as much needed education, healthcare, and economic development for previously underserved communities. Prior to the Act’s passage, African Americans had been denied resources and opportunities for many years; their issues were often ignored and discounted. Officials elected because of the equal voting opportunities afforded minority citizens have been more responsive to the needs of minority communities.

Although significant progress has been made as a result of the passage of the VRA, equal opportunity in voting still does not exist in many places. Discrimination on the basis of race and language still deny many Americans their basic democratic rights. Although such discrimination today is often more subtle than it used to be, it must still be remedied to ensure the healthy functioning of our democracy.

This report, therefore, urges Congress to implement the following proposals:

² President George W. Bush, President Celebrates African American History Month at the White House (Feb. 22, 2006) (transcript available at <http://www.whitehouse.gov/news/releases/2006/02/20060222-6.html>).

³ Written Testimony of Mark H. Morial, National Urban League, *Oversight Hearing on the Voting Rights Act: To Examine the Impact and Effectiveness of the Act Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 109th Cong. 1 (Oct. 18, 2005), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=475>.

⁴ *Congresswoman Linda Sánchez Speaks Out in Favor of Strengthening the Voting Rights Act* (Oct. 18, 2005), AMERICAN CHRONICLE, Oct. 18, 2005, available at <http://www.americanchronicle.com/articles/viewArticle.asp?articleID=3040> [hereinafter *Linda Sánchez Speaks Out*].

1. Renew the Section 5 pre-clearance requirements for 25 years, consistent with the time period adopted with the 1982 extension.
2. Renew Section 203 for 25 years so that citizens who are limited in their ability to speak English can continue to receive assistance when voting.
3. Renew Sections 6–9, which authorize the U.S. Attorney General to appoint federal election observers.
4. Provide for the recovery of expert fees for prevailing parties in voting rights litigation.
5. Clarify the original intent of Congress by addressing two narrowly decided U.S. Supreme Court decisions, which fundamentally weaken the administration of Section 5: *Reno v. Bossier Parish School Board* (2000) and *Georgia v. Ashcroft* (2003).

I. ENACTMENT OF THE VOTING RIGHTS ACT OF 1965

Congress passed the Voting Rights Act in 1965 to enforce rights guaranteed to minority voters nearly a century before by the Fourteenth and Fifteenth Amendments. Although these amendments prohibited states from denying equal protection on the basis of race or color or from discriminating in voting on account of race or color, African Americans and other minorities continued to face disfranchisement in many states. Poll taxes, literacy tests, and grandfather clauses were all used to deny African American citizens the right to register to vote, while all white primaries, gerrymandering, annexation, and at-large voting were used widely to dilute the effectiveness of minority voting strength.

In 1957, Congress passed the first civil rights act since Reconstruction empowering the U.S. Attorney General to bring suits on behalf of citizens denied the right to vote on account of race.⁵ These enforcement suits proved to be incredibly time consuming and inefficient – once a practice was declared unlawful, the state and local officials would merely circumvent the court’s ruling with a different, but equally discriminatory practice. Case-by-case litigation is costly and time-consuming and the burden of bringing these cases to federal courts was placed on poor and disfranchised minorities. Voting rights advocates began to push for a stronger set of tools, but resistance was fierce.⁶

On March 7, 1965, voting rights supporters planned a march from Selma, Alabama to the state capitol in Montgomery to present then-Governor George Wallace with a list of grievances. They were stopped on the Edmund Pettus Bridge in Selma by state troopers and sheriff’s deputies on horseback who, in front of television cameras, attacked the more than 500 demonstrators by firing toxic tear gas, charging the marchers, and beating people with clubs and whips. Scenes of the event were broadcast nationwide and many Americans were outraged.⁷

⁵ 42 U.S.C. § 1971(c).

⁶ See, e.g., Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 after Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 777-78 (2003).

⁷ *Id.* at 778-79.

On March 15, 1965, President Lyndon Johnson addressed a special joint session of Congress before a national television audience. He delivered what Representative John Lewis has called “the most moving speech ever delivered before the U.S. Congress,”⁸ saying:

I speak today for the dignity of man and the destiny of democracy.... At times history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.... Every device of which human ingenuity is capable has been used to deny this right.... Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books...can ensure the right to vote when local officials are determined to deny it.... This time, on this issue, there must be no delay, no hesitation and no compromise with our purpose.... We have already waited a hundred years and more, and the time for waiting is gone.⁹

By August 6, 1965, Congress had passed the Voting Rights Act by an overwhelming majority and President Johnson had signed it into law.¹⁰ The Act represents the most aggressive steps ever taken to protect minority voting rights. The impact was immediate and dramatic. In Mississippi, African American registration went from less than 10% in 1964 to almost 60% in 1968; in Alabama, registration rose from 24% to 57%. In the South as a whole, African American registration rose to a record 62% within a few years of the Act’s passage.¹¹ The Department of Justice (DOJ) has called the Act the “most successful piece of civil rights legislation ever adopted.”¹² But the promise of the Act has not yet been fully realized. As this report discusses, progress has been made, but the VRA’s protections are still needed today.

II. OVERVIEW OF THE VRA

The VRA contains both temporary and permanent provisions. The temporary, remedial provisions allow for significant federal oversight of state and local voting practices in jurisdictions deemed to have the most persistent and worst histories of voting discrimination. The general provisions of the Act, such as Section 2, are national in scope and permanent.

⁸ Rep. John Lewis, *The Voting Rights Act: Ensuring Dignity and Democracy*, HUM. RTS., A.B.A. SEC. OF INDIV. RTS AND RESP. Vol. 32, No. 2 at 3 (2005).

⁹ President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), in 107 Pub. Papers 281, 281-84.

¹⁰ Voting Rights Act of 1965, Pub. L. No. 89-110 (1965) (codified as 42 U.S.C. § 1973 *et seq.*).

¹¹ Rodriguez, *supra* note 6, at 782.

¹² U.S. Department of Justice, Civil Rights Division, Voting Section, *Introduction to Federal Voting Rights Laws*, <http://www.usdoj.gov/crt/voting/intro/intro.htm>.

A. Section 2

Section 2 bans race discrimination in voting nationwide and gives victims of discrimination the right to go to court to seek judicial remedies. Specifically, it prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act.¹³ Prior to 1980, courts invalidated election laws proven to be racially unfair without regard to intent. In 1980, in *Mobile v. Bolden*, the Court declared, in a vast departure from earlier established law, that any challenge to an election procedure brought under the Fourteenth or Fifteenth Amendments must include proof that the measure was enacted with the *intent* to discriminate against voters on account of race or color.¹⁴ Under that standard, a plaintiff had to prove that the standard, practice, or procedure was enacted or maintained, at least in part, with an invidious purpose – an onerous and unwarranted standard.

In 1982, Congress reauthorized the VRA and removed this intent requirement by explicitly providing that a discriminatory result constituted a violation of the Act. Congress examined the history of litigation under Section 2 and concluded that the section should be amended to provide that a plaintiff could establish a violation if the evidence established that, in the context of the "totality of the circumstances" of the local electoral process, the standard, practice, or procedure being challenged had the *result* of denying a racial or language minority an equal opportunity to participate in the political process.¹⁵ Now plaintiffs must prove only that a proposed election law or redistricting scheme impaired minority voters' ability to elect representatives of their choice.

B. Section 5: Preclearance Requirements

Recognizing that case-by-case litigation of voting rights abuses under Section 2 alone would not produce the needed widespread reform in those jurisdictions with a history of discrimination, Congress enacted Section 5. Unlike Section 2 of the Act, which applies nationally and permanently, Section 5 is temporary and applies only to those jurisdictions covered by the formula set forth in Section 4(b).¹⁶ Section 5 remains today a powerful tool for deterring state and local governments from adopting discriminatory election procedures and preventing discriminatory practices that have been adopted from being enforced.

Section 5 requires that a covered jurisdiction that wishes to enact any "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" [or November 1, 1968 or November 1, 1972, depending on the effective date of coverage for that jurisdiction] must seek approval, known as "preclearance," from the U.S. Attorney General or from a three-judge panel of the United States District Court for the District of Columbia.¹⁷ Approval is dependent on the jurisdiction's ability to show that the proposed changes do "not

¹³ 42 U.S.C. § 1973(a).

¹⁴ 446 U.S. 55 (1980).

¹⁵ 42 U.S.C. § 1973(b).

¹⁶ 42 U.S.C. § 1973b(b).

¹⁷ 42 U.S.C. § 1973c.

have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority group].”¹⁸

To comply with Section 5, a jurisdiction must submit its proposed changes to the DOJ in writing.¹⁹ The Attorney General then has sixty days to object to the change. If no objection is filed, after sixty days, the jurisdiction can implement its change. If the Attorney General does object, the jurisdiction may seek preclearance from a three-judge panel of the District Court for the District of Columbia, which will make a determination without deference to DOJ’s findings. An appeal from the district court’s decision goes directly to the Supreme Court.²⁰

In 1976, the Supreme Court established that under Section 5, a jurisdiction is required to ensure “that no voting-procedure changes would be made that would lead to a retrogression in the position of minorities with respect to the effective exercise of the franchise.”²¹ In other words, the Court held that voting changes could not weaken the voting power of the minority electorate. More recently, as discussed below, two Supreme Court decisions have narrowed the operation of Section 5 and the meaning of “retrogression.”²² While these decisions have weakened Section 5, it remains an important tool for ensuring full minority participation in jurisdictions with a history of voting rights abuses. In light of these decisions, however, it is imperative that during this reauthorization process, Section 5 be renewed and restored to its original vitality.

Preclearance acts as an essential deterrent because it puts modest safeguards in place to prevent backsliding. As a bipartisan report by the U.S. Senate in 1982 said, without Section 5, many of the advances of the past decade could be wiped out overnight with new schemes and devices.²³ Many scholars and voting rights experts agree that without the deterrent effect of Section 5, there will be little to prevent covered jurisdictions from imposing new barriers to minority participation.

1. The Section 5 Trigger Formula

Section 4(b) of the VRA sets out the coverage formula, also known as the “Section 5 trigger formula,” for determining which jurisdictions are subject to Section 5’s provisions. In the original 1965 Act, the formula applied Section 5 to any state or political subdivision of a state²⁴ which (1) maintained a test or device²⁵ on November 1, 1964, and where (2) less than 50 percent

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Beer v. United States*, 425 U.S. 130, 141 (1976).

²² *See Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (“*Bossier II*”).

²³ S. REP. NO. 97-417, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187.

²⁴ The Act defines “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 42 U.S.C. § 1973l(c)(2).

²⁵ “Test or device” is a term of art and includes any requirement that a registrant or voter must “(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.” 42 U.S.C. § 1973b(c).

of the voting age population was registered to vote on November 1, 1964 or voted in the 1964 presidential election.²⁶ Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina and Virginia, plus 26 counties in North Carolina, three counties in Arizona, one county in Idaho and one county in Hawaii were covered by the 1965 Act.²⁷ Alaska, the Arizona counties, and the Idaho county successfully petitioned the District Court for the District of Columbia for termination of coverage almost immediately.²⁸

In 1970, Section 5 was extended for five years and the coverage formula was amended to add jurisdictions that maintained a test or device on November 1, 1968 and where less than 50 percent of the voting age population were registered on November 1, 1968 or voted in the 1968 presidential election. This extension resulted in partial coverage of ten states: Alaska, Arizona, California, Connecticut, Idaho, Maine, Massachusetts, New Hampshire, New York and Wyoming.²⁹ Half of these states, Connecticut, Idaho, Maine, Massachusetts and Wyoming, filed successful termination suits.³⁰

In 1975, Section 5 was extended for seven more years and the coverage formula was again extended to include jurisdictions that maintained a test or device on November 1, 1972 and where less than 50 percent of the citizen voting age population was registered on November 1, 1972 or voted in the 1972 presidential election. In addition, the provisions were broadened to address discrimination against members of “language minority groups.”³¹ The definition of “test or device” was amended to include the provision of election information, including ballots, only in the English language, in states or political subdivisions where more than five percent of voting age citizens are members of a single language minority.³² This had the effect of covering Alaska, Arizona and Texas in their entirety, and parts of California, Florida, Michigan, New York, North Carolina and South Dakota.³³

Finally, in 1982, Section 5 was extended for an additional 25 years. Congress conducted a thorough fact-finding process to evaluate whether covered jurisdictions had progressed sufficiently in the area of voting rights to warrant removal from Section 5 coverage, but no changes to the coverage date or formula were made.³⁴

²⁶ 42 U.S.C. § 1973b(b).

²⁷ U.S. Department of Justice, Civil Rights Division, Voting Section, *Section 4 of the Voting Rights Act*, http://www.usdoj.gov/crt/voting/misc/sec_4.htm (last visited Feb. 28, 2006) [hereinafter *Section 4 of the Voting Rights Act*]; see 30 Fed. Reg. 9897 (Aug. 7, 1965).

²⁸ Coverage could be terminated prior to the 1982 amendments by obtaining declaratory judgment that tests or devices had not been used during the proceeding five years to abridge the franchise on racial grounds.

²⁹ *Section 4 of the Voting Rights Act*, *supra* note 27; see 36 Fed. Reg. 5809 (Mar. 27, 1971).

³⁰ *Section 4 of the Voting Rights Act*, *supra* note 27.

³¹ “Language minority groups” are defined as persons who are of American Indian, Asian American, Alaskan Natives, or Spanish heritage. 42 U.S.C. § 1973l(c)(3).

³² 42 U.S.C. § 1973b(f)(3).

³³ *Section 4 of the Voting Rights Act*, *supra* note 27; see 40 Fed. Reg. 43,746 (Sept. 23, 1975).

³⁴ For a full list of currently covered jurisdictions, see U.S. Department of Justice, Civil Rights Division, Voting Section, *Section 5 Covered Jurisdictions*, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Feb. 28, 2006).

2. The Bailout Provisions

As part of the 1982 amendments and extension of the Act, Congress established a new “bailout” mechanism to allow covered jurisdictions to remove themselves from Section 5 coverage if they meet certain requirements. A state or political subdivision wishing to bail out must obtain a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia. In order to bail out, a jurisdiction must show that during the preceding ten years: (1) no test or device has been used for the purpose or with the effect of abridging or denying the right to vote on account of race or color or language minority status; (2) all changes affecting voting have been submitted for preclearance before implementation; (3) no submission has been the subject of an objection by the U.S. Attorney General or the denial of declaratory judgment from the United States District Court for the District of Columbia; (4) there have been no adverse judgments in lawsuits alleging voting discrimination; (5) there have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice; (6) there are no pending lawsuits that allege voting discrimination; and (7) federal examiners have not been assigned to the jurisdiction.³⁵

In addition to these factors, the jurisdiction must demonstrate that it has “eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process” and that it has “engaged in constructive efforts to eliminate intimidation and harassment of persons exercising [protected voting] rights.”³⁶ The jurisdiction must also present evidence of minority electoral participation.³⁷ Finally, it must show it has not engaged in any other discriminatory practices regarding voting that violate any laws, unless the jurisdiction can establish the violations were “trivial, were promptly corrected, and were not repeated.”³⁸

If the court finds these conditions have been met, the jurisdiction can bail out from Section 5 preclearance requirements. To make it easier for states and their subdivisions to obtain bailout, the U.S. Attorney General is authorized to consent to an entry of judgment granting bailout.³⁹ The court, however, retains jurisdiction over the action for ten years during which it may reopen the matter in response to an allegation of discriminatory conduct that would have barred bailout originally.⁴⁰ This “probation” period serves to ensure that released jurisdictions do not immediately turn back to discriminatory practices.

Unlike the bailout provision of the original Act, the amended procedure allows individual political subdivisions within a covered state to bail out independently. Currently, ten jurisdictions in Virginia have taken advantage of the bailout provisions, despite Virginia’s continued coverage.⁴¹

³⁵ 42 U.S.C. § 1973b(a)(1)(A)-(E).

³⁶ *Id.* § 1973b(a)(1)(F).

³⁷ *Id.* § 1973b(a)(2).

³⁸ *Id.* § 1973b(a)(3).

³⁹ *Id.* § 1973b(a)(5).

⁴⁰ *Id.* § 1973b(a)(9).

⁴¹ Written Testimony of Bradley J. Schlozman, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, *Oversight Hearing on the Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Oct. 25, 2005), available at <http://judiciary.house.gov/media/pdfs/schlozman102505.pdf>; see also The NATIONAL COMMISSION ON THE VOTING

C. Section 203: Language Minority Assistance

It is crucial that every citizen in our democracy have the right to vote. Yet having that right is meaningless if certain groups of people are unable to accurately cast their ballot at the polls. Voters may be well informed about the issues and candidates, but to make sure their vote is accurately cast, language assistance is necessary in certain jurisdictions with concentrated populations of limited English proficient voters.

Section 203 requires certain jurisdictions to make language assistance available at polling locations for citizens with limited English proficiency.⁴² When Congress amended the VRA in 1975 by adding Section 203, it found that through the use of various practices and procedures, such as English only ballots, “citizens of language minorities have been effectively excluded from participation in the electoral process. . . .The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices. . . .”⁴³ Specifically, Section 203 provides: “Whenever any State or political subdivision [covered by the section] provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.”⁴⁴ This provision was extended during the 1982 reauthorization and then again in 1992.

Section 203 applies to four language groups: Americans Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage.⁴⁵ A community with one of these language groups will qualify for language assistance if: (1) more than 5% of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited English proficiency (LEP); or (2) more than 10,000 voting-age citizens in a jurisdiction belong to a single language minority community and are LEP; and (3) the illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate.⁴⁶ After the most recent Census Department determination on July 26, 2002, five states are covered in their entirety (Alaska for Alaskan Natives, and Arizona, California, New Mexico, and Texas for Spanish heritage) and 26 states are partially covered.⁴⁷

Even though most new citizens are required to speak some basic English, they still may not be sufficiently fluent to participate fully in the voting process without this much-needed

RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 29 (2006) [hereinafter PROTECTING MINORITY VOTERS].

⁴² Registration and voting materials for all elections must be provided in the minority language as well as in English. Oral translation during all phases of the voting process, from voter registration clerks to poll workers, also is required. Jurisdictions are permitted to target their language assistance to specific voting precincts or areas. 42 U.S.C. § 1973aa-1a(c); see U.S. Department of Justice, Civil Rights Division, Voting Section, *Minority Language Citizens: Section 203 of the Voting Rights Act*, http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm (last visited Feb. 28, 2006) [hereinafter *Minority Language Citizens*].

⁴³ 42 U.S.C. § 1973aa-1a(a); see also *Minority Language Citizens*, *supra* note 42.

⁴⁴ 42 U.S.C. § 1973aa-1a(c); see also *Minority Language Citizens: supra* note 42.

⁴⁵ 42 U.S.C. § 19731(c)(3).

⁴⁶ 42 U.S.C. § 1973aa-1a(b)(2)(A).

⁴⁷ See Voting Rights Act Amendments of 1992, Determinations Under 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55).

assistance. In addition, there are many other citizens who were born in the United States but who still may not be English proficient. The failure of certain jurisdictions to provide adequate education to non-English speaking minorities is well documented in legal decisions and in quantitative studies of educational achievement. Ballots, particularly long ballot initiatives like those we have seen recently in states such as California and Washington, can be very complicated, even for those fluent in English. Language assistance helps certain citizens navigate through a plethora of issues on the ballot. It has also encouraged language minority groups to register and vote and participate more fully in the political process.

Moreover, language assistance is not costly. According to two Government Accountability Office studies, as well as independent research conducted by scholars, language assistance, when implemented properly, accounts only for a small fraction of total election costs.⁴⁸ The most recent studies show that compliance with Section 203 accounts for approximately 5% of total election costs.⁴⁹

D. Federal Examiners and Observers Provisions

Other sections of the Act set to expire in August 2007 provide for the appointment of federal examiners and observers to monitor elections. Sections 6–9 enable the U.S. Attorney General to certify jurisdictions for examiner/observer coverage.⁵⁰ Where there is reason to suspect discrimination exists in a covered jurisdiction, the Attorney General may assign federal examiners to help register voters in covered jurisdictions, certified by him or court order, and assign federal observers to monitor election activities.

While registration examiners have not been used recently, most likely because of protections afforded by other legislation, polling place observers continue to play a vital role in DOJ's enforcement efforts. Since passage of the VRA, DOJ has regularly sent observers and monitors around the country to protect election-related civil rights. Since 1966, roughly 25,000 observers have been deployed in over 1,100 elections.⁵¹ Since the last reauthorization, from July 1982 through December 2005, DOJ has used observers approximately 600 times in elections in jurisdictions covered by the Section 4 coverage formula and certified for examiners and observers by the Attorney General.⁵² The importance of the observer program is further highlighted by DOJ's routine use of its own civil rights personnel to serve as civil rights monitors in jurisdictions not covered by the VRA. During the 2004 election, DOJ sent approximately 840 federal observers and more than 250 Civil Rights Division personnel to 86

⁴⁸ See Written Testimony of Dr. James Thomas Tucker, Attorney, Ogletree Deakins, P.C., *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4-6 (Nov. 9, 2005), available at <http://judiciary.house.gov/media/pdfs/tucker110905.pdf>.

⁴⁹ *Id.* at 6.

⁵⁰ 42 U.S.C. §§ 1973d–1973g.

⁵¹ PROTECTING MINORITY VOTERS, *supra* note 41, at 32.

⁵² *Id.* at 4, 61. Note that some of the 622 instances of DOJ's use of observers were pursuant to federal court orders.

jurisdictions in 25 states to monitor the general election to ensure voters were free from harassment, intimidation or other illegal activity.⁵³

The presence of polling place observers deter election officials and others from engaging in discrimination and harassment and allow for the remedying of any discrimination that does occur. Observers are required to report any problems to the Civil Rights Division attorney who accompanies and supervises each observer team, and the attorney in turn can immediately discuss the problem with local officials. If not resolved on site, problems can be the subject of discussion between DOJ and local officials, and observers can also provide the factual foundation for litigation under the VRA if necessary. Accordingly, there is a strong case for extending the observer program and the vital protections it affords.

E. The Impact of Sunsetting The Expiring Provisions

As will be discussed more below, the expiring provisions continue to be particularly important in combating voting discrimination. Unfortunately, their full promise has not yet been achieved. In addition to providing a remedy for changes that deprive minority communities of the opportunity to elect representatives of their choice, these provisions act as a deterrent to state and local government officials from enacting voting changes with the potential to harm minority voters. During the recent hearings before the U.S. House of Representatives on the reauthorization of the VRA, the President of the Georgia Association of Black Elected Officials testified that “[h]ad there been no federal intervention in the voting and redistricting process, it is unlikely that most southern states would have ceased their practices of denying and diluting black vote.”⁵⁴ He went on to state that “[t]he fact that Section 5 has been so successful is one of the arguments in favor of its extension, not its demise.”⁵⁵

Removal of federal oversight would doubtlessly result in significant erosion in minority voting rights. Even with the VRA as a deterrent, Georgia, for example, has received a total of 80 objections under Section 5 since the last extension of the preclearance requirement.⁵⁶ Moreover, Georgia has recently enacted a virtual poll tax, one of the most blatant measures adopted after Reconstruction to suppress the African American vote. Last year, the state enacted a photo ID requirement for voting in person, for which voters who did not already have a government photo ID such as a driver’s license would need to pay \$20 to obtain one.⁵⁷ This fee-for-voting would deter or prevent a disproportionate number of minorities, elderly, and the disabled from voting. A challenge to the photo ID law was filed by a coalition of groups, including the ACLU, and on October 18, 2005, the federal court enjoined its use on the grounds that it was in the nature of a

⁵³ Press Release, U.S. Department of Justice, *Department of Justice Announces Federal Observers to Monitor General Election in States Across the Country* (Oct. 28, 2004), available at http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm.

⁵⁴ Written Testimony of Representative Tyrone L. Brooks, Sr., Georgia House of Representatives, District 63, President, Georgia Association of Black Elected Officials, *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1 (Nov. 9, 2005) [hereinafter Brooks Testimony], available at <http://judiciary.house.gov/media/pdfs/brooks110905.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ H.B. 244, 2005 Ga. Gen. Assem., Reg. Sess., § 24 (Ga. 2005).

poll tax, as well as a likely violation of the Equal Protection clause.⁵⁸ Without voting protections (and even with them, as we see here), states covered by Section 5 could easily revert to their old, bad habits.

Certainly, preclearance must also continue in order to avoid ploys like the last-minute cancellation of a municipal election in Kilmichael, Mississippi, by the all-white town council. During the local elections of 2001, an unprecedented number of African Americans candidates were running for office. Three weeks before the election, however, the town's mayor and the all white five-member Board of Aldermen canceled the election.⁵⁹ In objecting to this change under Section 5, the Justice Department found that the cancellation occurred after Census data revealed that African Americans had become a majority in the town.⁶⁰ The town did not reschedule the election, and DOJ forced it to hold one in 2003 whereupon Kilmichael elected its first African American mayor, along with three African American aldermen.⁶¹ The episode is a reminder that the VRA remains a hedge against discriminatory election practices and that protections are still needed to ensure racial equality in voting. These temporary provisions are just as necessary today as they have been in the past and should not be allowed to sunset.

III. THE VRA IS A MODEL OF REMEDIAL LEGISLATION

Each time the VRA has been renewed, Congress has assessed the extent of current, ongoing voting violations in those covered jurisdictions and reached the conclusion that the VRA should be extended. And although some continue to question the constitutionality of the VRA, it has been repeatedly upheld as within Congress' authority and as a model of remedial legislation. Because the testimony and reports submitted during the recent congressional hearings on the VRA demonstrate a continued pattern of voting discrimination by the covered jurisdictions between the 1982 extension and now, the preclearance provisions and the coverage formula meet the Supreme Court's requirements for congruent and proportional remedial legislation. In order to pass constitutional muster again, the provisions should be extended temporarily and narrowly tailored to address the harms they were designed to cure.

A. Affirming the Constitutionality of the Act

The core constitutional issue raised by the Voting Rights Act concerns the extent to which Congress is authorized by the Fourteenth and Fifteenth Amendments to circumscribe state action in an attempt to cure discrimination.⁶² Not surprisingly, when the Act was first passed in 1965, it was immediately challenged as exceeding the powers of Congress and encroaching on an area traditionally reserved for the states. In *South Carolina v. Katzenbach*, South Carolina

⁵⁸*Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1376-77 (N.D. Ga. 2005).

⁵⁹ Melanie Eversley, *For a Mississippi Town, Voting Rights Act Made a Change*, USA TODAY (Aug. 5, 2005) [hereinafter *For a Mississippi Town*].

⁶⁰ Stuart Comstock-Gay, Executive Director, National Voting Rights Institute, *Ballot Box Equality* (August 5, 2005), available at http://www.tompaine.com/articles/2005/08/05/ballot_box_equality.php [hereinafter *Ballot Box Equality*].

⁶¹ *For a Mississippi Town*, *supra* note 59.

⁶² See generally Rodriguez, *supra* note 6, at 784-92.

challenged provisions of the Voting Rights Act on “the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution.”⁶³ The Supreme Court, however, in an 8-1 decision, upheld the constitutionality of the statute, and of Section 5 in particular. The opinion, written by Chief Justice Warren, found that Congress was acting well within its authority because Congress “has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”⁶⁴ The scope of Congress’ power under Section 5 of the Fourteenth Amendment, as reaffirmed by the Court in *South Carolina v. Katzenbach*, was considered broad:

‘Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.’⁶⁵

Noting that the “constitutional propriety of the [Act] must be judged with reference to the historical experience which it reflects,” the Court seemed particularly persuaded by the “great care” with which Congress had explored the problem of voting discrimination.⁶⁶ The Court observed that Congress had determined that its earlier attempts to remedy the “insidious and pervasive evil” of racial discrimination in voting had failed because of “unremitting and ingenious defiance of the Constitution” in some parts of this country.⁶⁷ In response, Congress had acted properly under the reconstruction amendments to create a “complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant.”⁶⁸

Applying the broad test for appropriate remedial legislation to the specific provisions of the VRA, the Court found that Section 5 was a proper exercise of congressional power because Congress had found either substantial evidence of voting discrimination or “fragmentary evidence of recent voting discrimination” in the covered areas.⁶⁹ The covered jurisdictions all shared characteristics that indicated a history of discriminatory disfranchisement of voters: some sort of test or device and a voting rate well below the national average.⁷⁰ While preclearance was admittedly “an uncommon exercise of congressional power... the Court... recognized that exceptional conditions can justify legislative measures not otherwise appropriate.”⁷¹

Since *South Carolina v. Katzenbach*, the Court has consistently ruled that a long history of racial discrimination in voting justifies a certain degree of intrusion into state and local affairs, and that Section 5 represents a valid means of combating discrimination. In *Katzenbach v.*

⁶³ *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

⁶⁴ *Id.* at 326.

⁶⁵ *Id.* at 327 (quoting *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880)).

⁶⁶ *Id.* at 308.

⁶⁷ *Id.* at 309.

⁶⁸ *Id.* at 315.

⁶⁹ *Id.* at 329-330.

⁷⁰ *See id.* at 330.

⁷¹ *Id.* at 334.

Morgan, another challenge to Congress' authority to pass such remedial legislation, Justice Brennan, writing for a unanimous court, upheld the constitutionality of the VRA, finding that Congress has a broad scope of authority in Fourteenth Amendment legislation.⁷²

In 1980, the Supreme Court again upheld the constitutionality of Section 5 and sustained Congress' 1975 determination to extend Section 5 for an additional seven years as a "both unsurprising and unassailable" exercise of Congressional power.⁷³ In *City of Rome v. United States*, the City of Rome, Georgia argued that the VRA was unconstitutional because it exceeded Congress' power to enforce the Fifteenth Amendment by prohibiting both purposeful discrimination as well as practices with a discriminatory effect.⁷⁴

The Court rejected this argument and upheld the Act's provisions as "an appropriate method of promoting the purposes of the Fifteenth Amendment."⁷⁵ Justice Marshall, writing the opinion of the Court, found that "Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent."⁷⁶

The Court in *Rome* went on to reject the assertion that the VRA violates the principles of federalism. The Court cited *Fitzpatrick v. Bitzer* for the proposition that the "[p]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"⁷⁷ Significantly, the Court noted that the Fourteenth and Fifteenth Amendments were "specifically designed as an expansion of federal power and an intrusion on state sovereignty."⁷⁸

Finally, the appellants in *Rome* argued that the Voting Rights Act had outlived its usefulness. Justice Marshall declined "this invitation to overrule Congress' judgment that the 1975 extension was warranted."⁷⁹ Instead, the Court found that the considerable history of racism in the country, and the efficacy of the VRA, affirmed Congress' decision to extend the Act as "plainly a constitutional method of enforcing the Fifteenth Amendment."⁸⁰

B. *City of Boerne v. Flores* and Congress' Remedial Power

As discussed, the Warren and Burger Courts interpreted Congress' Fourteenth Amendment enforcement power broadly. Since the last challenge to the Act, however, the Court has become increasingly responsive to objections to Congress' power under the Fourteenth Amendment. Beginning in the mid-1990s, the Rehnquist Court struck down a series of statutes aimed at combating discrimination as exceeding Congress' enforcement power, significantly limiting Congress' ability to act under Section 5 of the Fourteenth Amendment.⁸¹ Even as it did

⁷² *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (quoting *Ex Parte Virginia*, 100 U.S. at 345-46).

⁷³ *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

⁷⁴ *Id.* at 173.

⁷⁵ *Id.* at 177.

⁷⁶ *Id.*

⁷⁷ *Id.* at 179 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

⁷⁸ *Id.*

⁷⁹ *Id.* at 180.

⁸⁰ *Id.* at 182.

⁸¹ Given their parallel language and history, the Court has "always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive." *Lopez v. Monterey County*, 525 U.S. 266,

so, however, the Court has reemphasized that the remedies offered by the VRA are congruent and proportional to the harm of the voting discrimination at issue and a proper exercise of congressional power. The ACLU's recommendations for renewing the VRA remain well within Congress' authority to reauthorize.

The first in this series of cases was *City of Boerne v. Flores*, in which the Court struck down the Religious Freedom Restoration Act (RFRA) on the ground that it exceeded Congress' enforcement power under the Fourteenth Amendment.⁸² RFRA was designed to prohibit the government from substantially burdening a person's exercise of religion unless the government could demonstrate the burden was narrowly tailored to further a compelling government interest.⁸³ The Court in *Boerne* acknowledged that the enforcement provision is a "positive grant of legislative power to Congress" and that the power should be understood in broad terms.⁸⁴ The Court, however, distinguished between Congress' "remedial" power to enforce the Amendment's provisions, and "the power to decree the substance of the Fourteenth Amendment's restrictions on the States."⁸⁵

While the line between remedial action and substantive interpretation is admittedly not easy to discern, the Court proposed a test to be applied in determining whether Congress is acting appropriately under the Fourteenth Amendment: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."⁸⁶ Because the Court found that Congress had not compiled enough evidence of laws that discriminated on the basis of religion, RFRA was not a congruent or proportional response to constitutional violations by the states and, therefore, exceeded Congress' enforcement power.⁸⁷

Significantly, the Court in *Boerne* explicitly pointed to the Voting Rights Act as an example of appropriate congruent and proportional remedial action by Congress. The Court, in distinguishing it from inappropriate acts, cited several features of the VRA. These included the finite term of the Act's duration, its limited geographical scope, the vast record of abuse between the original enactment and the 1982 reauthorization as reflected in the congressional record, and the bailout provisions, which all tended to ensure the VRA's reach is limited only to those cases in which constitutional violations are most likely.⁸⁸ While the Court was quick to say that "termination dates, geographic restrictions, or egregious predicates" are not required for Fourteenth Amendment legislation, they are highly relevant, for "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5" of the Fourteenth Amendment.⁸⁹

294 n.6 (1999). Therefore, an analysis of the Court's jurisprudence related to § 5 of the Fourteenth Amendment is critical to analyzing the constitutionality of the Voting Rights Act, enacted under § 2 of the Fifteenth Amendment.

⁸² *City of Boerne v. Flores*, 521 U.S. 507, 511, 532-36 (1997).

⁸³ *Id.* at 515-16.

⁸⁴ *Id.* at 517-18.

⁸⁵ *Id.* at 519.

⁸⁶ *Id.* at 520.

⁸⁷ *Id.* at 535.

⁸⁸ *Id.* at 533.

⁸⁹ *Id.* at 533.

C. Application of Section 5 is a Congruent and Proportional Remedy

The Supreme Court has found the Section 5 coverage formula to be “rational in both practice and theory” because it was based on evidence of recent, actual discrimination in those jurisdictions that employed tests and devices related to voting.⁹⁰ Based on the record that has been developed in advance of this reauthorization process, application of Section 5 and its coverage formula remain a congruent and proportional remedy.

Congruence requires an agreement “between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.”⁹¹ Preclearance under Section 5 is a remedy clearly in agreement with preventing ongoing voting rights abuses. Considering numerous factors, including the Court’s previous characterization of voting rights abuses as a “blight” that had “infected the electoral process in parts of our country for nearly a century,” the availability of the bailout option, and the extensive record of continued voting rights discrimination developed in the congressional record to-date, a limited-duration extension of preclearance is in congruence with the ongoing danger of voting discrimination.⁹²

The proportionality prong of the *Boerne* test looks at whether a relationship of comparative magnitude exists between the proposed remedy and the supposed remedial objective so that it can be “understood as responsive to, or designed to prevent, unconstitutional behavior.”⁹³ Essentially, the proportionality inquiry looks to whether there is a tight fit between the injury and the remedy that serves to ensure Congress is truly acting in a remedial capacity, and not substantively determining what actions are unconstitutional.

The Court has pointed to several features of Section 5 that ensure a proportional relationship: Section 5 does not apply nationally, but only to limited jurisdictions with histories of voting discrimination; the bailout provisions allow jurisdictions to avoid preclearance by demonstrating they have been free of discriminatory voting practices; and Section 5 contains a sunset provision under which it lapses without reauthorization from Congress. Each of these features, and their effect on the constitutionality of a reauthorized Section 5 containing the same coverage formula, are discussed below, in turn.

1. The coverage formula limits the geographic scope of preclearance obligations.

The coverage formula was meant to reach jurisdictions with a long and pervasive history of voting discrimination against minorities – using objective factors to identify places where minority voter participation was low and where discriminatory tests or devices had been employed. It was not meant to take a snapshot of a particular date, but to protect against the risk of ongoing violations. The date in the formula itself was merely a starting point used to identify appropriate jurisdictions for the preclearance remedy. In 1982, Congress was concerned with evidence of continuing violations between 1975 and 1982, when determining whether preclearance was still an appropriate remedy. Congress’ role in 1982, as it will be now, is to

⁹⁰*South Carolina v. Katzenbach*, 383 U.S. at 330.

⁹¹*Boerne*, 521 U.S. at 530.

⁹²*Id.* at 525 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 308).

⁹³*Id.* at 532.

assess the situation in covered jurisdictions and determine whether evidence exists to support continuing coverage. As indicated in the report of the ACLU's Voting Rights Project summarizing its litigation docket of 300 voting rights cases filed since the 1982 reauthorization, substantial evidence exists to show that covered jurisdictions are still engaged in actions that bar full minority participation in elections.⁹⁴ Considering the magnitude of the harm, Section 5 and the coverage formula remain a necessary and proportional remedy. If certain jurisdictions, however, can demonstrate that they should no longer be covered, bailout remains the appropriate way to grant relief.

2. The bailout provision prevents overly broad application of the preclearance obligations

Congress designed the bailout formula to allow a jurisdiction that could sufficiently demonstrate it had taken steps to remove bars to minority enfranchisement, to be released from preclearance. The bailout formula ensures that the coverage formula is not overbroad or otherwise constitutionally flawed.

While few jurisdictions have bailed out, the mechanism may be operating just as Congress planned⁹⁵ – more jurisdictions are unable to utilize it simply because they do not qualify. If many of the covered jurisdictions cannot show they have complied with the Act and have been free of objections, discriminatory tests and devices, this is strong evidence that they remain the appropriate targets for federal oversight and that the coverage formula is adequately tailored towards remedying unconstitutional behavior. Similarly, if these jurisdictions are unable to demonstrate that they have eliminated the procedures that limited or diluted minority participation or that they have made constructive efforts to increase minority participation, the historical pattern of discrimination has not reached its end. According to J. Gerald Hebert, the legal counsel to *all* of the jurisdictions that have bailed out since the 1982 amendments to the VRA, the factors to be demonstrated are easily proven for those jurisdictions that do not discriminate in their voting practices.⁹⁶

3. The sunset provision addresses a temporary problem.

The temporary nature of the preclearance provisions has helped to ensure the proportionality of the VRA.⁹⁷ The sunset provisions have required Congress to revisit the situation faced by minority voters in covered jurisdictions on four occasions since 1965. The continuing inclusion of expiration dates in Section 5 further emphasizes that Congress' intention was to assess continuing violations at the time of renewal, not to merely reassess the situation at the date of coverage.

⁹⁴ See generally AMERICAN CIVIL LIBERTIES UNION, VOTING RIGHTS PROJECT, VOTE: THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT – VOTING RIGHTS LITIGATION, 1982-2006 (March 2006) [hereinafter ACLU VRP Report].

⁹⁵ S. REP. NO. 97-417, at 60 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 239.

⁹⁶ Written Testimony of J. Gerald Hebert, Former Acting Chief, Civil Rights Div., U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Oct. 20, 2005), available at <http://judiciary.house.gov/media/pdfs/herbert102005.pdf>.

⁹⁷ See, e.g., *Boerne*, 521 U.S. at 533.

Because of the bailout option, jurisdictions are really only covered as long as they need to be, after which they can take the necessary action to remove themselves from federal oversight. If Section 5 sunsets in 2007, however, the formerly covered jurisdictions will have escaped the need to make a showing of real progress. This was certainly not Congress' intent in 1982, and would defeat the goal of the preclearance provisions to bring about demonstrable reform in areas with a history of voting discrimination. Extending the VRA now, with another sunset date of 25 years, is necessary so that "recalcitrant" jurisdictions can make the changes they need to show that coverage should be discontinued.⁹⁸

D. Congressional Record Necessary to Reauthorize the VRA

The Court's recent cases regarding Congress' evidentiary burden are crucial to understanding what lawmakers must do in order to enact an extension of the Act that will withstand constitutional scrutiny. While the Court has notably raised the evidentiary burden in recent years, there are indications that the burden may be lessened when Congress is dealing with legislation that either addresses a fundamental right or is subject to a heightened level of scrutiny.

In *Board of Trustees of University of Alabama v. Garrett*, the Supreme Court indicated that it will search for an adequate evidentiary record to support federal legislation that restricts state actions deemed unconstitutional.⁹⁹ The majority pointed to the VRA as an example of the ideal legislative record needed to support remedial legislation. The Court felt that in 1965 and again in 1982, "Congress documented a marked pattern of unconstitutional action by the States" that was sufficient to convince the Court that the VRA was a justified response to the states' actions.¹⁰⁰

Notably though, the Court has indicated that it will require less of an evidentiary record when Congress is dealing with a fundamental right or a suspect class. In the two most recent Supreme Court cases on congressional power under the Fourteenth Amendment, *Nevada Department of Human Resources v. Hibbs* and *Tennessee v. Lane*, the Court appears to have backed away from the heightened evidentiary standard imposed in *Garrett*, and may be willing to accept a lower evidentiary showing to support remedial legislation.¹⁰¹

Hibbs involved a challenge to the Family and Medical Leave Act of 1993 (FMLA). The Court held that Congress' evidence of gender-based discrimination by the states was sufficient to justify imposing the FMLA's mandatory leave policy on the states.¹⁰² The Court distinguished *Garrett* by noting that a higher level of scrutiny applies in assessing the constitutionality of legislation that addresses discrimination on the basis of gender, as is the case in *Hibbs*, compared to rational basis scrutiny that applied in *Garrett*.¹⁰³ Given this distinction, the Court felt that "it

⁹⁸ S. REP. NO. 97-417, at 60 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 239 (stating that the sunset date was expected to affect only "those recalcitrant jurisdictions which have not bailed out by then.").

⁹⁹ 531 U.S. 356 (2001).

¹⁰⁰ *Id.* at 373-74.

¹⁰¹ *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

¹⁰² *Hibbs*, 538 U.S. at 735.

¹⁰³ *Id.* at 735.

was easier for Congress to show a pattern of state constitutional violations.”¹⁰⁴ Because race discrimination is subject to strict scrutiny, an even higher level of scrutiny than applies to gender discrimination, it follows that the Court could find it even easier for Congress to show the requisite pattern of racial discrimination required to uphold Section 5.¹⁰⁵

While an extensive evidentiary record for reauthorization in 2006 exists, the reasoning of the Court in *Tennessee v. Lane* also seems to indicate that an evidentiary burden to support Section 5 could be further lessened from *Garrett*. *Lane* concerned the question of whether a state could be subject to a suit for damages under Title II of the ADA for failing to make its courthouses reasonable accessible to the disabled. Because access to the courts was so fundamental, the Court upheld Congress’ power to make the states liable in this context stating that “the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent.”¹⁰⁶ Without explicitly acknowledging it was doing so, the Court upheld the statute with a significantly lower evidentiary showing than it had required in *Garrett*, allowing anecdotal evidence and evidence of non-state governmental actors to be considered.¹⁰⁷ Significantly, the Court allowed the use of older evidence of discrimination – most of the evidence was gathered in the 1980s and 1990s, while the decision was in 2004. What flows from the logic of *Lane* is that Congress may rely upon general evidence of racially discriminatory conduct in voting by state, county, and city officials in covered jurisdictions to support renewed preclearance, especially where Congress seeks to protect fundamental rights.

While multiple reports and testimony submitted as part of this reauthorization process abound with evidence of vote dilution, racial bloc voting, intimidation, and discrimination, in reauthorizing the VRA, the *Hibbs* and *Lane* approach makes logical sense. The greater the harm Congress seeks to address, the greater the power Congress has to remedy that harm. Interference with a fundamental right, such as voting, should impart Congress with significant leeway to determine how best to prevent and remedy the damage. Congress has access to a very detailed record of voting abuses since 1982 more than sufficient to meet the *Boerne* test, yet the *Lane* and *Hibbs* indicate the Court may be willing to relax the application of the *Boerne* test when a fundamental right is at stake.¹⁰⁸

It is clear that Section 5 put us on the path to equality. We have started down a road of great promise, but have not gone far enough to abandon a protection that is responsible for that progress and a deterrent against jurisdictions backsliding. Much work remains.

¹⁰⁴ *Id.* at 736.

¹⁰⁵ *Id.* (stating that in *South Carolina v. Katzenbach* the Court upheld the VRA, “[b]ecause racial classifications are presumptively invalid” and therefore “most of the States’ acts of race discrimination violated the Fourteenth Amendment.”).

¹⁰⁶ *Lane*, 541 U.S. at 523.

¹⁰⁷ *Id.* at 524-29.

¹⁰⁸ It should be noted, however, that since both *Hibbs* and *Lane*, the composition of the Court has changed. Justice O’Connor’s vote may be the key to the “heightened scrutiny – lower evidentiary standard” theory, making the outcome uncertain in light of her recent replacement by Justice Alito.

IV. IMPACT OF THE VRA: CONTINUING PROBLEMS AND CONTINUING NEED

There are numerous and ongoing violations of the Act which hurt minority and limited English proficient communities. Recent violations of the expiring provisions of the VRA highlight their ongoing need. A vital and robust VRA, giving these communities the ability to elect candidates of choice, is critical in order for these communities to have fair and responsive representation.

A. Impact of Section 5 and Elected Officials' Responsiveness to Underserved Communities

Voting discrimination persists; Section 5 violations are not a thing of the past. For example, since 1968, when DOJ first began to interpose objections to voting changes, more than 1,000 objections have been lodged.¹⁰⁹ The majority of these objections, 56%, have been lodged since the last reauthorization in 1982.¹¹⁰ Between January 1, 2000 and January 1, 2005, the U.S. Attorney General interposed 40 objections, 37 of which involved a change made by a local entity.¹¹¹ A single objection can protect thousands of voters from unlawful discrimination for many years. The ACLU alone has filed 300 voting rights cases over the past 25 years.

The facts behind these statistics attest to the ongoing problem of discrimination in voting and the central importance of retaining Section 5 preclearance. There is abundant, modern day evidence showing Section 5 is still needed to protect the equal right to vote of minorities in covered jurisdictions. Charleston County, South Carolina is a case in point. In 2003, South Carolina enacted legislation adopting the identical method of elections for the board of trustees of the Charleston County School District that had earlier, in a case involving the county council, been found to dilute minority voting strength in violation of Section 2.¹¹² Under the pre-existing system, school board elections were non-partisan, multi-seat contests decided by plurality vote, which allowed minority voters the opportunity to “bullet vote,” or concentrate their votes on one or two candidates and elect them to office. That possibility would have been effectively eliminated under the proposed new partisan system.

In denying preclearance to the county's submission, DOJ concluded “[t]he proposed change would significantly impair the present ability of minority voters to elect candidates of choice to the school board and to participate fully in the political process.”¹¹³ DOJ noted further that:

every black member of the Charleston County delegation voted against the proposed change, some specifically citing the retrogressive nature of the change. Our investigation also reveals

¹⁰⁹ PROTECTING MINORITY VOTERS, *supra* note 41, at 4.

¹¹⁰ *Id.*

¹¹¹ Michael J. Pitts, *Let's Not Call the While Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612 (2005).

¹¹² *United States v. Charleston County and Moultrie v. Charleston County Council*, 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).

¹¹³ Letter from R. Alexander Acosta, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to C. Havird Jones, Jr., Senior Assistant Attorney Gen., South Carolina (Feb. 26, 2004), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/l_022604.html.

that the retrogressive nature of this change is not only recognized by black members of the delegation, but is recognized by other citizens in Charleston County, both elected and unelected.¹¹⁴

Section 5 thus prevented the state from implementing a new and retrogressive voting practice – one that was understood to dilute black voting strength and ensure white control of the school board.

Another example of Section 5’s ongoing importance can be found in Georgia. Following the 2000 Census, the City of Albany, Georgia, adopted a new redistricting plan for its mayor and commission to replace an existing malapportioned plan, but DOJ rejected it under Section 5. DOJ noted that while the black population had steadily increased in Ward 4 over the past two decades, subsequent redistrictings had decreased the black population “in order to forestall creation of a black district.”¹¹⁵ The letter of objection concluded it was “implicit” that “the proposed plan was designed with the purpose to limit and regress the increased black voting strength in Ward 4, as well as in the city as a whole.”¹¹⁶ A subsequent court ordered plan remedied the vote dilution in Ward 4.¹¹⁷ In the absence of Section 5, elections would have gone forward under a plan in which purposeful discrimination was implicit. The plan could only have been challenged in time-consuming vote dilution litigation under Section 2, in which the minority plaintiffs would have borne the burden of proof and expense.

In another case in Georgia, after the state failed to enact remedial plans for the house and senate, the Georgia three-judge court appointed a special master to prepare court ordered plans. Under the special master's plan, nearly half of the black house members were paired, or placed in a house district with one or more other incumbents.¹¹⁸ As a result of the pairing, a disproportionate number of African American house members would likely not have been returned to office following the next election. A number of the paired black incumbents were chairs or officers of house committees, and some were also senior members of the house.¹¹⁹ Their loss would inevitably have adversely affected the representation of the black community in the state legislature.

The Georgia Legislative Black Caucus, represented by the ACLU, argued as *amicus curiae*, that the pairing of black incumbents caused a regression in minority voting strength within the meaning of Section 5, and created a discriminatory result within the meaning of Section 2.¹²⁰ The three-judge court agreed that court-ordered plans should “comply with the racial-fairness mandates of § 2 of the Act, as well as the purpose-or-effect standards of § 5,” and

¹¹⁴ *Id.*

¹¹⁵ Letter from J. Michael Wiggins, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Al Grieshaber, Jr., City Attorney, Albany, Ga. (Sept. 23, 2002), *available at* http://www.usdoj.gov/crt/voting/sec_5/tr/1_092302.htm.

¹¹⁶ *Id.*

¹¹⁷ *Wright v. City of Albany, Georgia*, 306 F. Supp. 2d 1228 (M.D. Ga. 2003).

¹¹⁸ ACLU VRP REPORT, *supra* note 94, Executive Summary at 24.

¹¹⁹ *Id.*; *see also* SENATE PUBLIC INFORMATION OFFICE & HOUSE PUBLIC INFORMATION OFFICE, MEMBERS OF THE GENERAL ASSEMBLY OF GEORGIA, SENATE AND HOUSE OF REPRESENTATIVES, FIRST SESSION OF 2003-2004 TERM (2003).

¹²⁰ ACLU VRP REPORT, *supra* note 94, Executive Summary at 24.

instructed the special master to draw another plan taking into account the unnecessary pairing of incumbents.¹²¹ A new plan was drawn and it unpaired virtually all the black incumbents. As the court found in adopting the new plan, there was “no retrogression” from the pre-existing benchmark plans. Indeed, the number of majority black senate districts was the same at 13, while the number of majority black house districts was actually increased from 39 to 44.¹²² The state appealed, but the Supreme Court affirmed the decision of the three-judge court.¹²³

In the absence of Section 5, the kind of plan adopted by the legislature would almost certainly have been far different from the one it adopted under federal oversight. In addition, the plan drawn by the three-judge court would likely have been different in its treatment of majority black districts in the absence of the non-retrogression standard of Section 5.

In Louisiana, no state house of representatives redistricting plan has ever been precleared since the VRA passed forty years ago. But in 2003, the state wanted to move forward with redistricting plans anyway, and deleted those provisions in the state redistricting guidelines that set out Louisiana's obligations under the VRA.¹²⁴ The state also chose to spend taxpayer money to protect a redistricting plan that was designed to diminish the political opportunities of African-American voters.¹²⁵ After litigation challenged these practices, a federal court decision forced the state to withdraw its original plan and restore a district where African Americans had an opportunity to elect a candidate of choice.¹²⁶

Latino voters have had similar trouble in Texas, where in 2003, a redistricting plan was drawn to purposefully limit Latino political representation.¹²⁷ The VRA was used to stop the plan, restore the districts, and make sure Latinos have a voice in the statehouse.

The need to renew the preclearance provisions is also especially critical to stop the ongoing abuses in Indian Country.¹²⁸ For example, in March 2005, the ACLU sought to enjoin South Dakota's implementation of House Bill 1265, an emergency measure which allows counties to redraw their county commission district lines more than once per decade.¹²⁹ The injunction was sought by the ACLU on behalf of four Native American plaintiffs on the grounds that HB 1265 violated the VRA, as well as a consent decree issued two-and-a-half years ago in *Quiver v. Nelson*, another voting case brought by the ACLU. In July 2005, a three-judge panel granted the injunction against the state, ruling unanimously that state officials must comply with Section 5 and obtain prior approval from DOJ before implementing the new law. The panel noted that the state's action “gives the appearance of a rushed attempt to circumvent the

¹²¹ *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004).

¹²² *Id.* at 1366.

¹²³ *Cox v. Larios*, 542 U.S. 947 (2004).

¹²⁴ American Civil Liberties Union, *Voting Rights: About the VRA*, <http://www.votingrights.org/more.php> (last visited Feb. 28, 2006) [hereinafter *About the VRA*].

¹²⁵ *Id.*

¹²⁶ *Id.*; NAACP Legal Defense and Educational Fund, Inc., *Louisiana Redistricting* (2003), available at <http://www.naacpldf.org/content.aspx?article=77>.

¹²⁷ *About the VRA*, *supra* note 124.

¹²⁸ See Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004-2005).

¹²⁹ *About the VRA*, *supra* note 124.

VRA.”¹³⁰ The opinion noted that South Dakota officials have for decades avoided complying with the VRA by failing to seek prior approval from federal officials before implementing more than 700 changes in election law or voting procedures that effect residents of Shannon and Todd Counties, which are covered by Section 5.¹³¹ Plaintiffs showed that for over 25 years defendants have intended to violate and have violated the preclearance requirements of the VRA.¹³² The fact that Secretary of State Chris Nelson had been found to have violated the VRA in an earlier lawsuit in 2002 was another factor cited by the judges in issuing their injunction.¹³³

Moreover in 2004, a federal court determined that South Dakota discriminated against Native American voters by packing them into a single district to remove their ability to elect a second representative of their choice to the state legislature.¹³⁴ This case was brought by Alfred Bone Shirt and three fellow Indians, represented by the ACLU, against the state for failing to submit a legislative redistricting plan for preclearance. In invalidating the plan, the court detailed the state’s continuing discrimination in voting against Native Americans, including illegal denials of the right to vote, dilutive voting schemes, intimidation, non-compliance with the language assistance provisions, and lack of access to polling sites.¹³⁵

Unfortunately, these examples are not anomalies; there are countless other instances of attempts to disfranchise minority voters and to dilute minority voting strength in Section 5 covered jurisdictions.¹³⁶

The previous examples indicate that the VRA still has a vital role to play in preventing on-going discrimination. The VRA has been instrumental in giving minority communities fair and responsive representation they would not otherwise have. Decades of experience strongly suggest that in racially polarized environments – common in the jurisdictions covered by the VRA – minority communities that do not constitute a majority of the district can be disregarded by hostile or indifferent officeholders.¹³⁷ Recent reports indicate the sharp racial differences in policy preferences.¹³⁸ One report concluded that “Southerners in general – and Deep Southerners in particular – are the least likely to endorse policies intended to ameliorate racial inequality.”¹³⁹ Therefore, when minority communities are given the opportunity to elect candidates of their choice, those elected officials have been, and are more likely to be, responsive to their constituencies.

¹³⁰ *Quiver v. Nelson*, No. 02 Civ. 5069, slip op. at 13 (D.S.D. July 13, 2005), available at <http://www.aclu.org/FilesPDFs/district%20court%20ruling%20in%20quiver%20v.%20nelson.pdf>.

¹³¹ *Id.* at 13.

¹³² *Id.* at 7.

¹³³ *Id.* at 13.

¹³⁴ *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).

¹³⁵ *Id.* at 1018-34.

¹³⁶ See generally ACLU VRP REPORT, *supra* note 94.

¹³⁷ See Written Testimony of Theodore M. Shaw, President and Director-Counsel of the NAACP Legal Defense and Education Fund, Inc., *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15 (Nov. 9, 2005), available at <http://judiciary.house.gov/media/pdfs/shaw110905.pdf>.

¹³⁸ See, e.g., PROTECTING MINORITY VOTERS, *supra* note 41, at 39.

¹³⁹ *Id.* at 40 (quoting Steven A. Tuch and Jack K. Martin, *Regional Differences in Whites’ Racial Policy Attitudes*, in RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 173 (Steven A. Tuch and Jack K. Martin eds., 1997)).

Indeed, evidence demonstrates that increased black representation has resulted in state legislatures giving greater priority to policy areas found to be important to black elected officials and their constituencies.¹⁴⁰ For example, the creation of the Black Legislative Caucus in South Carolina was a direct result of the civil rights movement and the VRA.¹⁴¹ The Caucus has been responsible for significant tangible benefits for minority communities in the state. After the passage of the VRA, in the late 1960s a few African Americans won local offices in the state. But it was not until a 1974 lawsuit under the VRA, forcing the state to redraw district lines, that the number of districts that had high percentage of African American voters increased and the number of black legislators rose from 3 to 13.¹⁴²

This small group became the Legislative Black Caucus in 1975, which for the first time in South Carolina's history enabled black legislators to focus on and be responsive to the needs of their black constituencies. This group convinced the white speaker of the house to appoint Caucus members to all permanent committees in the state house so that African Americans could provide input on all legislative matters.¹⁴³ They played an integral role in supporting the 1975 extension of the VRA, and in local matters, played a key part in expanding the state kindergarten system.¹⁴⁴

By the mid 1980s, the Caucus, which had grown to 21 members in the state house and senate, was responsible for several additional measures including a procurement statute that ensured minority businesses a greater opportunity to pursue state contracts, a Governor's Office for Small and Minority Business, and the creation of a State Human Affairs Commission.¹⁴⁵

By 1994 the Legislative Black Caucus had increased to 25 and began to push for more majority-minority districts – districts where a single minority constituency constitutes over 50% of the voting age population. Caucus members were concerned that non-minority officials, even within their own party, were not responsive to the minority constituencies and not sensitive to issues important to the Caucus, such as welfare reform, jobs, and economic development.¹⁴⁶ The Caucus continued to fight for and added to its list of accomplishments the election of African American judges, more money for traditionally black colleges, recruitment of more black teachers, and the building of rural health centers.¹⁴⁷ And in 1998, the Caucus had a significant achievement with the placing of a referendum measure on the November ballot that struck down the constitutional prohibition against inter-racial marriage.¹⁴⁸ All these tangible benefits were the direct result of the successes of the VRA. Prior to its passage, African Americans had been denied resources and opportunities; their needs were often ignored and discounted. Officials

¹⁴⁰ See Chris T. Owens, *Black Substantive Representation in State Legislatures from 1971-1994*, 86 SOCIAL SCI. 779, 780 (Dec. 2005) (documenting increased funding for both healthcare and welfare spending where the percentage of black state legislators examined increased).

¹⁴¹ Robert E. Botsch, Professor of Political Science, University of South Carolina Aiken, *Legislative Black Caucus* (August 1999), <http://www.usca.edu/aasc/blackcaucus.htm>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* Although the prohibition had long since been in conflict with federal law, its placement on the ballot and subsequent passage were of symbolic importance to members of the Caucus and their constituencies. *Id.*

elected because of the equal voting opportunities afforded minority citizens were more attuned to the needs of the minority communities in South Carolina.

The Georgia Legislative Black Caucus has a similar story. Over the past forty years African American legislators in Georgia have been responsive to their constituents and opened doors for increased African American leadership and economic opportunities.¹⁴⁹ Throughout the years, African American elected officials, who have been provided opportunities because of the VRA and other civil rights statutes, have consistently supported bills that have led to significant, positive ramifications for their constituencies and the state as a whole. For example, black members of the Georgia legislature helped enact the first fair housing act, sponsored legislation to help recipients of unemployment benefits, litigated over the appointment of more African American judges, and worked to limit the impact of predatory lending among minority, elderly, and low-income constituencies.¹⁵⁰ In order to provide needed legal protections for their constituencies, members of the Caucus have also authored anti-Ku Klux Klan legislation and introduced hate crime bills to protect victims of crimes based on race, religion, gender, ethnicity, national origin, and sexual preference.¹⁵¹

Similar tangible benefits have been documented in other states and jurisdictions because of the impact of the VRA and its deterrent effect. For example, in North Carolina in the mid-1990s, the predominately white neighborhoods to the west of Battleboro were being annexed by the city of Rocky Mount, but the city's leaders at first refused to annex the predominately black community of Battleboro.¹⁵² Annexation would bring municipal services to the residents of Battleboro as well as give them a vote in local elections. At the time, Rocky Mount was a majority white city, although city planners projected that by the 2000 Census, Rocky Mount would be a majority black city; annexing Battleboro would increase this trend.¹⁵³ One of the key factors that led the city to finally agree to annex this community was the fact that community members were prepared to vigorously oppose any further annexation of white neighborhoods in the Section 5 preclearance process. This pressure ultimately led the city to back down and agree to annex Battleboro.¹⁵⁴ Today, the residents of Battleboro, the majority of whom are African American, enjoy municipal services, the right to vote in city elections, rising property values, and a higher standard of living because of Battleboro's incorporation into the City of Rocky Mount – results unattainable without the continuing reach of Section 5.¹⁵⁵

B. Impact of Section 203 and Elected Officials' Responsiveness to Underserved Communities

As discussed, the language provisions of the VRA keep the franchise open to all citizens, who deserve the equal opportunity to exercise their constitutional right to vote. As Senator Orrin Hatch observed during the 1992 hearings, “[t]he right to vote is one of the most fundamental of

¹⁴⁹ Georgia Legislative Black Caucus, Inc, *History*, <http://www.galbc.org/history.htm> (last visited Mar. 6, 2006).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² LCCR/LCCREF, *Protect Voting Rights: Renew the VRA, Learn More: Real Stories, Battleboro, North Carolina*, <http://renewthevra.civilrights.org/resources/detail.cfm?id=186> (last visited Mar. 6, 2006).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

human rights. Unless government assures access to the ballot box, citizenship is just an empty promise. Section 203 of the Voting Rights Act, containing language assistance election requirements, is an integral part of our government's assurance that Americans do have such access."¹⁵⁶ The need for federal oversight on minority language assistance continues. Since 2001, DOJ has filed more minority language cases than in the entire previous 26 years in which these provisions have been applicable.¹⁵⁷

The VRA has precipitated many of the achievements of Latinos in the United States. For instance, before the language assistance provisions were added to the VRA in 1975, many Spanish-speaking citizens did not register to vote because they could not read the election material and could not communicate with poll workers. When the VRA was enacted, about 2.5 million Latinos were registered to vote. Today, there are 9.3 million Latinos registered to vote, and in the past three decades, participation has tripled.¹⁵⁸ In the 1976 presidential election, Latinos cast about 2 million ballots and in 2004 that number climbed to 7.5 million.¹⁵⁹ In 1974, there were about 1,200 Latino elected officials and today there are 6,000.¹⁶⁰

Section 203 has also removed barriers to voting and opened up the political process to thousands of Asian Americans, many of them first-time voters and new citizens. According to the Asian American Legal Defense and Education Fund's 2004 exit poll of 11,000 Asian American voters, almost 33% of all respondents needed some form of language assistance in order to vote, and 46% of respondents who needed language assistance were first time voters.¹⁶¹

Many communities still rely on the VRA to maintain full participation in local, state, and federal elections. Recent violations of Section 203, however, highlight its ongoing need. For example, in the late 1990s, DOJ sued Passaic County and city election officials in New Jersey for their failure to comply with the language assistance provisions. This resulted in a comprehensive consent decree that forced election officials to engage in recruitment of bilingual election workers, publish election notices and materials in Spanish, and provide voter assistance to Spanish speaking voters.¹⁶²

¹⁵⁶ H.R. REP. NO. 104-728, at 25-26 (1996) (quoting *Voting Rights Act Language Assistance Amendments of 1992: Hearings on S. 2236 Before the Subcomm. On the Constitution of the Senate Comm. On the Judiciary*, S. Hrg. 102-1066, 102d Cong., 2d Sess., at 134 (1992) (statement of Sen. Hatch)).

¹⁵⁷ Written Testimony of Bradley J. Schlozman, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Nov. 8, 2005) [hereinafter Schlozman 203 Testimony], available at <http://judiciary.house.gov/media/pdfs/schlozman110805.pdf>.

¹⁵⁸ *Linda Sánchez Speaks Out*, *supra* note 4.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Written Testimony of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (Nov. 8, 2005) [hereinafter Fung Testimony], available at <http://judiciary.house.gov/media/pdfs/fung110805.pdf>.

¹⁶² Written Testimony of Juan Cartagena, General Counsel, Community Service Society, *Oversight Hearing on the Voting Rights Act: Section 203 – Bilingual Election Requirements Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 9 (Nov. 9, 2005), available at <http://judiciary.house.gov/media/pdfs/cartagena110905.pdf>.

Similarly, in 2003, in Harris County, Texas, officials did not provide language assistance for Vietnamese citizens. DOJ intervened and, as a result of the federal oversight, Vietnamese language assistance was required, voter turnout doubled, and the first Vietnamese American, Hubert Vo, was elected to the state legislature in 2004.¹⁶³ His impact on the daily lives of Vietnamese communities has already been felt. Recently, Vo was honored by the Vietnamese community of Louisiana for his ongoing efforts to find food, shelter, and relief for more than 20,000 Vietnamese Americans who were evacuated in the wake of Hurricanes Katrina and Rita.¹⁶⁴ Vo helped raise more than \$500,000 in emergency funds to help evacuees in the Houston area and played a key role on Mayor Bill White's task force providing aid, housing, food, clothes, health care, jobs and other assistance.¹⁶⁵

Section 203 has also proven its effectiveness for Asian American communities in New York. The Asian American Legal Defense and Education Fund reports accounts of voters being told that they must learn English at home before they will be allowed to vote.¹⁶⁶ Yet because of Section 203, in 2001, first-generation citizens in New York City had the ability to vote independently. The city's implementation of language assistance has enabled more than 100,000 Asian Americans not fluent in English to vote.¹⁶⁷ As a direct result, in 2001, John Liu was elected to the New York City Council, becoming the first Asian American elected to a major legislative position in New York – the U.S. city with the nation's largest Asian American population.¹⁶⁸ In addition, Jimmy Meng became the first Asian American member of the New York State Assembly in 2004.¹⁶⁹ Both Liu and Meng were elected in Queens County, one of the three counties in New York City covered by Section 203.

Moreover, since DOJ brought suit against San Diego County, California in 2001 to enforce the language minority provisions of Section 203, voter registration among Vietnamese Americans is up over 37%, and Latino and Filipino American registration has risen by over 20%.¹⁷⁰ Similarly, in Yakima County, Washington, Latino voter registration is up over 24% because of a DOJ Section 203 lawsuit.¹⁷¹

According to a recent study, the VRA and its language provisions have also had a tremendous impact on the daily lives of Native American voters.¹⁷² In Washington State and in South Dakota, Native Americans helped determine federal race winners.¹⁷³ Similarly, in

¹⁶³ Fung Testimony, *supra* note 161, at 3.

¹⁶⁴ Hubert Vo, Texas House of Representatives District 149, *Vo Honored for Hurricane Relief Efforts* (Dec. 2, 2005), available at http://www.hubertvo.com/press12_02_05.htm.

¹⁶⁵ *Id.*

¹⁶⁶ *Ballot Box Equality*, *supra* note 60.

¹⁶⁷ Rep. John Lewis, Op-Ed., *Keeping the Polls Open*, N.Y. TIMES, Aug. 6, 2005, at A13.

¹⁶⁸ *Ballot Box Equality*, *supra* note 60.

¹⁶⁹ Fung Testimony, *supra* note 161, at 3.

¹⁷⁰ Schlozman 203 Testimony, *supra* note 157, at 4.

¹⁷¹ *Id.*

¹⁷² FIRST AMERICAN EDUCATION PROJECT, NATIVEVOTE2004: A NATIONAL SURVEY AND ANALYSIS OF EFFORTS TO INCREASE THE NATIVE VOTE IN 2004 AND THE RESULTS ACHIEVED 4 (2005) [hereinafter NATIVEVOTE2004]. Currently there are 81 local jurisdictions across 18 states required to provide minority language assistance in voting pursuant to Section 203 because of their American Indian populations. Of these 81 jurisdictions, 31 are already covered under Section 5. See ACLU VRP REPORT, *supra* note 94, Appendix C at 865.

¹⁷³ NATIVEVOTE2004, *supra* note 172, at 4.

Arizona, Native American voters, participating in higher numbers, decided the fate of state office candidates and ballot measures.¹⁷⁴

For the first time, candidates for statewide and federal offices have become aware of the importance of Native American constituencies, even though Native Americans were not always successful in electing their preferred candidates.¹⁷⁵ What is changing is that Native American voters only give overwhelming support to candidates with a record of support and responsiveness on Native American issues.¹⁷⁶ Moreover, the study indicated that where a candidate has a consistent record of hostility towards issues of importance to Native American voters, a strong showing of electoral opposition from Native American voters can almost be assured.¹⁷⁷ There is a long documented history of Native American populations suffering from problems resulting from indifferent or hostile treatment by non-Native American elected officials.¹⁷⁸ Without elected representatives who will advocate solutions to the particularized and unique needs of the Native American communities, it is unlikely that such problems will be addressed by general government policies.¹⁷⁹

Section 203 had enabled increasing numbers of minority language citizens to register and cast ballots. It has also been instrumental in adding to the number of federal, state, and local elected officials of Latino, Asian American, and Native American descent. This has translated into tremendous gains for these communities. Still, more remains to be accomplished on the road to equal participation.

C. Impact of the Observers Provisions

Assistance provided by federal examiner and observers in the election process has played an instrumental role in preventing discrimination and increasing minority voter participation. Congress found federal oversight necessary to catch violations of the Act in covered jurisdictions, as well as to serve as a deterrent to such violations.

Post-1982 data reveals that several thousand observers were sent to 622 covered locations.¹⁸⁰ Prior to 1982, observers were sent to 520 covered jurisdictions.¹⁸¹ In Mississippi alone after 1982 there were 250 sites involving 3,000 observers.¹⁸² Five of six southern states accounted for 66% of all post-1982 locations needing observers.¹⁸³ During the 2004 election alone, observers were sent to locations in 25 states.¹⁸⁴ DOJ dispatched 898 federal observers and monitors to 85 jurisdictions.¹⁸⁵ The provisions remain an important tool in not only

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See, e.g.,* PROTECTING MINORITY VOTERS, *supra* note 41, at 43.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 4.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Ballot Box Equality*, *supra* note 60.

¹⁸⁵ PROTECTING MINORITY VOTERS, *supra* note 41, at 64.

protecting the right to vote generally, but also ensuring that Section 5 and Section 203 are properly obeyed and enforced.

According to Barry Weinberg, the former Deputy Chief and Acting Chief of the Voting Section of the Civil Rights Division at DOJ, the federal observer provisions have had a real impact on previously disfranchised voters and the need is still great.¹⁸⁶ He testified that federal observers have witnessed discriminatory treatment of racial and minority language voters in a variety of forms, including taunting and rudeness, ridiculing their need for assistance, and barring them from voting by failing to find their names on lists of registered voters, by refusing to allow them to vote on provisional ballots, or by misdirecting them to incorrect polling places.¹⁸⁷

He also testified that minority language voters suffer additional discriminatory treatment when people who only speak English are assigned as polling place workers in areas populated by minority language voters. Observers have also witnessed polling place workers failing to communicate the voting rules and procedures to voters or failing to respond to voters' questions.¹⁸⁸ In some instances, qualified voters are turned away because poll workers erroneously believe the voters had not furnished all the necessary information, or are unable to understand what the voters are saying.¹⁸⁹ For example, DOJ recently sent observers to Boston to watch its elections. Because of that oversight and abuses they witnessed, DOJ has begun proceedings against the city for failing to meet the needs of language minorities under Section 203.¹⁹⁰

Similarly, in the case *United States v. Berks County*, the court allowed DOJ to deploy observers to Reading, Pennsylvania because of evidence that Latino voters were treated unfairly.¹⁹¹ The court found, based on the observers' work, substantial evidence of hostile and unequal treatment.¹⁹² Because of this evidence, the court issued a permanent injunction that required the county to provide language assistance to Spanish-speaking citizens at all stages of the electoral process.¹⁹³

And finally, as discussed in the previous section on the impact of Section 203, Passaic County, NJ was under a consent decree to comply with the language provisions of the VRA. On the basis of information gathered by the federal observers, DOJ took legal action to ensure the county's compliance with Section 203.¹⁹⁴ Voters thereafter elected the first Latino mayor.¹⁹⁵

¹⁸⁶ See Written Testimony of Barry Weinberg, former Deputy Chief and Acting Chief of the Voting Section of the Civil Rights Division, U.S. Dep't of Justice, *Oversight Hearing on the Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program* (Nov. 15, 2005), available at <http://judiciary.house.gov/media/pdfs/weinberg111505.pdf>.

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Ballot Box Equality*, *supra* note 60.

¹⁹¹ 277 F. Supp. 2d 570, 574 (E.D. Pa. 2003).

¹⁹² *Id.* at 575.

¹⁹³ *Id.* at 583.

¹⁹⁴ PROTECTING MINORITY VOTERS, *supra* note 41, at 65.

¹⁹⁵ *Id.*

Observers have played a major role since the last authorization in deterring and documenting racial discrimination in voting. Evidence collected by observers has served a useful role in covered jurisdictions and observers' continued availability is necessary to ensure fair and equal participation for all voters at the polling places.

V. RESTORING THE VITALITY AND ORIGINAL INTENT OF THE VRA

Since 1982, Supreme Court decisions have chipped away at the strength of the VRA. In addition to the need to reauthorize the expiring provisions of the VRA, the ACLU urges Congress to restore its original vitality.

Current law provides that in order to obtain preclearance under Section 5, a state must demonstrate that a change in a voting practice or procedure does not have a discriminatory purpose or effect.¹⁹⁶ The leading case interpreting this standard is *Beer v. United States*, in which the Supreme Court explained that discriminatory purpose or effect in the preclearance context means that a purpose or effect shall not have a "retrogressive" effect on minority voters.¹⁹⁷ In other words, any change cannot weaken the voting power of the minority electorate. Since *Beer*, there have been two very significant cases that have construed this retrogression concept in a manner that undermines the original intent of Congress.

As an initial inquiry, it is instructive to look at Congress' amendment of Section 2 during the 1982 reauthorization after a Supreme Court decision similarly diluted the provision's power. Prior to 1980, courts invalidated racially unfair election laws without regard to intent. In 1980, however, in *Mobile v. Bolden*, the Court declared that any challenge to an election procedure brought under the Fourteenth or Fifteenth Amendments must include proof that the measure was enacted with the intent to discriminate against voters on account of race or color. The Court went on to hold that Section 2 provided no more protection than the Fifteenth Amendment, that is, that intent was also required.¹⁹⁸ In 1982, Congress clarified the law, eliminating this intent requirement, as inconsistent with the congressional intent behind the VRA. In rejecting the Court's decision in *Bolden*, Congress explicitly provided in the reauthorization that a discriminatory "result" constituted a violation of Section 2.¹⁹⁹ The Court later accepted the amended Section 2 in *Thornburg v. Gingles*, in which the Court held that in order to prevail on a Section 2 claim, plaintiffs must prove only that a proposed election law or redistricting scheme impaired minority voters' ability to elect representatives of their choice.²⁰⁰

Like *Mobile v. Bolden*'s impact on Section 2, two Supreme Court cases since 1982 – *Reno v. Bossier Parish Sch. Bd* and *Georgia v. Ashcroft* – have severely undermined Section 5

¹⁹⁶ 42 U.S.C. § 1973c.

¹⁹⁷ 425 U.S. 130 (1976).

¹⁹⁸ 446 U.S. 55, 61 (1980).

¹⁹⁹ 42 U.S.C. § 1973(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .") (emphasis added); S. REP.NO. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.

²⁰⁰ 478 U.S. 30, 44 & n. 8 (1986).

by imposing more onerous requirements than imposed by statute. The ACLU urges Congress to address these limitations in reauthorization.

A. *Reno v. Bossier Parish School Board* (“*Bossier II*”)

While the “discriminatory purpose or effect” language of Section 5 was long understood to prohibit jurisdictions from implementing both intentionally discriminatory voting changes, as well as those with a discriminatory or “retrogressive” effect, the Supreme Court issued a decision in 2000 that effectively eliminated the “purpose” prong of the Section 5 test. This decision, *Reno v. Bossier Parish Sch. Bd.*, was a significant setback to voting rights because it has dramatically reduced the power of Section 5.²⁰¹

Bossier Parish is located in the northwest corner of Louisiana, near the border of Texas and Arkansas. In 1990, African Americans constituted approximately 20 percent of the parish’s 86,000 residents, yet no African American had ever been elected to the 12-member school board.²⁰² After the 1990 Census, the school board refused to include any majority African American districts in the new plan, even though the school board later admitted in court that it was “‘obvious that a reasonably compact black-majority district could be drawn within Bossier City.’”²⁰³ According to undisputed testimony, two school board members specifically acknowledged that the school board’s plan reflected opposition to “black representation” or a “black-majority district.”²⁰⁴

Despite the plain language of Section 5 and the strong evidence that the school board was acting with an unconstitutional intent to discriminate against African American voters, the Supreme Court found no basis for an objection under Section 5.²⁰⁵ Instead, the Court came up with a new interpretation of the statute. According to the Court, DOJ was powerless to block intentionally discriminatory voting changes unless it found that the jurisdiction acted with the retrogressive purpose of making things worse than they already were for minority voters.²⁰⁶ Thus, because the school board in Bossier had no majority African American districts before 1990, its enactment of a plan preserving the all-white school board could not violate Section 5, no matter how blatant the evidence that the plan was motivated by racial discrimination. In other words, because African Americans already had no representation on the school board, there was no way to make them worse off, hence even an intentionally discriminatory voting change could not have a retrogressive effect. Therefore, the Court ruled, it was legal to maintain the all-white school board and ignore the fact that it was possible to increase African American representation by creating two majority-African American districts.²⁰⁷

It is critical to fix this loophole with legislation that restores the purpose prong to the Section 5 preclearance test. Section 5 should be clarified to provide that any proposed voting

²⁰¹ 528 U.S. 320 (2000) (“*Bossier II*”).

²⁰² *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 437 (D.D.C. 1995), *aff’d in part, vacated & remanded in part sub nom. Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (“*Bossier I*”).

²⁰³ *Bossier II*, 528 U.S. at 350 (Souter, J., concurring in part, dissenting in part) (quoting Bossier Parish School Board member Barry Musgrove).

²⁰⁴ *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995).

²⁰⁵ *Bossier II*, 528 U.S. at 340.

²⁰⁶ *Id.* at 335.

²⁰⁷ *See id.*

change enacted with a discriminatory purpose, including a nonretrogressive discriminatory purpose, should be denied preclearance under Section 5. This language will restore the traditional purpose requirement that guided enforcement of the preclearance requirement for the quarter century preceding *Bossier II*.

B. *Georgia v. Ashcroft*

In 2003, the Supreme Court further weakened the *Beer* standard in the redistricting case, *Georgia v. Ashcroft*.²⁰⁸ Following *Beer*, courts had held that the failure to preserve the ability of minority voters to elect candidates of their choice is retrogressive and that such voting changes are objectionable under Section 5. This standard was also ratified when Congress extended Section 5 in 1982. The Court in *Ashcroft*, however, created a new standard for retrogression that allows states to make minority voters into second-class voters, who can “influence” the election of white candidates, but who cannot amass the political power necessary to elect a candidate of their choice.²⁰⁹

Georgia v. Ashcroft was an action instituted by the state of Georgia seeking preclearance under Section 5 of its congressional, state senate, and state house redistricting plans. Following the 2000 Census, the Democratic-controlled Georgia legislature passed a redistricting plan that was backed by many African American leaders because it would have spread African American voters and influence across several districts rather than concentrating them in a select few. Georgia's Republican governor objected to the plan because he said it violated the VRA, which discourages the dilution of minority voting strength. The district court precleared the congressional and state house plans, but objected to three of the districts in the state senate plan because “the State has failed to demonstrate by a preponderance of the evidence that the reapportionment plan . . . will not have a retrogressive effect.”²¹⁰ Although African Americans were a majority of the voting age population (VAP) in all three senate districts, the district court concluded that the state failed to carry its burden of proof that the reductions in the African American VAP from the benchmark plan would not “decrease minority voters’ opportunities to elect candidates of choice.”²¹¹

The Supreme Court, however, vacated the decision because, in its view, the district court “did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts.”²¹² The Court held that while this factor “is an important one in the Section 5 retrogression inquiry,” and “remains an integral feature in any Section 5 analysis,” it “cannot be dispositive or exclusive.”²¹³

²⁰⁸ 539 U.S. 461 (2003).

²⁰⁹ Written Testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, Found., *Oversight Hearing on the Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1-2 (Nov. 9, 2005) [hereinafter McDonald Testimony], available at <http://judiciary.house.gov/media/pdfs/mcdonald110905.pdf>.

²¹⁰ *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 94 (D.D.C. 2002).

²¹¹ *Id.* at 89.

²¹² *Ashcroft*, 539 U.S. at 490.

²¹³ *Id.* at 480, 484.

The Court indicated that the district court should have considered other factors, including: “whether a new plan adds or subtracts ‘influence districts’— where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”²¹⁴ The majority stated that Georgia “likely met its burden of showing non-retrogression,” even if “minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.”²¹⁵ The Court reasoned that an elected Democrat was most likely to represent the interest of African American voters, regardless of the official’s race or the demographics of his or her supporters, and therefore the new plan protected the interest of African American voters in Georgia.²¹⁶

This new interpretation of the retrogression standard is a dramatic departure from *Beer* and other Section 5 cases, greatly weakening the enforcement provisions of Section 5.²¹⁷ Instead of looking at the effects of the newly devised plan, the new standard enunciated by the Court attempts to evaluate the intent of the state legislative drafters. Rather than relying on the federal government’s assessment that a plan hurts minority voting strength as contemplated by the VRA, the new standard defers to the judgment of the jurisdiction – indeed, a jurisdiction covered by Section 5 preclearance requirement because of a history of discriminatory behavior towards minority voters. So even if the effect is an overall reduction in the election of candidates of choice by minority constituencies, the Court is unlikely to find retrogression if the jurisdiction can show that there is an increase in the “number of representatives [assumed] sympathetic to the interests of minority voters.”²¹⁸ This is a particularly ambiguous and paternalistic standard, especially when the ability to elect candidates of choice has a great impact on minority communities and has been critical to these communities having fair and responsive representation.

Research indicates that majority-minority districts still play an important role in enabling minority communities to be fairly represented in our democracy.²¹⁹ Majority-minority districts were originally developed in response to racially polarized voting – where the “race of voters correlates with the selection of a certain candidate or candidates” – as a means of protecting and increasing the political power and representation of minority voters.²²⁰ The purpose of these districts is to enable these historically disfranchised and geographically concentrated racial groups, where there is a history of racially polarized voting, to have the power to elect candidates of their choice, whether white or black. For example, in the 1990 redistricting efforts, “[t]he majority of Southern states did not elect a single Black state legislator from any majority-White district.”²²¹ And in 2000, only 8% of black U.S. Representatives were elected from majority-

²¹⁴ *Id.* at 482.

²¹⁵ *Id.* at 487, 489-90.

²¹⁶ *Id.* at 469-71.

²¹⁷ *See, e.g., Bush v. Vera*, 517 U.S. 952, 955 (1996); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (“*Bossier I*”).

²¹⁸ *See Ashcroft*, 539 U.S. at 483 (citing *Thornburg*, 478 U.S. at 87-89, 99 (O’Connor, J., concurring in judgment)).

²¹⁹ *See generally, e.g., QUIET REVOLUTION IN THE SOUTH* (Bernard Grofman & Chandler Davidson eds., 1994); *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 134 (Bernard Grofman et al. eds., 1992); Lani Guinier, *THE TYRANNY OF THE MAJORITY* (1994); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 *ELECTION L.J.* 21, 35 (2004); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 *WM. & MARY L. REV.* 725, 740 (1998).

²²⁰ *See, e.g., Thornburg*, 478 U.S. at 62 .

²²¹ Richard H. Pildes, *The Politics of Race*, 108 *HARV. L. REV.* 1359, 1368-69 (1995). This author also has noted:

white districts.²²² Similarly, when Latino candidates oppose white candidates, there is still a high degree of racial polarization in voting, and in white-majority districts the ability of Latino voters to elect their preferred candidate is decreased.²²³ Indeed, in 2000, there were no Latino U.S. Representatives holding office who had been elected from majority white districts.²²⁴ It is still nearly impossible for minority communities to elect candidates of their choice outside of districts where more than 50% of the voting age population is a combination of minority groups.²²⁵

In recent testimony before the House Subcommittee on the Constitution, Tyrone L. Brooks, Sr., a long time member of the Georgia legislature and current chair of the Georgia Association of Black Elected Officials testified that:

I can confidently say that if we abolished the majority black districts for the state legislature, we would do away with most of the black legislators. The same would be true of black elected officials at the county and local levels. The argument that the state made in its Ashcroft brief failed to take into account how extensive racial bloc voting is, and that when a district is changed from majority black to majority white it depresses the level of black political activity. The enthusiasm, the spirit, the sense that blacks have a chance are all diminished.²²⁶

The inability of African Americans to exercise the franchise effectively in influence districts is apparent from the lack of electoral success of black candidates in majority-white districts.²²⁷ As of 2002, of the 10 African Americans elected to the state senate in Georgia, all were elected from majority black districts (54% to 66% black population).²²⁸ Of the 37 African

From 1972 to 1992, the probability of a majority-white congressional district electing a black representative remained at [a] negligible level regardless of a district's median family income, its percentage of high school graduates, the region of the country, or the proportion of residents who were urban, elderly, foreign born, or resident of the relevant state for more than five years. . . . [E]very majority black congressional district in the South (out of four) elected a black candidate to office; only one nonmajority black district in the South (out of 112) elected a black candidate.

Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself?: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1525-26 (2002).

²²² PROTECTING MINORITY VOTERS, *supra* note 41, at 38-39.

²²³ *Id.* at 42.

²²⁴ *Id.* at 42-3.

²²⁵ Pamela S. Karlan, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting is Different*, 84 CAL. L. REV. 1201, 1231 (1996).

²²⁶ Brooks Testimony, *supra* note 54, at 3. It was noted at the recent VRA hearings, that there is a “chilling” effect upon black political participation, and a “warming” effect on white political participation caused by the transformation of a majority black district into a majority white district. McDonald Testimony, *supra* note 209, at 7. Once a district is no longer perceived as majority black, black candidacies and black turnout are diminished, while white candidacies and white turnout are enhanced. *Id.*

²²⁷ McDonald Testimony, *supra* note 209, at 6.

²²⁸ *Id.*

Americans elected to the state house, 34 were elected from majority black districts.²²⁹ Of the three who were elected from majority white districts, two were incumbents; the third was elected from a three-seat district.²³⁰

The fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the *Shaw/Miller* cases, which were brought by whites who were redistricted into majority black districts.²³¹ Rather than relishing the fact that they could “play a substantial, if not decisive, role in the electoral process,” and perhaps could achieve “greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interests,”²³² they argued that placing them in white “influence,” *i.e.* majority black districts, was unconstitutional. The Supreme Court has agreed.²³³ If influence districts were as powerful as they have been held up to be, white voters would be eager to become a minority group in as many districts as possible.²³⁴ White voters have not been eager for such an outcome, and therefore, the question remains why a different standard should apply to African American voters.

The ACLU urges Congress to support legislation restoring the protection lost under Section 5 as a result of *Georgia v. Ashcroft*, by making clear that the retrogression standard of Section 5 protects the ability of minority voters to elect representatives of their choice and takes into account the problem of racially polarized voting. Any efforts to address this issue should provide that any diminution of the ability of a minority group to elect a candidate of its choice would constitute retrogression under Section 5.

Therefore, it is recommended that Section 5 be clarified to provide that any voting change that would leave minority voters with less opportunity to elect preferred candidates than they had before the change would violate the effect standard of Section 5.

Congress has the power to restore the original intent of Section 5, which has been severely undermined by *Ashcroft v. Georgia* and *Bossier v. Parish*. It is vital that Congress not only renew the expiring provisions of the Act, but also create clear, meaningful protections against changes in election laws to ensure equal voting opportunities for all Americans.

C. Recovery of Expert Fees

The reach of another Supreme Court case has hurt the vitality of the VRA and should be addressed during the reauthorization process. In 1991, the Supreme Court ruled that prevailing parties in civil rights cases cannot recover expert witness fees as part of the attorneys’ fees that they are entitled to receive. This decision, *West Virginia University Hospitals, Inc. v. Casey*, has had a chilling effect on private attorneys and public interest organizations considering voting rights litigation, because it requires lawyers to front thousands of dollars in expert witness fees

²²⁹ *Id.* at 6-7.

²³⁰ *Id.* at 7.

²³¹ *Id.* at 10.

²³² *Ashcroft*, 539 U.S. at 482-83 (citing *Thornburg*, 478 U.S. at 98-100 (O’Connor, J., concurring in judgment)).

²³³ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 919-20 (1995).

²³⁴ See McDonald Testimony, *supra* note 209, at 9.

that will never be recovered.²³⁵ It also greatly undermined the purpose of fee awards in civil rights cases, which is to ensure that victims of discrimination can maintain access to the courts. In response to this case, and in order to alleviate these burdens, Congress passed the Civil Rights Act of 1991, which provided for the recovery of expert fees in employment discrimination cases.²³⁶ For the same reasons, amending the VRA to provide for the recovery of expert fees is critical.

Litigating voting rights cases is particularly expensive because expert witnesses are often needed to document the extent of racial bloc voting, analyze and present statistical evidence, and testify about the “totality of circumstances” surrounding racial discrimination in the state or local jurisdiction directly impacted by the lawsuit. It is a tremendous cost borne by those least able to. Additionally, given the standards established by the Supreme Court, it is virtually impossible for plaintiffs to try a voting rights case without expert witness services. For all these reasons, the attorneys’ fees provision must be amended so that winning parties in voting rights lawsuits are allowed to recover the cost of hiring the expert witnesses necessary to prove that voting discrimination exists.

CONCLUSION

The promise of equality is on the march, but the struggle continues. Discrimination in voting still exists and the protections of the VRA are still necessary to ensure fairness in our political process and equal opportunity for all citizens to participate in the political process. Because the expiring provisions of the VRA also help deter discrimination, the failure to renew these provisions will undoubtedly turn back the clock on the progress made so far.

The Voting Rights Act is one of the most effective civil rights statutes ever enacted to prevent discrimination. Since its passage, the VRA has guaranteed millions of minority voters a chance to have their voices heard. From New York to South Carolina to Texas and California, minority voters have gained greater influence in the creation of laws and policies that affect them because of the VRA.

We need the VRA today to ensure that progress continues and America, as a society, keeps its promise of democracy to all citizens. Indeed, at a time when America has staked so much of its international reputation on the need to spread democracy around the world, we must ensure its vitality here at home. By renewing the expiring provisions for another 25 years and strengthening them to address problems raised by recent U.S. Supreme Court decisions, we can ensure that the VRA remains current and effective in protecting the right to vote for all Americans. Therefore, the ACLU urges Congress to implement the following recommendations.

²³⁵ 499 U.S. 83, 102 (1991).

²³⁶ Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1071, § 113 (1991).

RECOMMENDATIONS

In 2007, three crucial sections of the Voting Rights Act will expire unless Congress votes to renew them. In light of the past and present discrimination that minorities have experienced when voting, and the proven effectiveness of the Voting Rights Act, Congress should renew and restore the original intent of the Act in the following manner:

1. Renew the Section 5 pre-clearance requirements for 25 years, consistent with the time period adopted with the 1982 extension. These provisions directly impact nine states with a documented history of discriminatory voting practices and local jurisdictions in seven others by requiring them to submit planned changes in their election laws or procedures to the U.S. Department of Justice or the U.S. District Court for the District of Columbia for pre-approval.
2. Renew Section 203 for 25 years so that new citizens and other Americans who are limited in their ability to speak English can continue to receive assistance when voting. These provisions currently impact some 466 local jurisdictions across 31 states.
3. Renew Sections 6–9, which authorize the U.S. Attorney General to appoint federal election observers.
4. Provide for the recovery of expert fees for prevailing parties in voting rights litigation.
5. Restore the original intent of Congress as expressed in the 1982 reauthorization and repair the damage done by two U.S. Supreme Court decisions that fundamentally weaken the administration of Section 5: *Reno v. Bossier Parish Sch. Bd.* (2000) and *Georgia v. Ashcroft* (2003).