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The Promise and Pitfalls of the New Voting Rights Act

ABSTRACT. In the summer of 2006, Congress reauthorized the expiring provisions of the Voting Rights Act (VRA) with a unanimous vote in the Senate and with limited opposition in the House of Representatives. The veneer of bipartisanship that outsiders perceived in the final vote glossed over serious disagreements between the parties over the meaning of the central provision of the new VRA, which prohibits voting laws that “diminish the ability” of minority citizens “to elect their preferred candidates of choice.” Those disagreements came to the surface in a fractured Senate Committee Report released only after Congress had passed the law. This Article describes the unprecedented legislative history of this law, and the political and constitutional constraints that led the law to take the form that it did. It also presents an interpretation of the new retrogression standard that avoids the partisan bias of alternatives while emphasizing the importance of racially polarized voting to the constitutionality and meaning of this new law. It urges that the new law be read as preventing redistricting plans that reduce the aggregated probability across districts of the election of candidates preferred by the minority community and disfavored by whites.

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INTRODUCTION

In the series of cases that have made up the Supreme Court's recent jurisprudence concerning congressional power to protect civil rights, the Voting Rights Act (VRA) has been the standard against which all other statutes are judged.¹ Unlike other civil rights statutes that may have swept too broadly in their geographic reach and permanent duration, section 5 of the VRA² targeted a limited number of geographically defined wrongdoers³ and did so for a limited time.⁴ Unlike those constitutionally precarious statutes that may have elevated classes from the lower tiers of Fourteenth Amendment scrutiny,⁵ the VRA dealt specifically with race (a classification that is "immediately suspect"⁶) and with voting ("a fundamental political right, because [it is] preservative of all rights"⁷). And unlike those statutes with a tenuous relationship to unconstitutional state action,⁸ the VRA was built on a record of

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1. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) ("The ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations.").
 2. 42 U.S.C. § 1973c (2000).
 3. Section 5 applies to all or part of sixteen states: all of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; most of Virginia; four counties in California, five counties in Florida, two townships in Michigan, ten towns in New Hampshire, three counties in New York, forty counties in North Carolina, and two counties in South Dakota. Voting Section, U.S. Dep't of Justice, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Jan. 23, 2007).
 4. See *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) ("By contrast [to the Violence Against Women Act], the [VRA] § 5 remedy upheld in *Katzenbach v. Morgan* . . . was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* . . . the remedy was directed only to those States in which Congress found that there had been discrimination.").
 5. See *Garrett*, 531 U.S. at 374 (striking down Title I of the Americans with Disability Act, 42 U.S.C. §§ 12,111-12,117 (2000), as applied to the states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91-92 (2000) (striking down the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000), as applied to the states).
 6. *Johnson v. California*, 543 U.S. 499, 509 (2005) (citation omitted) (internal quotation marks omitted).
 7. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
 8. *Morrison*, 529 U.S. at 627 (striking down the Violence Against Women Act, 42 U.S.C. § 13,981 (2000)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (striking down the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (2000), as applied to the states); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("A comparison between RFRA [Religious Freedom Restoration Act] and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the Judiciary in the

persistent constitutional violations by state actors who were unapologetic in their defiance of federal court orders.⁹

Because Congress acted at the apex of its power to enforce the guarantees of the post-Civil War Amendments in passing the VRA, the Court could stomach the tough medicine that is section 5 of the Act. That measure stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws. No other statute applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law.¹⁰ Such a remedy was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order.¹¹

Congress intended the expiration of section 5 to force the nation to take stock of its progress, or lack thereof, in achieving equal voting rights, as well as to adapt the law to new challenges and changing political realities. Those who originally crafted the law, however, could not have foreseen how section 5 would become, in both substance and symbolism, a cornerstone of the architecture of federal election law and civil rights guarantees. As each election reminds us of how far we need to go in securing the equal right to vote, the notion that we might allow this most successful of civil rights protections to die on the vine has become so unacceptable that Congress has now reauthorized this “emergency” provision for another twenty-five years.

Elsewhere I have described how the VRA could have been transformed to address the problems facing minority voters that constituted the principal

voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”).

9. See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (acknowledging that section 5 was an uncommon exercise of congressional power justified by the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution”); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 546-47 (2d ed. 2002).
10. Section 5 requires jurisdictions specified by section 4 to preclear “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” VRA § 5, 42 U.S.C. § 1973c (2000). A jurisdiction may seek preclearance from the Attorney General or a declaratory judgment from the U.S. District Court for the District of Columbia. Under either process, the jurisdiction must demonstrate that the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.” *Id.*
11. See ISSACHAROFF ET AL., *supra* note 9, at 546-47.

justification for the law.¹² Even for many who favored renewal, the reauthorization process in the summer of 2006 represented a missed opportunity to deal with some of these problems. In addition to the political and judicial constraints placed on the reauthorization debate, the specter of returning to an age and political environment first disciplined by section 5 of the VRA paralyzed any attempt to use this opportunity to address the most pressing voting rights challenges.

This Article attempts to explain the constraints on the process that led the law to take the form that it did and to identify the best evidence in the legislative record to ensure the law's constitutionality. More important from the standpoint of those wishing to interpret or enforce this new law, this Article provides an interpretation of the law's key provision that would allow it to do more good than harm. Part I provides a summary of the unique legislative history of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (the VRARA, or the new section 5).¹³ As with other legislation, disagreements about the statute's meaning were passed on to the courts, and various legislators attempted to manipulate legislative history for partisan ends. Never before in American history, however, has a Senate committee that unanimously voted in favor of a law later published a postenactment committee report that was supported only by members of one party. Part II examines the sufficiency of the evidentiary record assembled by Congress to justify the continued operation of section 5 in the areas that it currently covers (the "coverage formula" or "trigger"). Section 5 applies only to certain parts of the country, based on voting practices and data that are at least thirty years old. The novel constitutional question posed by this law was how Congress could provide a

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12. See Nathaniel Persily, *Options and Strategies for Renewal of Section Five of the Voting Rights Act*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 223, 228 (David L. Epstein et al. eds., 2006). My own view is that the greatest advantages of the newly enacted law will continue to be felt at the local level, where the partisan stakes and salience of voting law changes are low. For the small covered county that is moving a polling place or annexing some unincorporated territory, having the DOJ "in the room" while such decisions are made ensures that the impact on minority voting rights will be factored into the decision. For voting changes at the state level, particularly well-publicized redistricting plans, section 2 of the Voting Rights Act provides a comparable deterrent against discriminatory voting laws without the accompanying risks of a politicized DOJ enforcement process. With that said, the disenfranchisement of felons, the discriminatory application of voter ID laws, and partisan or incompetent administration of elections present greater nationwide challenges to minority voting rights than the voting changes ordinarily denied preclearance in the covered jurisdictions.
 13. Pub. L. No. 109-246, 2006 U.S.C.C.A.N. (120 Stat.) 577 (to be codified at 42 U.S.C. §§ 1971 to 1973aa-1a).

record of constitutional violations necessitating the continuation of a law that, if it works as intended, prevents such evidence from emerging. Part III explains why the law had to take the form that it did, despite widespread concerns about the coverage formula and statutory architecture. Various proposals to tinker with the well-known section 5 procedures—namely, where it should apply, how jurisdictions might escape its constraints, and how the law would be administered—faced an uphill battle and were soundly defeated. Part IV forms the bulk of this Article and offers an interpretation of the key provision of the new section 5: the new retrogression standard that prevents covered jurisdictions from enacting or administering voting laws that “diminish” minority voters’ “ability . . . to elect their preferred candidates of choice.”¹⁴ The proposed interpretation, which focuses on the extent of racial polarization in the electorate, represents an attempt to save the law from likely constitutional challenges and from enforcement patterns that would contradict the underlying purposes of the law.

The Conclusion presents an argument presaged here. The descriptive and normative sections of this paper are united by a common appreciation for the unprecedented political context in which this reauthorization occurred. In a sense, as compared to the legislative efforts of twenty-five and forty-two years ago, everything should have been different for this reauthorization. The constitutional test the courts would now apply never before cast a shadow on legislative bargaining. The partisan stakes, never before accorded much significance, were now well known. The most salient threats to minority voting rights had evolved beyond the categories and geography contemplated by the VRA. Nevertheless, the fear and uncertainty of what the world would be like without it allowed transformation only in the direction of restoring the Act to its original meaning. The consequences of this altered political reality do not end with the passage of the law, however. Despite historically familiar purposes and language, the VRA begins to mean something different when grafted onto a political system that it helped shape.

I. THE PATH OF LEGISLATION

When considered in the abstract, and against the history of American election reform and civil rights legislation, the 2006 reauthorization of the VRA by a near unanimous vote represents a remarkable, even if predictable,

14. 42 U.S.C.A. § 1973c(b) (West Supp. 2007).

achievement.¹⁵ The vote was remarkable in that almost all participants in the policy debate recognize that section 5 of the VRA represents a unique exception to the normal functioning of federalism and partisan politics; many Republicans consider it offensive to their notions of color-blindness and states' rights, and some Democrats see it as counter to their political interests.¹⁶ The vote was predictable, however, in that virtually no one wanted to be on record opposing the legislation.¹⁷ Republicans who may have disagreed with the legislation in principle nevertheless viewed it as largely serving their political interests. Most of them considered redistricting pursuant to aggressive enforcement of section 5 as creating inefficient Democratic districts. Moreover, the legislation appeared to be a relatively costless step toward thawing relationships with African Americans and maintaining gains among Hispanic supporters. On the other hand, most Democrats supported the reauthorization in principle, and those who did not considered opposition (or even amendment) to constitute political suicide.

A. The VRARA in the House: Channeling Dissent into Failed Amendments

Despite the widespread consensus in favor of reauthorization, many potential obstacles could have derailed the steady progress toward renewal.¹⁸ One cannot overstate the importance of the unlikely leadership of James

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15. The law passed the House by a vote of 390 to 33, 152 CONG. REC. H5207 (daily ed. July 13, 2006), but passed the Senate unanimously, 98 to 0, 152 CONG. REC. S8012 (daily ed. July 20, 2006). The original Voting Rights Act of 1965 passed the House by a vote of 328 to 74 and the Senate by a vote of 79 to 18. See Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827, 833 (2006); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).
 16. See Joseph Williams, *Voting Act Overshadows Race Debate: Democrats Weigh Diluting Districts of Black Majorities*, BOSTON GLOBE, July 31, 2006, at A2 (quoting Representative Rahm Emanuel arguing for the unpacking of heavily minority districts in order to help more Democrats win).
 17. See Julie Fernandes, Leadership Conference on Civil Rights, Remarks at the Conference on Elections and Democracy at Stanford Law School (Apr. 7, 2007), available at http://voirdire.stanford.edu/program/centers/conlaw/20070407_ConLaw_ElectionsDemocracy_Panel_2-150k.mov (describing the strategy of the civil rights community to make passage of the bill seem "inevitable" and make voting against it seem dramatic).
 18. For a comprehensive discussion of the reauthorization process in the House of Representatives, see James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007). Tucker's exposition of events in the House is so comprehensive that I provide only an abbreviated recounting here and focus mainly on the Senate. By doing so I do not mean to understate the importance of what happened in the House.

Sensenbrenner, Chairman of the House Committee on the Judiciary, in pushing through the legislation.¹⁹ He wanted the reauthorization of the Voting Rights Act to occur on his watch, and, consistent with his leadership style on other issues, nothing was going to stand in his way. Pursuant to the rules of the Republican Conference, however, his term as Chairman was to expire at the end of 2006, a year before section 5 of the VRA was scheduled to sunset.²⁰ Therefore, the timetable for the legislation was moved up a year, with House hearings held between October 2005 and May 2006.

On the House side, as is often true with legislation expected to pass by a wide margin, the hearings featured relatively few witnesses testifying against

19. *See id.* at 214-15. If one wants to get a sense of the influence of Sensenbrenner on the process, one need only look at the comments of one of his Republican colleagues, Representative Lynn Westmoreland, who eventually voted against reauthorization and has promised to sue to have the courts strike it down. A press release from Westmoreland's office the day the bill passed explained:

We came up short today of the votes we needed to modernize and strengthen the Voting Rights Act, largely because of partisan posturing, ignorance of the act's details and lingering prejudice toward Southerners. We lost on the vote board in the House, but we won in the grand scheme of things. . . .

. . . We created a public record that will be cited when there's an inevitable court challenge to Section 5. We needed 218 votes in the House but we'll only need five votes on the Supreme Court. Justice will prevail. The honor of Georgia will be restored. . . .

. . . .

. . . If this bill is tossed by the courts and the Voting Rights Act is undermined, the fault should be laid at the feet of Judiciary Committee Chairman James Sensenbrenner of Wisconsin. His legacy will be his unyielding support for a law that endangered the future of the Voting Rights Act.

Press Release, Representative Lynn Westmoreland, Statement on House Passage of Voting Rights Act (July 13, 2006), *available at* <http://westmoreland.house.gov/news/DocumentSingle.aspx?DocumentID=47024>.

20. Had the Republicans retained control of the House, Sensenbrenner would likely have been replaced as chairman by Representative Lamar Smith, a conservative Texan with a record of opposing parts of the VRA. *See* Tucker, *supra* note 18, at 216. The expedited process and early success of reauthorization led to an unintended consequence in the law. Like its predecessor, the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971 to 1973aa-6 (2000)), the 2006 legislation sunsets after twenty-five years. *See* VRARA, Pub L. No. 109-246, § 4, 2006 U.S.C.A.N. (120 Stat.) 577, 580 (to be codified at 42 U.S.C. § 1973b(a)); Tucker, *supra* note 18, at 221. Because no one thought the reauthorization would happen before it was necessary (that is, before 2007), the twenty-five-year time horizon had the virtue of capturing three redistricting cycles (2012, 2022, 2032). However, because Congress passed the legislation one year early, the legislation now is set to expire in the middle of the 2031 redistricting process.

reauthorization.²¹ Most of the effort of the House Committee was directed at assembling a record demonstrating the persistence of discrimination in voting in the covered jurisdictions and the constitutionality of the proposed bill. Nevertheless, once the measure moved toward the floor, two sets of Republicans became more vocal concerning their objections to the bill. One group, mainly from the Southern jurisdictions covered by section 5, renewed familiar arguments from the VRA's inception that their states were unfairly targeted and urged reforms to the coverage formula and bailout procedures.²² Members of another faction objected to the language assistance provisions of section 203 of the VRA,²³ echoing similar arguments expressed during the concurrent debate over immigration reform.²⁴ Although the original rule for the vote on the VRA would have precluded any amendments, those with objections invoked the norm, if not the rule, of the Republican Conference that a "majority of the majority" had to support a bill before it could be moved to

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21. See *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (pt. 2): *Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 14-17 (2006) (statement of Chris Norby, Supervisor, Orange County Board of Supervisors) (opposing language assistance provisions of section 203 of the Act); *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (pt. 1): *Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13-37 (2006) (statement of Roger Clegg, President & General Counsel, Center for Equal Opportunity) (finding the bill to be "bad policy from beginning to end"); *Voting Rights Act: Section 5—Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 29-43 (2005) (statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity) (arguing, prior to the proposal of the bill, that certain proposed changes to section 5 might be unconstitutional); *Voting Rights Act: The Continuing Need for Section 5: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 29-48 (2005) (statement of Ronald Keith Gaddie, Professor of Political Science, University of Oklahoma) (noting progress in covered jurisdictions and lack of differences with uncovered jurisdictions); *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 14-17 (2005) (statement of Edward Blum, Visiting Fellow, American Enterprise Institute) (opposing reauthorization bill as excessively race-based and outdated).
 22. See *infra* note 30 (describing how Representatives Norwood and Westmoreland introduced amendments to replace section 5's coverage formula and bailout provisions).
 23. Pub. L. No. 109-246, § 7, 2006 U.S.C.C.A.N. (120 Stat.) 577, 581 (to be codified at 42 U.S.C. § 1973aa-1a(b)(1)).
 24. See Tucker, *supra* note 18, at 238-40; *infra* note 29 and accompanying text (explaining that Representative King introduced an amendment to repeal section 203's multilingual assistance provisions in their entirety).

the floor.²⁵ To mollify the holdouts, four amendments were allowed on the floor. These ranged from proposals to alter the coverage formula²⁶ or bailout procedures²⁷ to others attempting to accelerate the sunset of the law²⁸ or to change the language assistance provisions.²⁹ All were soundly defeated, but three garnered a majority of the Republican members.³⁰ The House passed the bill by a vote of 390 to 33 on July 13, 2006.³¹

B. The VRARA in the Senate: Channeling Dissent into Postenactment Legislative History

The story in the Senate was quite different. The nine Senate Judiciary Committee hearings held between April 27, 2006, and July 13, 2006, featured heated debates concerning the constitutionality and desirability of the legislation.³² Individual Judiciary Committee members had serious reservations

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25. See Carl Hulse, *Rebellion Stalls Extension of Voting Act*, N.Y. TIMES, June 22, 2006, at A23 (explaining that the House leadership's informal rule that "no bill can reach a vote without the support of the majority of the Republicans" was met with criticism for not fostering bipartisan support); *Southerners Complain, Voting Rights Act Pulled from Floor*, NAT'L J.'S CONGRESS DAILY, June 21, 2006 (explaining that the House Republican leaders no longer applied the "majority of the majority rule" to the Voting Rights Act, angering Southern Republicans); see also Tucker, *supra* note 18, at 245 (explaining the rule of a "majority of the majority").
 26. Representative Norwood's amendment, H.R. REP. NO. 109-554, pt. 1, at 2 (2006), would have updated the coverage formula to apply based on voter turnout in the last three presidential elections. That amendment was defeated by a vote of 318 to 96. 152 CONG. REC. H5204 (daily ed. July 13, 2006).
 27. Representative Westmoreland's amendment, H.R. REP. NO. 109-554, pt. 4, at 2 (2006), the so-called proactive bail out measure, would have made it easier for covered jurisdictions to bailout from coverage. It was defeated by a vote of 302 to 118. 152 CONG. REC. H5206-07 (daily ed. July 13, 2006).
 28. Representative Gohmert's amendment, H.R. REP. NO. 109-554, pt. 2, at 2 (2006), would have shortened the sunset period of the bill to ten years. It failed by a vote of 288 to 134. 152 CONG. REC. H5205 (daily ed. July 13, 2006).
 29. Representative King's amendment, H.R. REP. NO. 109-554, pt. 3, at 2 (2006), would have deleted section 203's multilingual assistance provisions. It failed by a vote of 238 to 185. 152 CONG. REC. H5205-06 (daily ed. July 13, 2006).
 30. See *supra* notes 26-29; see also Tucker, *supra* note 18, at 236-39 (describing other amendments considered and defeated in committee).
 31. 152 CONG. REC. H5207 (daily ed. July 13, 2006).
 32. The debate in the Senate hearings revealed a bit of a rift between legal academics and voting rights advocates. See generally Rick Hasen, *Why Bother Trying To Fix Section 5*, Election Law Blog, May 13, 2006, <http://electionlawblog.org/archives/005607.html> (describing the

about the proposed bill. Those concerns revolved around the maintenance of the current coverage formula and bailout procedures, the twenty-five-year extension period, the new retrogression test, and what some Republican Senators considered the rushed process of deliberation that rejected any substantive amendments to the bill.³³ At various points it appeared that the legislation might be held over to the next Congress, especially once the language assistance provisions of section 203 became framed by the parallel debate over immigration reform.³⁴

testimony of law professors). Loyola Law School Professor Richard Hasen alerted the committee to the potential constitutional difficulties with the bill and provided suggestions on how to save it. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 214-19 (2006) [hereinafter *Introductory Senate Hearings*] (statement of Richard Hasen). NYU Law School Professor Samuel Issacharoff suggested a dramatically different enforcement regime for section 5. *Id.* at 220-25 (statement of Samuel Issacharoff). NYU Law School Professor Richard Pildes raised concerns about the new retrogression standard that overruled *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the constitutional deficiencies in the record supporting reauthorization, and the inability of the section 5 architecture to deal with contemporary voting rights problems. *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 198-207 (2006) [hereinafter *Need for Section 5 Pre-Clearance Senate Hearing*] (statement of Richard Pildes). Stanford Law School Professor Pamela Karlan defended the constitutionality of the bill. *Id.* at 174-95 (statement of Pamela S. Karlan). I focused my remarks, *see infra* Part IV, on what the retrogression standard should mean in practice. *Understanding the Benefits and Costs of Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11-13, 105-37 (2006) (statement of Nathaniel Persily). Professor Drew Days of Yale Law School detailed his experiences as Solicitor General and Assistant Attorney General for Civil Rights, suggesting that the VRA was still necessary and constitutional, and reinforced the findings of the National Commission on the VRA. *Id.* at 5-7, 31-70 (statement of Drew Days). Professor Sherrilyn Ifill of the University of Maryland attempted to explain why the Supreme Court's decision in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), reinforced the need for a strong VRA. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 6-8, 50-60 (2006) [hereinafter *Section 5 Renewal Senate Hearing*] (statement of Sherrilyn Ifill). Seattle University Law School's Joaquin Avila attested to the persistence of racially polarized voting in California. *Id.* at 11-13, 27-44 (statement of Joaquin G. Avila).

33. See S. REP. NO. 109-295, at 25-36 (2006) (presenting Senators Cornyn and Coburn's objections to the "expedited process" that reauthorized an outdated coverage formula and "failed to produce thorough deliberation" that would have generated a superior product). The concerns of the senators were also quite evident in the tone of the questions they submitted to witnesses. See *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 98-104 (statement of Pamela S. Karlan, Professor of Law, Stanford University) (responding to questions submitted by Senators Cornyn and Coburn).
34. See *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 288 (2006) (statement of Sen. Leahy) ("I

Any potential roadblocks to passage were removed once President Bush became involved, however. He scheduled his first presidential speech to the NAACP for July 20, 2006, and used the opportunity to stress his support for reauthorization “without amendment.”³⁵ Majority Leader Bill Frist placed the House bill on the Senate calendar for the same day as the President’s speech with rules that prevented any amendments on the floor. On the day before the Senate vote on the House bill, the Senate Judiciary Committee reported its own bill, which was identical to the House version, save for the addition of César Chávez’s name to the title.³⁶ This raised an interesting procedural question: if the Senate passed a bill that had a different title but exactly the same substance as the one passed by the House, would a conference committee nevertheless need to be assembled? To avoid that possibility, to prevent any Senate dilly-dallying on its bill, and to ensure the Senate vote would take place on the day of the President’s speech to the NAACP, Majority Leader Frist simply moved the House bill to the Senate floor.³⁷ The Senate unanimously approved (98-0) the House bill shortly after the President’s speech.³⁸

was troubled during the immigration debate that the rhetoric of some Members of the Senate appeared to be anti-Hispanic in supporting the adoption of an English language amendment.”); Letter from Charles Norwood et al., Members of the House of Representatives, to J. Dennis Hastert, Speaker, House of Representatives, and John Boehner, Majority Leader, House of Representatives (June 9, 2006), *available at* <http://electionlawblog.org/archives/vra-house-letter.pdf> (explaining that forty-four Republican House members do not support section 203 which imposes a “serious burden on the states” at the cost of causing “cracks in our party’s cohesiveness”); *see also* Tucker, *supra* note 18, at 239-43.

35. *See* President George W. Bush, Keynote Address at the NAACP Annual Convention (July 20, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/07/20060720.html> (“I thank the members of the House of Representatives for re-authorizing the Voting Rights Act. Soon the Senate will take up the legislation. I look forward to the Senate passing this bill promptly without amendment—(applause)—so I can sign it into law. (Applause.)”). A week before the speech, the White House released a statement of policy that forecast the administration’s position. *See* Tucker, *supra* note 18, at 251 nn.475-76.
36. *See* Fannie Lou Hamer, Rosa Parks, Coretta Scott King, and César E. Chávez Voting Rights Act Reauthorization and Amendments Act of 2006, S. 2703, 109th Cong. § 1 (as reported by S. Comm. on the Judiciary, July 19, 2006); S. REP. NO. 109-295, at 34 (2006) (“[T]he Committee approved by voice vote an amendment offered by Senator Leahy to incorporate Mr. Cesar Chavez’s name into the title of the Act . . .”). In the subsequent Congress, a bill has been proposed to rename the Act to the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, and William C. Velasquez Voting Rights Act Reauthorization and Amendments Act of 2006. *See* A Bill To Revise the Short Title of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, S. 188, 110th Cong. (as submitted Jan. 4, 2007).
37. Perhaps it should go without saying, but the Republicans also had a legitimate fear that Democrats would use the VRA in the 2006 elections to motivate their base. If the legislation

Six days after the Senate passed the House bill and one day before the President signed the bill into law on July 27, the Judiciary Committee “Report” on its version of the bill was filed.³⁹ Not only was a presidential “stick” instrumental in propelling the House bill to passage in the Senate, but the unprecedented character of the after-the-fact committee report strongly suggests that the opportunity to alter the Senate Report provided a carrot that appeased some of the Senate Republicans who had reservations. In fact, despite a unanimous vote on the Senate bill both in the committee and on the floor, only half of the eighteen members of the Judiciary Committee—all of whom were Republicans—signed on to the Report.⁴⁰ The final draft of the Report itself was not circulated to Democratic senators on the Committee until the day the President signed the bill into law.⁴¹ In their “additional views” included with the Report, the Democrats on the Committee emphasized, “We object and do not subscribe to this Committee Report . . . which . . . has become a very different document than the draft Report circulated by the Chairman on July 24, 2006.”⁴²

had been held over until 2007 when the old section 5 was to expire, the Democrats might have used the failure to reauthorize ahead of schedule as a club to target certain House and Senate incumbents in their reelection campaigns. Indeed, when it looked like the process might come off the rails due to objections from those concerned with the language assistance provisions of section 203, as well as those in favor of the various House amendments, the civil rights community launched an intense public relations effort to urge Congress to pass the measure. *See, e.g.,* Barbara Arnwine, Op-Ed., *Voting Rights Act Renewal up to Specter*, PHILA. TRIB., June 27, 2006, at 7-A (complaining of efforts to stall the Act at the last minute).

38. 152 CONG. REC. S8012 (daily ed. July 20, 2006).
39. S. REP. NO. 109-295, at 1 (2006). I place the word “Report” in quotes and use the passive voice in the text because the precise nature of the document that was filed by nine members of the Committee is open to dispute given the procedural irregularities described below.
40. All of the Republicans on the Judiciary Committee except Senator Mike DeWine signed the Report, and all eight of the Democrats refused to do so, attaching “additional views” to the Report registering their objections. *See* 152 CONG. REC. S8373 (daily ed. July 27, 2006) (statement of Sen. Leahy) (listing the names of the nine Republicans who appeared on the signature page of the Report). As a result, only half of the committee’s membership (nine of eighteen senators) signed onto the Report, and eight expressly dissented from the Report.
41. *See id.* (“I understand that the chairman filed a committee report last night on S. 2703, the Senate bill reported by the committee last Wednesday. I have yet to see a copy of that final report, nor is it yet publicly available.”); Rick Hasen, *Senate VRA Report Now Available*, Election Law Blog, Aug. 1, 2006, <http://electionlawblog.org/archives/006382.html>.
42. S. REP. NO. 109-295, at 54 (2006); *see also* Seth Stern, *Senate Democrats Suggest Republicans Tried To Undercut Voting Rights Act*, CONG. Q. TODAY, July 27, 2006. In fact, the Democrats’ additional views were based on a prior draft of the Report, as is clear from their inaccurate statement that the Report “include[s] Additional Views signed by the Chairman.” S. REP.

The evolution of the Senate Judiciary Committee Report offers the best window into the fragility of the political compromise that undergirds the new VRA and the basic disagreement that exists concerning its key provision. It also provides a unique case study in the self-conscious manipulation of legislative history for partisan ends and the shadow cast on the legislative bargaining process by the Supreme Court's recent federalism precedents. Moreover, given the importance the Court has attributed to legislative history in previous reauthorizations—namely, the centrality of the “Senate Factors” to the Court's subsequent interpretation of the 1982 Amendments to the VRA⁴³—the unique character and procedural background of the Committee Report should cause concern regarding how courts or the Department of Justice (DOJ) might apply the law in concrete cases.

The hope of supporters of reauthorization was that the Senate Report would take the form of the House Report. Akin to a lawyer's brief, it would present the legislative record as unambiguously supporting reauthorization, and as providing substantial evidence to support its constitutionality. To do so, the Report would need to credit the damning examples of voting rights violations in covered jurisdictions and interpret the previous twenty-five years of experience under section 5 as demonstrating the VRA's continued utility. The proposed “Statement of Joint Views of Senate Judiciary Committee Members,” which the Committee Democrats originally crafted but never released, did exactly that.⁴⁴ It is unsurprising that the Republican members of

NO. 109-295, at 54 (2006). Chairman Specter did not sign onto the additional views of any of his Republican colleagues.

43. See *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); ISSACHAROFF ET AL., *supra* note 9, at 769.
44. The Democrats' initial statement (totaling 145 pages) was quickly assembled the weekend before the Senate vote and circulated to Judiciary Committee Republicans at 8:35 p.m. the day before the vote. The next draft, circulated to the Republican members at 8:33 a.m. on the day of the vote, was 100 pages and comments were requested by 9:30 a.m. Minority Staff of the S. Comm. on the Judiciary, 109th Cong., Statement of Joint Views of Senate Judiciary Committee Members (July 20, 2006) (unpublished draft report, on file with author) [hereinafter Statement of Joint Views]. The tight timetable led to a volley of heated letters between Ranking Member Patrick Leahy and Chairman Arlen Specter. On July 25, Senator Leahy suggested that the rush to release the Report would prevent Democratic senators from offering their own additional views and was in violation of Senate rules. Letter from Patrick Leahy, Ranking Democratic Member, Senate Comm. on the Judiciary, to Arlen Specter, Chairman, Senate Committee on the Judiciary (July 25, 2006), available at <http://electionlawblog.org/archives/leahy.pdf>. Describing Leahy as “misinformed on several points,” Senator Specter responded with a letter the following day, when the Report was released. Letter from Arlen Specter, Chairman, Senate Comm. on the Judiciary, to Patrick J. Leahy, Ranking Democratic Member, Senate Comm. on the Judiciary (July 26, 2006), available at <http://electionlawblog.org/archives/specter-response.pdf>. According to Senator

the Committee could not sign onto this “Statement of Joint Views.” As is clear from the final product, the Republicans did not want to condemn the covered jurisdictions with as broad and resounding a declaration as did the House Committee. They also disagreed fundamentally with the Democrats’ interpretation of the retrogression standard⁴⁵ and wanted to provide what they considered to be a more balanced view of the record, which would place greater emphasis on voting rights progress. The final Report bears no resemblance to the initial “Statement of Joint Views.”

In their additional views in the final Report, the Democrats summarized their objections as follows: “we must register our disappointment that this Report does not reflect our views or those of scores of other cosponsors, does not properly describe the record supporting our bill, and does not fully endorse the bill we introduced and sponsored”⁴⁶ The Democrats objected both to the body of the Report and to the additional views from Senators John Kyl, Tom Coburn, and John Cornyn.⁴⁷ The body of the Report (as well as the additional views of Senator Kyl) proffered a specific view of the new retrogression standard that protected only “naturally occurring majority-minority districts.”⁴⁸ Many Democrats consider this interpretation of the central provision of the bill to be counter to their political interests,⁴⁹ if not subversive of the goal of protecting all kinds of districts (so-called influence or coalition districts) in which minorities usually constitute less than half of the district’s voting population, but can nevertheless influence the outcome of an election.⁵⁰ There was a risk, expressed by some who testified at the hearings, that protecting the ability of minorities to elect their “preferred candidate of choice” would mean protecting their ability to elect Democrats, given that

Specter’s letter, on July 21 his staff “made it clear that [he] could not join” the Statement of Views. *Id.* at 2. He also maintained that on July 23 Senator Leahy made clear that he could support a draft of the Report with edits provided by his staff, although he “preferred that no report be filed on behalf of the Committee.” *Id.* Senator Spector further stated that this version of the Report, along with additional views provided by any Member, was the version he intended to file. *Id.*; see also Rick Hasen, *Some Insight into the Drafting of the Senate VRA Committee Report*, Election Law Blog, Aug. 2, 2006, <http://electionlawblog.org/archives/006393.html>.

45. See S. REP. NO. 109-295, at 14-15 (2006).

46. *Id.* at 54.

47. *Id.*

48. *Id.* at 24.

49. See Williams, *supra* note 16 (describing Rep. Rahm Emanuel’s concerns about heavily packed minority districts).

50. See *infra* Section IV.B.

minorities tend to favor Democrats.⁵¹ As described in greater detail below, the new retrogression standard can be seen as entrenching either Republican or Democratic gerrymanders depending on which types of districts it protects and which types of interdistrict population tradeoffs it prevents. The Republicans maintain that the law prevents minority population reductions in majority-minority districts and only in those districts. The Democrats would allow the unpacking of some such districts but would also protect certain minority-minority districts that elect minority-preferred candidates.⁵²

In addition to their dispute over the meaning of the new section 5, the Democrats worried that the Report undermined the case supporting the constitutionality of the law. The inclusion of the additional views of Senators Cornyn and Coburn, in particular, had the potential to characterize the legislative record in a way that would lead the Supreme Court to strike down the law as exceeding Congress's power under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments.⁵³ Those Senators expressed what several witnesses at the hearings found problematic with the Act: the lack of findings of relevant differences between the covered and noncovered jurisdictions, the alleged inflexibility of the bailout procedures, and the overreaching policy and constitutional precariousness of a twenty-five-year sunset period.⁵⁴ These concerns were heightened by what those Senators considered defects in the legislative process leading to reauthorization. Despite the fact that their party could have controlled the pace of the legislation (admittedly receiving criticism for being against civil rights had they slowed it down), they complained that “[a]n artificial rush to move the House version” occurred a full year before the relevant sections of the VRA were to expire.⁵⁵ “[T]his important legislation was—unfortunately—a bit of a foregone

51. See *Section 5 Renewal Senate Hearing*, *supra* note 32, at 10–11 (statement of Michael A. Carvin, Partner, Jones Day).

52. For more on this point, see *infra* Part IV.

53. See S. REP. NO. 109–295, at 25–36 (2006); Stern, *supra* note 42 (“It’s outrageous that several members of that committee who signed this report who purport to support the [Voting Rights Act] show up at the signing ceremony at the same time they file this report which seeks to lay out a road map to challenge the constitutionality of the law,” said Caroline Fredrickson, director of the ACLU’s Washington office.”). In fairness to the Republicans, they would not characterize the Report as sowing the seeds of unconstitutionality. Rather, they would likely argue that a biased report that ignored voting rights progress would be written off by the Court as disconnected from reality.

54. S. REP. NO. 109–295, at 25–26 (2006); see also *infra* Part III.

55. S. REP. NO. 109–295, at 31 (2006).

conclusion,” they argued, and “[f]rom the outset the default seemed to be to accept the House product without deliberation.”⁵⁶

In contrast, the House Report had included an entire section arguing in favor of the constitutionality of the bill and rejected any specific clarifying definition of the new retrogression standard.⁵⁷ The House Report emphasized the long line of precedent upholding the VRA against constitutional challenge and compared the newly reauthorized VRA to the laws (such as the Family and Medical Leave Act (FMLA)⁵⁸ or equal access provisions of the Americans with Disability Act⁵⁹) upheld after *City of Boerne v. Flores*.⁶⁰ Those laws were constitutional because they protected suspect classes or fundamental rights; the Voting Rights Act has the advantage of doing both. The House Report also evaded the tough questions concerning the retrogression standard by merely clarifying (and reiterating ad nauseum) that it overruled *Georgia v. Ashcroft*,⁶¹ reinstated the standard from *Beer v. United States*,⁶² and focused the retrogression inquiry on the “ability to elect” rather than on any amorphous standard of influence. It did not give guidance as to how the ability-to-elect determination should be made.⁶³

56. *Id.* at 31, 34; see also Fernandes, *supra* note 17. It is worth noting, however, that Senate Majority Leader Bill Frist originally proposed renewal of section 5 as an amendment to a gun bill in 2004. Supporters of reauthorization were justifiably concerned that slipping the VRA through in such a manner without a considerable record being developed would lead the Court to strike it down. See Tucker, *supra* note 18, at 211-12 & n.60.

57. H.R. REP. NO. 109-478, at 55 (2006).

58. 29 U.S.C. §§ 2612-2654 (2000). The Court upheld the FMLA against constitutional challenge in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

59. 42 U.S.C. §§ 12,101-12,213 (2000). Those were upheld in *Tennessee v. Lane*, 541 U.S. 509 (2004).

60. 521 U.S. 507 (1997).

61. 539 U.S. 461 (2003). In a curious turn of phrase, the House Report says the bill emphasizes that “Congress partly rejects the Supreme Court’s decision in *Georgia v. Ashcroft*.” H.R. REP. NO. 109-478, at 94 (2006). It is not clear from either the bill or the legislative materials which part of *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the law rejects and which part it retains. Presumably, it retains the part that says merely reducing the number of ability-to-elect districts could constitute retrogression, while it rejects the notion that a jurisdiction could make up for such reductions with a comparable increase in the number of influence districts.

62. 425 U.S. 130, 138 (1976) (interpreting section 5 to apply only to “proposed changes in voting procedures”).

63. See H.R. REP. NO. 109-478, at 68-72 (2006). The apparent shift in the parties’ positions from the publication of the House Report to the Senate Report could be due to several factors. First, the House Democrats were so pleased with the swift movement of the bill that they did not want to rock the boat by dealing with the hard questions as to what the ability-

Fundamental disagreements existed among the senators over the desirability, constitutionality, and the meaning of the law. Thus, even an attempt to pass a watered-down consensus report and to leave heated disagreements for expressions of “additional views” was not possible. As is clear from the final Report, some Republican senators found the geographic reach of the law to be unfair and potentially unconstitutional, as well as unjustified given what they regarded as voting rights progress. On the fundamental question of what the major new requirement in the law (the retrogression standard) meant, the Republicans believed it only protected “naturally occurring majority-minority districts,”⁶⁴ while the Democrats considered it to protect a greater variety of districts with varying percentages of racial minorities.⁶⁵ The parties could not even agree as to what evidence of

to-elect standard would mean in practice. Second, the meaning of the ability-to-elect standard was a more substantial point of debate in the Senate hearings than in the House hearings. See *supra* note 32. The potential partisan effects of two completely different but legitimate interpretations of the standard were first emphasized in the Senate hearings. Third, the Supreme Court issued its opinion in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), just as the Senate Committee was wrapping up its hearings. That decision, which struck down one Republican district held by a Hispanic incumbent as violating section 2 of the VRA and upheld another district against a challenge based on an argument that the white Democrat in the district was the African American candidate of choice, brought to the fore the way that ability-to-elect might be interpreted to help Democrats. Following the decision, at the insistence of Senator Cornyn, the Committee held an additional hearing to evaluate the decision’s impact on VRA reauthorization, where some witnesses warned of how the standard could be interpreted to protect Democratic districts. *Section 5 Renewal Senate Hearing, supra* note 32. Finally, the Democrats’ proposed Joint Statement made clear their differences with the Republicans and provoked a debate that had been kept below the surface during the drafting of the House Report.

64. S. REP. NO. 109-295, at 18-21 (2006).

65. In contrast to the final Report, which viewed the law as preventing the reduction in the number of “naturally occurring majority minority districts,” the “Statement of Joint Views” interpreted the retrogression standard along the following lines:

Nothing in this language suggests that covered jurisdictions cannot reduce the percentage of minority voters in a given district, with the goal of creating a new “coalition district” or increasing the influence of minority voters in other districts, so long as minority voters in the original district—though a smaller percentage of the district—still retain their ability to elect a preferred candidate.

The “ability to elect” standard does not lock in districts that meet any particular threshold. Determinations about whether a district provides the minority community the ability to elect must be made on a case-by-case basis. Indeed, prior to *Georgia v. Ashcroft*, the Department of Justice utilized case-by-case analysis to determine whether a voting change impacted the minority community’s “ability to elect.” . . . This analysis allows jurisdictions a degree of flexibility in the adoption of their voting changes.

Statement of Joint Views, *supra* note 44, at 84.

voting rights violations should be included in the body of the Report, as opposed to the Appendix.

These substantive disagreements and procedural irregularities may lead reviewing courts to disregard the Senate Report entirely, and rely on the House Committee Report and record, the findings in the law itself, and the materials that the senators had before them at the time of their vote.⁶⁶ Indeed, the gamesmanship surrounding the Committee Report will provide additional ammunition for those, such as Justice Scalia, who never want to consider such legislative materials as a guide to statutory meaning.⁶⁷ However, as discussed later in this Article, on certain key questions of what the law means, the Senate Report provides the principal legislative history as to how the law should work in practice. Therefore, while judges may discount it in their opinions, they inevitably will need to confront it.

II. THE EVIDENTIARY RECORD

The differing views of policymakers and advocates as to what the law actually meant remained pushed to the background of the legislative debate because Congress spent most of its time and effort assembling a record sufficient to justify the constitutionality of the law. The constitutional standard for congressional authority to enforce civil rights had changed since the last reauthorization. Supporters of the Act were justifiably concerned that the new VRA (whatever it provided) was more vulnerable than its predecessors.

It is worth mentioning at the outset, however, the unique constitutional quandary presented to supporters of the Act concerning the record they needed to develop.⁶⁸ The new constitutional standard for congressional authority to

66. See Tucker, *supra* note 18, at 266 n.653 (assembling cases ruling that postenactment legislative history is irrelevant to statutory interpretation).

67. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34 (1997); see also *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring) (viewing committee reports as unreliable indicators of legislative intent); *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (“Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.”). Justice Scalia’s views on the meaninglessness of committee reports for purposes of statutory interpretation predate his appointment to the Supreme Court. See *Hirschey v. Fed. Energy Regulatory Comm’n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

68. See *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 174-97 (statement of Pamela S. Karlan) (highlighting potential constitutional problems with the reauthorized VRA); Richard L. Hasen, *Congressional Power To Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 206-07 (2005) (same).

enforce civil rights that emerged from *City of Boerne v. Flores*⁶⁹ and its progeny⁷⁰ established that such laws must be “congruent and proportional” to remedying or preventing violations of the Fourteenth Amendment. The new VRA was quite different from other laws either upheld⁷¹ or struck down⁷² post-*Boerne*: (1) the bill proposed renewal of existing legislation, not drafting a law from scratch; and (2) the law would not apply nationwide.⁷³

First, because Congress was not writing legislation anew, but rather reauthorizing a law currently in effect, it was unclear what record of discrimination it needed to develop.⁷⁴ To prove the law was necessary, the best evidence would be data concerning the extent of voting rights violations in the covered jurisdictions, especially if such violations were more prevalent in covered than in noncovered jurisdictions. However, if the Act was working well, then few such examples should exist. Conversely, if widespread voting rights violations continued in the covered jurisdictions, then the law arguably

69. 521 U.S. 507, 520 (1997).

70. See cases cited *supra* notes 1, 4-5, 8; cases cited *infra* notes 71-72.

71. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding public accommodations provisions of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12,131-12,165 (2000), insofar as they provide access to state courthouses); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000), against constitutional challenge). The Court had upheld the VRA as amended in 1982 against a federalism challenge two years after *Boerne*. See *Lopez v. Monterey County*, 525 U.S. 266 (1999). However, that case was principally about the constitutionality of the Act insofar as it required covered localities in uncovered states to seek preclearance for state voting laws.

72. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (striking down Title I of the Americans with Disability Act, 42 U.S.C. §§ 12,111-12,117 (2000), as applied to the states); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act, 42 U.S.C. § 13,981 (2000)); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (striking down the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000), as applied to the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (striking down the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (2000), as applied to the states); *Boerne*, 521 U.S. at 536 (striking down the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), as applied to the states).

73. See Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007); Ellen D. Katz, *Congressional Power To Extend Preclearance: A Response to Professor Karlan*, 44 HOUS. L. REV. 33 (2007). See generally *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 5-6 (statement of Pamela S. Karlan) (explaining why the VRARA poses new questions but is nevertheless constitutional under *Boerne*).

74. See Karlan, *supra* note 73, at 20-27; Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51, 123-131 (2006) (arguing that the VRARA is constitutional).

was not working, and it would be difficult to justify it as a congruent and proportional remedy.⁷⁵ Like those who advocate for continuing a heightened police presence in a previously, but not presently, high-crime neighborhood, advocates for renewal needed to marshal evidence both of the law's success and the harmful consequences of its removal.⁷⁶

Second, "congruence and proportionality" may mean something different for a law that does not apply to the nation as a whole. Unlike a law of general applicability, a law with a specific geographic reach may need to justify not only the need for the law but also the differential need for the law in some areas rather than others. Does the constitutional test require a record merely of continued voting rights violations in the covered jurisdictions? Or does it require a record of a greater frequency, tendency, or severity of such violations in the covered, as opposed to uncovered, jurisdictions?⁷⁷ If the latter, then the concerns expressed above become exacerbated, as an absence of differences between the two classes of jurisdictions could either constitute evidence of the law's successful deterrent effect or it might suggest the arbitrariness of the geographic choice the law makes.⁷⁸

Supporters of reauthorization decided that the safest course of action was to stick with the coverage formula that the Supreme Court had previously upheld. Despite the recognized need to extend coverage to the newest generation of voting rights violators, constitutional and political constraints prevented any alteration of the statute's geographic reach. The requirements of the *Boerne* standard were sufficiently uncertain that any change in the coverage formula was seen as an additional gamble on the ability of Congress to predict what types of evidence the Court would find important. Moreover, the political

75. See *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 174-97 (statement of Pamela S. Karlan) (arguing that the bill was sufficiently "congruent and proportional" to survive constitutional scrutiny); Karlan, *supra* note 73, at 20-27.

76. See *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 62 & n.34 (statement of Anita Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights, Chapel Hill, N.C.) ("Evidence that a law is being complied with is not a reason to do away with it. If there were an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but rather that it is sufficiently serving its purpose. So long as the risk of pollution continues the law would need to be renewed.").

77. On this point, see generally Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 183, 204-214 (Ana Henderson ed., 2007).

78. See *Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1999) (reaffirming the constitutionality of section 5 and the ability of Congress to address discrimination one step at a time, instead of nationwide).

hurdles of adding new jurisdictions, most of which likely would have been Republican, to the preclearance regime made maintaining current coverage the safest political choice. The new Act was therefore not an attempt to capture all of the worst voting rights violators, but rather an effort to capture some of them and to preserve historic gains where they had been made. As a result, supporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.

Despite considerable disagreement as to the sufficiency of the legislative record for purposes of proving the law's constitutionality, very little disagreement existed as to the facts on the ground. The legislative record assembled principally in the House,⁷⁹ but repeated in the Senate, contains four categories of evidence to support reauthorization of the VRA: (1) statistics as to minority voter turnout, registration, and rates of officeholding; (2) statistics concerning DOJ and jurisdiction behavior with respect to the preclearance process; (3) examples of voting rights violations in the covered jurisdictions; and (4) data as to all VRA section 2 litigation nationwide. The hearings made clear that the supporters and opponents of the bill differed principally as to how to interpret and emphasize the evidence.

A. Rates of Minority Voter Turnout, Registration, and Officeholding

For the original VRA and the subsequent two reauthorizations, voter turnout statistics represented one of two critical components to deciding which jurisdictions should be covered. A jurisdiction with a voter turnout rate below 50% that also employed a “test or device,” such as a literacy test, in the 1964 election would be covered under the original section 5.⁸⁰ This “trigger” or

79. Although the record appeared to be developed in the House and Senate, in truth the civil rights community had begun developing the record for reauthorization well before. The National Commission on the Voting Rights Act, an ad hoc coalition of civil rights organizations, had held hearings around the country to document voting rights violations and develop the record necessary for reauthorization. See NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005 (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf>. Both the House and the Senate included the study in the hearings. The House Report, H.R. REP. NO. 109-478 (2006), however, referenced it frequently, citing it over twenty-five times, while the Senate Report, S. REP. NO. 109-295 (2006), largely ignored it. See also Tucker, *supra* note 18, at 218 (describing the record developed by civil rights organizations prior to the House hearings on the VRARA).

80. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb (2000) (amended 2006)).

coverage formula was reverse engineered in order to capture a foreseeable group of jurisdictions, principally in the South.⁸¹ This original trigger, as well as a subsequent amendment that included in the definition of “test or device” English-only ballot materials in jurisdictions with a large number of non-English speakers, was both overinclusive and underinclusive of discriminatory jurisdictions.⁸² However, the formula roughly corresponded to jurisdictions Congress found “guilty” and avoided the politically fraught task of merely picking and choosing jurisdictions based on subjective judgments about their relative lack of protection for minority voting rights.⁸³ Moreover, any jurisdictions erroneously captured by the coverage formula could simply “bail out” by demonstrating in court their unproblematic voting rights records.

For the 2006 reauthorization, voter registration and turnout statistics—either aggregate registration and turnout by state or differential registration and turnout by racial group—did not help the cause much.⁸⁴ Turnout rates in the covered and uncovered jurisdictions do not differ consistently.⁸⁵ Both the House and the Senate Reports also noted the remarkable decrease in differential registration and turnout rates among racial groups. The Senate Report emphasized success, noting that in some covered jurisdictions (California, Georgia, North Carolina, Mississippi, and Texas) African

81. *Introductory Senate Hearings*, *supra* note 32, at 21–22 (statement of Samuel Issacharoff).

82. Michael P. McDonald, *Who’s Covered? Coverage Formula and Bailout*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 12, at 255, 257.

83. *But see* Karlan, *Section 5 Squared*, *supra* note 73, at 26 & nn.119–22 (explaining that political considerations to avoid coverage of Texas and Arkansas played a role in the decision to have literacy tests, rather than poll taxes, constitute part of the original trigger).

84. See RONALD KEITH GADDIE & CHARLES S. BULLOCK, III, *MINORITY VOTING STUDIES OF JURISDICTIONS COVERED BY SECTION FIVE OF THE VOTING RIGHTS ACT* (2006), *available at* <http://www.aei.org/research/nri/subjectAreas/pageID.1140,projectID.22/default.asp>.

85. See Charles S. Bullock, III, & Ronald Keith Gaddie, *Focus on the Voting Rights Act: Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 *GEO. J.L. & PUB. POL’Y* 1, 7 (2007) (“On both of the dimensions used to determine the jurisdictions to which Section 5 would apply, the South compares well with other parts of the nation.”). Although with each election different states do better or worse, rates of voter turnout in most of the covered southern states in the 2004 election are near the national mean or below. See U.S. CENSUS BUREAU, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004* (2006) [hereinafter *CENSUS REPORT*], *available at* <http://www.census.gov/prod/2006pubs/p20-556.pdf> (providing turnout and registration rates for various subsections of the population based on a census survey). The clustering of the covered southern states at the bottom of the distribution is not as stark for the 2000 election, and for either of the two most recent elections, the differences between the top quartile and bottom quartile do not exceed ten percentage points, although the covered states are generally at or below the median.

American turnout exceeded that of whites.⁸⁶ The House Report also noted success, but made express findings as to differential turnout rates for African Americans in Virginia and South Carolina, and Hispanics in Texas and Florida, that provided evidence of the continued need for section 5.⁸⁷

Remarkably, both the House and Senate reports, when comparing black and white turnout, count Hispanics as white instead of comparing non-Hispanic white and black turnout. As a result, white turnout appears artificially low and in some states makes black turnout appear to be a few percentage points higher than white turnout. For example, the Senate Report notes higher black turnout than white turnout in 2004 in Texas: blacks (55.8%), whites (50.6%), Hispanics (29.3%).⁸⁸ Those statistics are technically correct, yet once Hispanics are taken out of the white category the picture changes considerably. Non-Hispanic-white turnout in Texas in 2004 was 63.4%⁸⁹—7.6 percentage points *higher* than black turnout.⁹⁰

Although one can focus on a few bad states or aberrant years, turnout statistics no longer capture the level of unconstitutional discrimination that may exist in the covered or noncovered jurisdictions. African Americans generally trail whites in turnout by between five and ten percentage points.⁹¹

86. S. REP. NO. 109-295, at 11 (2006).

87. See H.R. REP. NO. 109-478, at 25-32 (2006) (noting that in Virginia 68.2% of whites were registered to vote in 2004 as compared to 57.4% of African Americans, in South Carolina 74.4% of whites were registered as compared to 71.1% of African Americans, in Florida 64.8% of whites were registered as compared to 38.2% of Latinos, and in Texas 61.5% of whites are registered as compared to only 41.5% of Latinos).

88. S. REP. NO. 109-295, at 11 (2006).

89. U.S. Census Bureau, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004 (May 25, 2005), available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>.

90. When comparing the estimates of turnout of blacks and non-Hispanic whites in the 2004 election, the only two covered Southern states where black turnout appears to exceed non-Hispanic white turnout are Alabama (where the difference is within the confidence interval) and Mississippi (where the estimates differ by 6.9 percentage points). In North Carolina, which is only partially covered by section 5, the estimate of black turnout in the 2004 election exceeded white turnout, although the 1.6 percentage point difference is within the confidence interval. In the aggregate, black turnout lags non-Hispanic white turnout by about 9 percentage points, but the covered jurisdictions do not depart systematically from the average. *Id.*

91. See Paul R. Abramson & William Claggett, *Race-Related Differences in Self-Reported and Validated Turnout*, 46 J. POL. 719 (1984); Jan E. Leighley & Arnold Vedlitz, *Race, Ethnicity and Political Participation: Competing Models and Contrasting Explanations*, 61 J. POL. 1092, 1108 (1999).

States that disenfranchise felons prevent a substantial share of the African American male population from voting, but the practice does not appear to affect differential turnout between the covered and uncovered jurisdictions.⁹² Hispanics' extremely low voter turnout rates are due in large part to their ineligibility to vote given their low rates of citizenship.⁹³ The voter turnout statistics presented in the House and Senate reports use voting age population as the denominator, as opposed to citizen voting age population or eligible voters. Because a large number of Hispanics in the voting population are ineligible to register even if they wanted to, their turnout rates appear dramatically lower than other racial groups.

Data in the House and Senate reports with respect to minority officeholding reflected a similar pattern. Although minorities hold only about 5% of elected positions nationwide,⁹⁴ as the committee reports noted, there has been a very significant increase in the number of African Americans and Hispanics holding positions in Congress and state legislatures.⁹⁵ The House Report, however, noted minorities' underrepresentation as compared to their share of the population. It emphasized that in the Deep South (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina), where African Americans make up 35% of the population, they hold only 20.7% of the seats in states legislatures—with even less frequent success in winning statewide office.⁹⁶ The Senate Report struck a somewhat different tone, pointing to near proportional representation for African Americans in the state legislatures and congressional delegations from Georgia and Mississippi.⁹⁷

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92. See The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (Apr. 2007), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.
93. Benjamin Highton & Arthur L. Burris, *New Perspectives on Latino Voter Turnout in the United States*, 30 AM. POL. RES. 285, 286-87 (2002) (finding that the thirty-one percentage point gap drops to sixteen points when noncitizens are excluded).
94. See Zoltan Hajnal & Jessica Trounstine, *Transforming Votes into Victories: Turnout, Institutional Context, and Minority Representation in Local Politics*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER, *supra* note 77, at 83, 84.
95. See H.R. REP. NO. 109-478, at 18 (2006) (noting that the number of African American elected officials increased from 1469 in 1970 to over 9000 in 2000); S. REP. NO. 109-295, at 11-12 (2006) (describing the increase in the number of black and Latino public officials).
96. See H.R. REP. NO. 109-478, at 33 (2006); NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 79, at 37-39.
97. See S. REP. NO. 109-295, at 33 (2006).

Nothing in the record, however, pointed to a difference in rates of minority officeholding between covered and uncovered jurisdictions.⁹⁸

B. Evidence Concerning the Preclearance Process: Rates of Submissions, Denials, and Requests for More Information

The threat to reauthorization posed by the success of the VRA becomes clearest when considering the evidence concerning violations of section 5 itself.⁹⁹ Preclearance behavior is the most easily measured and presented data in the record, which contains rates of preclearance submissions, denials, and requests for more information, as well as accounts as to the deterrent effect of section 5.

Despite large increases in the volume of preclearance requests, the rate and absolute number of DOJ denials of preclearance have declined in recent years. Although the total number of preclearance denials (682) was greater for the twenty-five years after the 1982 amendments than during the first seventeen years of the VRA,¹⁰⁰ the rate of DOJ objections to preclearance requests has decreased from over 4% in the first five years after the Voting Rights Act, to between 0.05% and 0.23% from 1983 to 2002.¹⁰¹ With only ninety-two total objections in the last ten years, the annual objection rate since the mid-1990s has dropped to an average of less than 0.2%.¹⁰²

Much of that recent drop is due to changes in DOJ enforcement of the discriminatory purpose prong of section 5 as mandated by the Supreme Court in *Reno v. Bossier Parish (Bossier Parish II)*,¹⁰³ which the VRARA overturns. Nearly three-quarters of the objections from 1990 to 2000 involved purposeful

98. See DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 16 (2001) (arraying data as to rates of African American officeholding from all states which suggest no difference between the South and non-South); Bullock & Gaddie, *supra* note 85, at 7.

99. See Hasen, *supra* note 68, at 190-93 (arguing that the DOJ's preclearance statistics provide little evidence that the coverage formula remains congruent and proportional).

100. See Tucker, *supra* note 18, at 263 (citing to relevant portions of the congressional record).

101. Hasen, *supra* note 68, at 192 fig.3.

102. *Modern Enforcement of the Voting Rights Act: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 117 (2006) (statement of Wan J. Kim, Assistant Att'y Gen., Civil Rights Division, U.S. Department of Justice) (providing preclearance objection rates from 1965 to 2006).

103. 528 U.S. 320, 341 (2000).

discrimination, with 43% based on purpose alone.¹⁰⁴ However, the *Bossier Parish II* decision rejected discriminatory purpose (as opposed to retrogressive purpose) as the purpose inquiry for section 5. Since that decision, the DOJ has lodged only a handful of purpose-based objections.¹⁰⁵

A better indicator of section 5's deterrent effect, however, might be the number of DOJ "Requests for More Information" (MIRs) and the rate of withdrawal of voting changes pursuant to such requests.¹⁰⁶ After all, the fact that the preclearance regime leads to few denials could simply mean that the section is working as intended. Like any other law, section 5's effectiveness should not be evaluated by the number of times it is broken. The Voting Section of the Civil Rights Division files a "Request for More Information" when the submission from the jurisdiction does not provide all the information needed to evaluate the potential retrogressive effect of a voting change.¹⁰⁷ An MIR also represents a DOJ signal that the voting change might be found retrogressive (and denied preclearance) unless the jurisdiction allays the DOJ's concerns. Since 1982, DOJ has sent over 800 requests for more information regarding voting changes, leading jurisdictions to withdraw their submissions in 205 instances and change their submissions in many others.¹⁰⁸ Again, as a total share of preclearance submissions, this represents a small fraction, but it gives a sense of how many dogs did not bark as a result of the threat of a denial of preclearance.

The same could be said regarding the testimony pointing to DOJ negotiations with jurisdictions even before they submit a plan for preclearance. Often a jurisdiction will work with the DOJ to ensure that a voting change that

104. See Peyton McCrary, Christopher Seaman & Richard Valelly, *The Law of Preclearance: Enforcing Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 12, at 26 tbl.2.2.

105. *Id.* at 27. It is also possible that the Supreme Court's decision in *Reno v. Bossier Parish School Board* (*Bossier Parish I*), 520 U.S. 471 (1997), also led to a drop in denials. Prior to that case the DOJ had assumed it could deny preclearance based on a jurisdiction's violation of section 2 of the VRA, 42 U.S.C. § 1973 (2000). The Court rejected that interpretation and therefore in the last ten years the DOJ has not been able to deny preclearance on that ground.

106. On the deterrent effect of section 5 as revealed in MIRs, see Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, *supra* note 77, at 47. *But see Need for Section 5 Preclearance Senate Hearing*, *supra* note 32, at 112-14 (statement of Richard H. Pildes) (questioning the significance of MIRs).

107. Voting Section, U.S. Dep't of Justice, Making Section 5 Submissions, http://www.usdoj.gov/crt/voting/sec_5/making.htm (last visited Oct. 7, 2007).

108. H.R. REP. NO. 109-478, at 40-41 (2006) (citing NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 79, at 58).

might be retrogressive is altered, even before it is submitted, in a way that ensures a grant of preclearance. These bargains occur in the shadow of section 5 without the threat of a preclearance denial needing to be exercised.¹⁰⁹

C. Voting Rights Violations in Covered Jurisdictions

The hearings in the House and the Senate, as well as the committee reports, are replete with examples of voting rights violations in covered jurisdictions.¹¹⁰ Evidence of violations falls into three principal categories: actual court decisions finding unconstitutional deprivation of the right to vote, examples and case studies describing such deprivations, and systematic data detailing violations of section 2 of the VRA. If the Court upholds section 5 against constitutional challenge, it will most likely do so based on these types of evidence, as opposed to the other types discussed above.

The Senate Report identified only six published cases arising in covered jurisdictions since 1982 where a court has found unconstitutional discrimination against minorities with respect to the right to vote.¹¹¹ It found an equal number in the uncovered jurisdictions,¹¹² as well as an equal number of successful claims made by white voters.¹¹³ Those data certainly understate the total number of cases because many generic voting rights claims are not counted as alleging racial discrimination, while still others do not appear in the official reports or databases from which those cases were drawn. Nevertheless, even if the actual number is three or four times what the committees found, it still amounts to less than one successful case per year in the covered jurisdictions, and the lack of a difference with the uncovered jurisdictions (let alone cases brought by white voters) is notable. Again, the scarcity of evidence, as well as the lack of an identified difference between the covered and uncovered jurisdictions, could be due to the successful operation of section 5, which would have prevented many such violations in the covered jurisdictions, especially when the DOJ denied preclearance to any law with a discriminatory purpose. Moreover, the amended section 2, passed in 1982, led to more

109. See *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 53-54 (statement of Anita S. Earls, Director of Advocacy, Center for Civil Rights, University of North Carolina School of Law).

110. The Appendix to the Senate Committee Report, which describes these cases, is almost 300 pages long. S. REP. NO. 109-295 apps. I-III, at 65-363 (2006).

111. S. REP. NO. 109-295, at 13 (2006).

112. *Id.*

113. *Id.*

litigation under section 2 of the VRA instead of the Fourteenth and Fifteenth Amendments. Because litigation under section 2 does not require a demonstration of discriminatory intent as constitutional challenges do, it is not surprising that most such cases do not show up in the totals of the Senate Report. With those qualifications about how the record might be “tainted,” the low number of court-identified cases of constitutional violations in the covered jurisdictions represents a data vacuum that has been a focal point for the law’s critics.¹¹⁴

A determination of the constitutional sufficiency of the evidentiary record provided by Congress will likely rise or fall based on the avalanche of case studies of voting rights violations in the covered jurisdictions assembled by the civil rights community and presented to the Committees.¹¹⁵ Those examples range from Jim Crow-like suppression to more subtle forms of voting rights deprivations.¹¹⁶ They describe outright intimidation and violence against minority voters,¹¹⁷ discriminatory administration of elections,¹¹⁸ disparate treatment in registration and voting,¹¹⁹ minority vote dilution and racial gerrymandering,¹²⁰ and bias against non-English speakers.¹²¹

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114. See Abigail Thernstrom & Edward Blum, Op-Ed., *Voting Rights Act: After 40 Years, It's Time for Virginia To Move On . . .*, RICHMOND TIMES-DISPATCH, Aug. 1, 2005, at A11; see also Bullock & Gaddie, *supra* note 85, at 3 (“Relatively little effort was invested in demonstrating widespread problems in compliance with the statute or the law’s coverage. Instead legislators repeatedly pointed to a handful of examples to explain why they opposed allowing any covered jurisdictions to escape Section 5.”); Abigail Thernstrom, Editorial, *Emergency Exit*, N.Y. SUN, July 29, 2005, at 10.
115. See generally NAT’L COMM’N ON THE VOTING RIGHTS ACT, HIGHLIGHTS OF HEARINGS OF THE NATIONAL COMMISSION ON THE VOTING RIGHTS ACT (2005) [hereinafter HEARING HIGHLIGHTS] (assembling cases of voting rights violations in covered jurisdictions).
116. Senator Kennedy highlighted the following examples in his floor speech during the reauthorization debate: the DOJ’s purpose-based objection to Kilmichael, Mississippi’s cancellation of an election three weeks before election day; the discriminatory moving of a polling place in Dinwiddle, Virginia; and the failure of the DOJ to deny preclearance to the Georgia photo identification law and the Texas re-redistricting. 152 CONG. REC. S7967 (daily ed. July 20, 2006) (statement of Sen. Kennedy).
117. See, e.g., HEARING HIGHLIGHTS, *supra* note 115, at 4 (describing voter intimidation in Texas including the burning of the home of a campaign staff treasurer of a black candidate).
118. See, e.g., *id.* at 4-5 (describing the discriminatory moving of polling places in Black Belt counties in South Carolina and in Latino areas in Texas).
119. See, e.g., *id.* at 4-6, 8, 11 (describing discrimination in registration and voting in South Carolina, Texas, Alabama, and Arizona); *id.* at 35-36 (describing Georgia photo identification law).
120. See, e.g., *id.* at 57, 68, 73 (describing vote dilution in California and Mississippi and an attempted racial gerrymander in Virginia).

The best attempt at a large-scale empirical study to demonstrate the different voting rights records of the covered and uncovered jurisdictions arose with respect to the rate of section 2 violations. The study, overseen by University of Michigan Law School Professor Ellen Katz, analyzed all of the published opinions in 331 lawsuits since 1982 in which courts addressed a section 2 claim.¹²² The study found that a little more than half of reported section 2 cases were filed in noncovered jurisdictions, but that the rate of success for plaintiffs was about ten percentage points greater in covered jurisdictions (42.5% success rate, as opposed to 32.2% success rate in the noncovered areas).¹²³ This is despite the fact that only the covered jurisdictions were constrained by section 5, and that the DOJ for much of this period prevented laws violating section 2 from going into effect. The study also found that most of the so-called Senate Factors,¹²⁴ indicating a history and present

121. See, e.g., *id.* at 8, 24, 34 (describing the importance of language assistance in Arizona and discrimination against Hispanics in North Carolina and New York City).

122. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, University of Michigan Law School, 39 U. MICH. J.L. REFORM 643, 654 (2006). The Michigan study was inserted into the record in the House. See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 964 (2005). Although I stress the importance of the study here, I do not want to overemphasize its prominence in the legislative record. It was summarized by the National Commission on the VRA Report, referenced by several witnesses, inserted into the record, and cited in the House Report. See H.R. REP. NO. 109-478, at 53 n.133 (2006); NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 79, at 82-85; Publications Citing the Final Report of the Voting Rights Initiative (Mar. 18, 2007), <http://sitemaker.umich.edu/votingrights/files/citations.pdf> (pointing to citations in the VRARA legislative history citing the Michigan Report). It was not the subject of concerted debate among witnesses or members of Congress.

123. As stated in the Michigan study:

Of the 123 successful plaintiff outcomes documented, 68 originated in covered jurisdictions, and 55 elsewhere. Plaintiffs in covered jurisdictions also won a higher percentage of the cases decided than did those in non-covered areas. Of the 171 lawsuits published involving non-covered jurisdictions, 32.2% ended favorably for plaintiffs, while 42.5% of the 160 lawsuits from covered jurisdictions produced a result favorable to the plaintiffs.

Katz et al., *supra* note 122, at 655-56.

124. See *Thornburg v. Gingles*, 478 U.S. 30, 44-45, 50-51 (1986). The Senate factors are: (1) a history of official discrimination in voting; (2) racially polarized voting; (3) use of enhancing practices, such as at-large elections and majority vote requirements; (4) discrimination in candidate slating; (5) ongoing effects of discrimination in areas such as education, employment, and health; (6) racial appeals in campaigns; (7) lack of success of minority candidates; (8) significant lack of responsiveness of elected officials to the minority community; and (9) a tenuous policy justification for the challenged practice.

practice of discrimination (intended or not), were more prevalent in suits lodged against covered jurisdictions.¹²⁵

Of the Senate Factors analyzed in the set of reported cases, the starkest difference between the covered and noncovered jurisdictions concerns the extent of racial bloc voting.¹²⁶ The number of successful cases in which a court found legally significant racial bloc voting is virtually the same between the covered (fifty-two decisions) and uncovered (fifty-three decisions) jurisdictions.¹²⁷ However, of the elections analyzed in cases where racial bloc voting was found, white bloc voting was found to be much higher in covered jurisdictions.¹²⁸ One way to get a sense of the extent of racial bloc voting is to look at the share of elections in which whites vote as a bloc at the 80% level—that is, elections where at least 80% of whites voted against the minority candidate of choice. Of the universe of cases that find racial bloc voting, the study found that in 81% of the elections analyzed for covered jurisdictions, but only 41% of the elections analyzed for noncovered jurisdictions, whites voted as a bloc at the 80% level.¹²⁹

These findings are consistent with others that find differences between the South and non-South with respect to the extent of racially polarized voting. In particular, for African Americans in the South, a greater share of a given district needs to be African American in order for an African American to be elected.¹³⁰

125. See Katz, *supra* note 77, at 193. All of the Senate Factors, except factors 2 (racial bloc voting), 4 (candidate slating), and 8 (lack of responsiveness), appeared more prevalent in the reported cases from the covered jurisdictions. It might be worth noting that only three factors showed any statistically significant difference between the covered and noncovered jurisdictions: (1) a history of official discrimination in voting; (3) use of enhancing practices, such as at-large elections and majority vote requirements; and (7) lack of success of minority candidates. *Id.*

126. See *id.* at 195-97 (summarizing the findings of the Michigan study); Katz et al., *supra* note 122, at 657.

127. Katz et al., *supra* note 122, at 665.

128. Katz, *supra* note 77, at 220 tbl.8.5.

129. *Id.* The elections in which racial bloc voting is discovered by a court are hardly a representative sample of elections, of course. Moreover, analyzing the number of elections as opposed to the number of cases or jurisdictions necessarily warps one's conclusions as to the prevalence of racial bloc voting in covered versus noncovered jurisdictions. If the Supreme Court will be relying on data from published section 2 cases, though, the rates of extreme bloc voting identified in such cases might provide some indication of systematic differences.

130. See David L. Epstein & Sharyn O'Halloran, *Trends in Minority Representation, 1974 to 2000, in THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 12, at 65; see also *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 133 (2006) (statement of Nathaniel Persily) (pointing to differences between the South and non-South concerning necessary black population shares for a district to elect

To be sure, much of the “racial” polarization in voting patterns can be explained by (or at least correlated with) divergent party preferences between whites and minorities.¹³¹ Insofar as racial polarization merely stands for the proposition that minorities and whites tend to vote for different candidates, we should not be surprised to find higher rates of racial bloc voting in the South, given that whites are more uniformly Republican in the South.¹³² In other words, the lesser ability of minorities to elect their preferred general election candidates in the South due to the relative unwillingness of southern whites to vote for Democrats shows up as racially polarized voting. Whether one deems this confounding variable important depends on whether one cares about the so-called causes of racial polarization in the electorate, as opposed to the simple fact that such polarization, when interacting with at-large elections or certain districting plans, has the effect of reducing minority electoral opportunity.¹³³ Moreover, the legislative record includes many examples indicating racial polarization apart from arenas of partisan competition.¹³⁴ Although party preferences may explain divergent preferences of racial groups in general elections, they would not be able to explain racially polarized voting in nonpartisan races or Democratic party primaries.

As the study itself recognizes, there are plenty of reasons to quibble with (or qualify) the findings of the Michigan study.¹³⁵ Moreover, evidence of

a black candidate); HEARING HIGHLIGHTS, *supra* note 115, at 7-8 (citing testimony of Richard Engstrom regarding the high rates of racial polarization in seven southern states).

131. See Bernard Grofman & Thomas Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 12, at 311, 317-18 (noting that racial bloc voting along party lines makes it harder for black candidates to win office); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 314-20 (1997) (describing the relationship between partisanship and racial bloc voting in the South).
132. See DAVID LUBLIN, THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE (2004) (explaining the rise and dominance of the Republican Party in the South); Karlan, *supra* note 131, at 314-20.
133. There is a healthy debate in the circuits, in addition to among the Justices in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), as to whether one must control for party in racial bloc voting analysis. See Katz et al., *supra* note 122, at 665-70; see also *infra* notes 180-186 and accompanying text (describing the debate in *Gingles*).
134. See H.R. REP. NO.109-478, at 34-35 (2006); NAT'L COMM'N ON THE VOTING RIGHTS ACT, *supra* note 79, at 91-92.
135. Relying on reported cases, let alone successful reported cases, necessarily skews the results in that such cases may represent an incomplete and biased selection of jurisdictions, election laws, or the relative prevalence of discriminatory election laws. See Katz, *supra* note 77, at 187 n.14 (explaining inevitable incompleteness of the Michigan study); Katz et al., *supra* note 122, at 655 (suggesting that the total number of lawsuits may be five times larger than the number of reported opinions); see also HEARING HIGHLIGHTS, *supra* note 115, at 84-85

successful section 2 cases (to the extent a geographic pattern does exist) does not necessarily indicate a greater prevalence or tendency toward unconstitutional violations of voting rights. One might argue that a greater threat to constitutional rights is posed, in general, by jurisdictions with laws that have discriminatory effects as defined by section 2. However, violations of the Fourteenth or Fifteenth Amendments require a showing of intentional discrimination.¹³⁶ Thus, for example, a high rate of use of dilutive at-large

(discussing limitations of the Michigan study and pointing to evidence suggesting the number of filed section 2 lawsuits is larger); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. (forthcoming Jan. 2008) (manuscript at 36-40, on file with The Yale Law Journal) (describing selection biases of relying on reported section 2 cases).

First, the number of lawsuits might be due to strategic decisions by civil rights lawyers or the disproportionate presence of certain governmental forms, such as at-large elections, in covered jurisdictions, just as it might be due to the disproportionate presence of unconstitutional state action. Moreover, the total population of the covered jurisdictions is much lower than that of the uncovered jurisdictions. The study does not “weight” the two categories of jurisdictions either by the number of people living in the jurisdictions or by the relative proportions of racial minorities.

Second, the number of successful lawsuits does not indicate how severe the adjudicated voting rights violations were. If the covered jurisdictions tend to commit more egregious violations than the uncovered jurisdictions—even if they commit the same “number” of violations or lose the same number of lawsuits—the relative severity of their violations remains constitutionally relevant. A lawsuit that uncovers a state policy found to disenfranchise a sizable portion of the state’s population would “count” equally with a lawsuit demonstrating that a local town council’s redistricting plan unintentionally dilutes minority votes.

Third, although some covered jurisdictions may have violated section 2 quite often and severely, many have never violated it. The case data may help justify coverage of those jurisdictions found to violate section 2, but not justify the coverage formula per se. The data are skewed, in effect, because a subset of the covered jurisdictions has been found guilty of race-based vote dilution. If one or two of the worst states were subtracted from the dataset, then the covered and uncovered jurisdictions would appear to have the same number of violations.

Finally, preliminary data from the last five years suggest the gap between covered and noncovered jurisdictions may have diminished or reversed, with the total number of successful section 2 cases declining and the share of successful lawsuits in uncovered jurisdictions outpacing the share in covered jurisdictions. See Katz, *supra* note 77, at 215 tbl.8.1 (finding plaintiffs succeeding in 20.7% of section 2 cases in covered jurisdictions and 23.9% of cases in noncovered jurisdictions from 2000 to 2005). It is unclear why the recent data differ from those of the earlier decades or whether by 2010 the decade of the 2000s will show a similar regional pattern as the 1990s.

136. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

voting systems, the most prevalent section 2 violation in the VRA's early years,¹³⁷ does not necessarily indicate a high rate of constitutional violations.¹³⁸

With all of these qualifications and caveats, the data concerning section 2 violations, and particularly the relative prevalence of racially polarized voting, provides the best systematic evidence to distinguish covered from noncovered jurisdictions. There are ways to explain these differences away, but the section 2 case data will provide the greatest help for a court wishing to hang its hat on systematic data that justifies the current coverage formula. Turnout rates cannot perform this function as they did previously, and the many examples of voting rights violations in the record will only suffice if the Court decides evidence exclusively from the covered jurisdictions satisfies the *Boerne* standard. Reliance on almost any of the voting data in the record to prove a greater need for section 5 in the currently covered jurisdictions, however, must account for the fact that the successful operation of section 5 will prevent the emergence of the type of evidence that would best justify its continued operation.

III. WHY THE BASIC STRUCTURE OF THE LAW REMAINS INTACT

In the end, the bill that became law was virtually unchanged from the original version that the House and Senate Committees considered in their first hearings on the subject. The new VRA keeps the same structure as the old VRA, while overturning Supreme Court decisions thought to limit it. The same jurisdictions remain covered, the bailout procedures remain intact, the DOJ retains its special place in the preclearance regime, and the legislation was reauthorized once again for twenty-five years.¹³⁹ The two most notable changes were the alterations in the standards for what constitutes discriminatory purpose and discriminatory effect. Overturning *Bossier Parish II*,¹⁴⁰ the new law makes clear that mere discriminatory purpose—regardless of whether such purpose seeks to make minorities worse off than the status quo—is grounds for a denial of preclearance.¹⁴¹ Overturning *Georgia v. Ashcroft*,¹⁴² the legislation

137. See Katz, *supra* note 77, at 192-93.

138. *Id.* at 211-13 & n.145.

139. The law also retains the language assistance provisions of section 203, as well as updates to provisions concerning federal observers and the provision of expert witness fees in litigation. See Tucker, *supra* note 18, at 223-32.

140. *Reno v. Bossier Parish Sch. Bd.* (*Bossier Parish II*), 528 U.S. 320, 335 (2000) (interpreting discriminatory purpose to mean retrogressive purpose).

141. 42 U.S.C.A. § 1973c(c) (West Supp. 2007).

requires denials of preclearance when voting laws “diminish[] the ability” of minorities to “elect their preferred candidates of choice.”¹⁴³

The discussion in this Part explains why Congress could not merely have tinkered with the law in ways that would have updated the provisions that critics of the law find most disturbing. If the can of worms that is the basic structure of section 5 had been opened, the political coalition behind the law would have collapsed or Congress would likely have needed to revamp the VRA completely. In addition to the well-known political constraints, the shadow cast by the Supreme Court’s federalism decisions stultified the available options for reforming section 5’s key provisions.

A. Retaining the Same Coverage Formula

As discussed above, the coverage formula for section 5 is both overinclusive and underinclusive of jurisdictions of concern with respect to their record of minority voting rights violations. Such was the case in 1965 and it remains so today. The statute attempts to address the imperfect fit by providing for bailout of “good” jurisdictions and “bail in” of jurisdictions that courts determine should be included in the preclearance regime because of an identified voting rights violation.¹⁴⁴ At least in the abstract, though, it is difficult to defend a formula which, for example, covers counties in Michigan and New Hampshire,¹⁴⁵ but does not cover the counties in Ohio and Florida with the most notorious voting rights violations in recent elections. The most one can say in defense of the formula is that it is the best of the politically feasible alternatives or that changing the formula would sufficiently disrupt settled expectations that it is better to go with the devil we know than one we do not.

What became clear throughout the reauthorization process was that a debate over the coverage formula would turn into a debate about the purpose and utility of section 5 itself. Such a debate likely would have led to the

142. 539 U.S. 461, 480 (2003).

143. 42 U.S.C.A. § 1973c(b) (West Supp. 2007). As described in greater detail below, *Georgia v. Ashcroft*, 539 U.S. 461 (2003), redefined the “retrogression” standard in section 5 so as to permit redistricting plans that opted for broader minority influence across a range of districts or in the legislature as a whole as opposed to maintaining minorities’ ability to elect their candidates of choice. See *infra* notes 220-227 and accompanying text.

144. See 42 U.S.C. § 1973a(c) (2000). This so-called pocket trigger allows a court to require a jurisdiction to seek preclearance for an “appropriate time” if it has been found to violate the Fourteenth or Fifteenth Amendments. See also *infra* Section III.B.

145. See *supra* note 3 (listing covered jurisdictions).

complete unraveling of the bill. If Congress had added or subtracted jurisdictions based on some new criteria then the justification for those criteria would become the central political and constitutional question underlying the bill. Congress would have needed to make some findings as to why these new criteria roughly correspond (or more precisely, were “proportional and congruent”) to areas of concern with respect to minority voting rights violations.

Nothing akin to the “neutral” triggers of past reauthorizations could have achieved that easily. Those seeking to expand coverage struggled to find a formula similar to the existing one that would capture an appropriate group of jurisdictions while passing constitutional muster and not giving rise to concerted political opposition. That turned out to be an impossible task. As described above, voter turnout rates (either in the aggregate or racial disparities) would not do so,¹⁴⁶ nor would a history of successful voting rights lawsuits (for example, cover all those jurisdictions that had been found guilty of a violation of section 2 of the VRA). Moreover, no objective statistical criteria could have added the most recent bad actors (Ohio and Florida) to the list of currently covered jurisdictions. Indeed, as Richard Pildes has argued, the bad actors of recent elections were discovered principally after the fact when a competitive election and subsequent litigation exposed the problems in those states’ election laws and administration.¹⁴⁷

146. Representative Norwood’s proposed amendment, H.R. REP. NO. 109-554, at 3 (2006), would have updated coverage to include states with low voter turnout in recent elections.

147. If a similar light were projected on other states, similar problems would have been detected. As discussed later, this point only goes to show that voting rights violators are difficult to predict *ex ante*, and that we only really become concerned as a country about such violations when they make a difference in an election. *See generally* *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 198-207 (statement of Richard H. Pildes) (explaining the difficulties of identifying potential voting rights violators before an election takes place).

As with a decision to apply section 5 nationally,¹⁴⁸ a decision to cherry-pick such large and politically powerful states as Ohio and Florida would have sunk the bill. It is one thing to retain coverage of jurisdictions that have lived with the constraints of section 5 for some time; it is quite another to heap a new and costly administrative scheme onto jurisdictions unaccustomed to needing federal permission for their voting laws. Moreover, if the formula were tailored to capture the most notorious alleged recent violators of minority rights, the likely targets of increased coverage would have been Republican-controlled states—and the Republican Congress should hardly be expected to increase coverage to include solely those areas Democrats considered bad actors in recent elections. Perhaps a deal could have been struck to include some Democratic states that have been the subject of controversy, such as Washington, which demonstrated its share of voting irregularities in its 2004 gubernatorial recount. Yet, those complaints were not race-based, and if section 5 was going to become a generic troubleshooter for voting violations, let alone “fraud” however defined, then the whole structure would need to have been rethought.

The political obstacles to increased coverage reveal how political changes since 1965 have transformed the meaning of section 5. As Samuel Issacharoff and others have described at greater length, the original section 5 targeted uncompetitive Dixiecrat jurisdictions and did not have any obvious partisan effect.¹⁴⁹ The specter, for example, of a politicized DOJ seeking to use the preclearance process to serve partisan ends was not considered a serious

148. Expanding section 5 to the nation as a whole was considered politically infeasible and constitutionally problematic. See Tucker, *supra* note 18, at 254, 262 (describing Congress’s consideration of potential coverage changes that would have applied the law nationwide); ACLU Voting Rights: About the VRA, <http://www.votingrights.org/more.php> (last visited Oct. 7, 2007) (arguing against nationwide application of section 5 because of the “volume of voting changes that would have to be reviewed” and because it would no longer appropriately focus on jurisdictions where there is a history of voting discrimination). National coverage would require a Voting Section of the DOJ about five times bigger than it currently is. Moreover, the fact that section 5 was geographically targeted has always been seen as one of its constitutional saving graces. See *United States v. Morrison*, 529 U.S. 598, 626–27 (2000) (“By contrast [to the Violence Against Women Act], the [VRA] § 5 remedy upheld in *Katzenbach v. Morgan* . . . was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* . . . the remedy was directed only to those States in which Congress found that there had been discrimination.”).

149. See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1713 (2004) (“As long as the [covered jurisdictions] remained entirely Democratic, the tremendous powers given to the federal government to intercede in local political affairs in the covered jurisdictions could not be used for partisan gain.”); cf. Persily, *supra* note 12, at 226 (“When Congress first passed the Voting Rights Act, the Republican Party was almost completely absent from the ‘Solid South.’”).

problem, nor was the coverage formula viewed as having a disparate impact on one political party (even though most of the covered jurisdictions were controlled by Democrats).

In 2006, any decision to expand coverage would have needed to appear politically evenhanded. As insulted as the currently covered jurisdictions were to remain under the section 5 umbrella, any newly covered state would have considered its addition to the preclearance regime as a national condemnation of its recent voting rights record. The only way such a signal could have been politically acceptable is if the eventual targets were not uniformly dominated by one party (that is, Republicans). Extending coverage to the most high-profile recent violators (or at least, to those that had received the most attention because competitive elections in those states exposed vulnerabilities that were more widely shared), therefore, would have required finding some criterion that also added a few Democratic jurisdictions.

At the same time, any attempt to avoid disparate partisan treatment while reforming the coverage formula must also comply with the congruence and proportionality standard. In other words, the new coverage formula would have to be both politically fair and justifiable as preventing or remedying violations of voting rights. A slapdash choice of jurisdictions arising from a political compromise to balance out the partisan effects of a new coverage regime would be incongruent with the geography of voting rights violators almost by definition. As unsatisfying and constitutionally risky as resigning the VRA regime to its current geographical reach may be, tinkering with it would have invited a whole host of unknown problems. Whatever its drawbacks, the current coverage formula had the virtue of already having been upheld by the Supreme Court.¹⁵⁰ While the coverage formula might be outdated, advocates for the law at least would have *stare decisis* on their side and could force the Court into the position of explaining why a previously constitutional law was now unconstitutional.

B. Bailout

Given the inherent political difficulties involved with reform of the coverage formula, altering the bailout procedures for section 5 appeared to be a different way to constrain the reach of section 5 and improve the chances that

150. See *Lopez v. Monterey County*, 525 U.S. 266, 284-85 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

the Court would uphold it.¹⁵¹ Professor Richard Hasen and Congressman Lynn Westmoreland supported a proactive bailout measure that would have freed jurisdictions from coverage if the Attorney General determined they met the current criteria and the U.S. District Court for the District of Columbia agreed.¹⁵² Anything that increased the likelihood that “good” jurisdictions could escape from coverage would make the constitutionality of the coverage formula easier to defend. Although the existing coverage formula may not pick up all the “bad” jurisdictions, the argument goes, an eased bailout mechanism would at least ensure that coverage was merely underinclusive, but not overinclusive.

The requirements for bailout remained unchanged in the reauthorized VRA. Although the statutory requirements are somewhat detailed,¹⁵³ they basically require the covered jurisdiction to prove to the U.S. District Court for the District of Columbia that in the previous ten years it has not violated the voting rights of its citizens, has fully complied with its preclearance obligations, has taken affirmative steps to prevent potential VRA violations and has included minorities in the apparatus of election administration. Although several jurisdictions successfully bailed out of the original VRA and the two subsequent reauthorizations, only fourteen counties (all in Virginia) have successfully bailed out since 1982, and no others have attempted to do so.¹⁵⁴

151. See generally J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, *supra* note 77, at 257 (describing the history of bailout); McDonald, *supra* note 82 (describing the history of bailout and exploring alternatives).

152. See Rick Hasen, *Drafting a Proactive Bailout Measure for VRA Reauthorization*, Election Law Blog, May 18, 2006, <http://electionlawblog.org/archives/005655.html> (presenting drafted language that would put the “proactive bailout” measure into effect).

153. As set out in 42 U.S.C. § 1973b(a)(1) (2000), the criteria for a declaratory judgment granting bailout require a jurisdiction to prove that during the preceding ten years it has not used a test or device to abridge the right to vote, has not been found by a court to have violated minority voting rights, has not been assigned federal examiners, has fully complied with its preclearance obligations, has not received an objection from the DOJ, has eliminated discriminatory or dilutive voting practices, and has engaged in constructive efforts to incorporate minorities into the process of election administration.

154. See Voting Section, *supra* note 3, n.1, http://www.usdoj.gov/crt/voting/sec_5/covered.htm#note1 (last visited Oct. 7, 2007) (explaining that fourteen political divisions in Virginia have “bailed out” from section 5 coverage). See generally J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, *supra* note 77, at 257 (describing what successful bailout has entailed); McDonald, *supra* note 82 (providing an excellent discussion of the history of bailout).

The infrequency of bailout in the last twenty-five years may indicate that the requirements for bailout are simply too stringent. There are probably dozens of local jurisdictions that could make the required showing if they wanted to, but for some reason they have not. For some jurisdictions, perhaps the cost of hiring lawyers to make the bailout request and the uncertainty as to how such an effort would be received by the relevant court have retarded efforts to free some of the jurisdictions from coverage.¹⁵⁵ If that is true, then bailout exists more as a fictitious way out of coverage than an authentic way of shoring up the constitutionality of the coverage formula.

However, other theories, apart from the “burdensome bailout” hypothesis, may explain the pattern over the last twenty-five years. The covered jurisdictions that could bail out most easily may find coverage to be least burdensome. In other words, even if bailout is relatively easy and feasible, a jurisdiction that lives comfortably under the preclearance regime may have very little incentive to liberate itself from what others consider a burdensome administrative procedure. The covered townships in Michigan and New Hampshire, for example, are almost completely white and have never been the subject of a preclearance denial. Nevertheless, these jurisdictions have never tried to bail out. Indeed, even for those jurisdictions that might be borderline cases for bailout, the preclearance process may not be as burdensome as many think. The DOJ objects to less than 1% of submissions even from the most historically guilty jurisdictions, so remaining covered, once a jurisdiction has the administrative apparatus in place, may not be an onerous requirement.¹⁵⁶

Related to this first hypothesis is a second: some jurisdictions may prefer to remain covered rather than to bail out. As strange as it might seem for a jurisdiction to desire to pay the marginal cost of coverage, certain benefits may accrue from coverage. With a DOJ grant of preclearance comes a certain signal as to the legality of a voting change. To be sure, preclearance does not mean the change is legal, just that it is not retrogressive. However, a DOJ stamp of approval could be a powerful political message to those who might otherwise object to a voting change. As such, the preclearance process might deter

155. See Letter from Marguerite Mary Leon, Robert Naylor & Christopher E. Skinnell to James Sensenbrenner 238-48 (Nov. 29, 2005), available at <http://a257.g.akamaitech.net/7/257/2422/16feb20061130/www.access.gpo.gov/congress/house/pdf/109hrg/24034.pdf> (describing the difficulties the bailout provision presents to Yuba County, California).

156. See S. REP. NO. 109-295, at 13-14 (2006) (citation omitted) (showing that the annual percent of submissions receiving objection letters was under 1% for every year from 1983 to 2006).

litigation that otherwise would materialize if the voting change had not been vetted.¹⁵⁷

Finally, the infrequency of bailout might be the product more of a public relations phenomenon than a legal one. Politicians who seek to remove their jurisdictions from the preclearance regime would need to confront the obvious questions: “Why don’t you want to ensure that your changes to voting laws are legal?” In essence, “What are you trying to hide or what are you afraid of?” Of course, there are many adequate responses to such questions, but releasing one’s jurisdiction from important civil rights legislation is hardly a battle worth waging for most politicians. Better to suffer the inconveniences of preclearance than to be tagged as a politician against civil rights.

No one knows which of these theories best explains the relative absence of bailouts since 1982. Each probably has a kernel of truth for some subset of jurisdictions. However, if we do not know why jurisdictions have chosen not to bail out, we cannot adapt the bailout regime to account for its alleged shortcomings. Although it would have been politically easier to change the bailout requirements than to change the coverage formula, the supporters of reauthorization were steadfast in their opposition to an altered bailout regime.¹⁵⁸ There was great fear, I think, that making bailout easier would be a camel’s nose under the tent that would have upended the coverage regime. Adjusting the bailout regime with the intent that “good” jurisdictions would not be unfairly covered might morph into an accidental release from coverage of several “bad” jurisdictions.

C. *The Section 5 Enforcement Regime*

In addition to changing which jurisdictions might need to seek preclearance, Congress could have considered how the preclearance process worked. In particular, Congress could have altered the central and extraordinary role the DOJ plays in granting permission for changes in voting

157. See *Reauthorizing the Voting Rights Act’s Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 314 (2006) (statement of Donald M. Wright, General Counsel, N.C. State Board of Elections) (“Section 5 can vindicate governmental units from allegations of discrimination or adverse racial effects. It provides a ‘seal of approval’ that a voting change is not discriminatory because the USDOJ has precleared the change.” (emphasis omitted)).

158. See Press Release, Am. Civil Liberties Union, ACLU Challenges Lawmakers Who Aim To Gut Voting Rights Act, Says Proposals Would Eliminate Historic Federal Protections (June 23, 2006), available at <http://www.aclu.org/votingrights/gen/25988prs20060623.html>.

laws. Critics of the Voting Section of the Civil Rights Division have frequently accused its lawyers of being ideologues, particularly when it comes to the construction (or alleged maximization) of majority-minority districts or their propensity to find discriminatory purposes wherever they looked for them.¹⁵⁹ However, in recent years, the allegations of ideological extremism have been replaced by charges of partisan infection of the preclearance process. In particular, the much-publicized divisions between the career attorneys and the political appointees concerning the Georgia and Arizona photo identification laws, the re-redistricting of Texas,¹⁶⁰ and the holdup of the Mississippi congressional redistricting plan gave rise to charges that partisan concerns had come to steer the granting or withholding of preclearance in a few high-profile cases.¹⁶¹ In the face of these allegations, academics suggested judicial review of grants of preclearance might check any partisan excesses in the DOJ's administration of section 5.

Elsewhere I have described in greater detail the shortcomings of judicial review of preclearance decisions modeled on review of administrative agency adjudication.¹⁶² The chief difficulties arise from the massive number of submissions the DOJ receives and the opportunity for gamesmanship that appeals would provide any party aggrieved by a grant of preclearance. Moreover, allowing appeals from section 5 runs the risk of duplicating

159. See *Section 5 Renewal Senate Hearing*, *supra* note 32, at 142 (statement of Michael A. Carvin, Partner, Jones Day) (“It is well documented, however, that the Justice Department routinely finds discriminatory purpose every time the submitting authority fails to create the maximum number of minority opportunity districts.”).

160. See Section 5 Recommendation Memorandum from Tim Mellett et al., Attorneys and Staff, Voting Section, U.S. Dep’t of Justice to Robert S. Berman, Deputy Chief, Voting Section, Dep’t of Justice (Dec. 12, 2006) [hereinafter DOJ Memo], available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>. In fairness to the political appointees, the re-redistricting, for all its other shortcomings, presented a close call under the retrogression test of *Georgia v. Ashcroft*, 539 U.S. 461 (2003). If not for the fact that the minority legislators in Texas (unlike Georgia) were uniformly against the plan, the changes in racial percentages alone probably would not constitute retrogression.

161. See Persily, *supra* note 12, at 227; see also Jeffrey Toobin, *Poll Position: Is the Justice Department Poised To Stop Voter Fraud—or To Keep Voters from Voting?*, NEW YORKER, Sept. 20, 2004, at 56 (“The main business of the Voting Section is still passing judgment on legislative redistricting in areas that have a history of discrimination. Under Ashcroft, its actions consistently favored Republicans—for instance, in Georgia, where the department challenged the Democrats’ gerrymander, and in Mississippi, where the Voting Section stalled the redistricting process for so long that a pro-Republican redistricting plan went into effect by default.”).

162. See Persily, *supra* note 12, at 232. As mentioned therein, I am indebted to Samuel Issacharoff for many of these points.

litigation under section 2 of the VRA. It also would increase the federalism costs by making the process less automatic and more time consuming for jurisdictions attempting to implement voting laws.

When operating as intended, the nearly automated preclearance process forces transparency in policymaking and an outside check on the covered jurisdictions that seek to pass subtly discriminatory voting laws. While shifting the burden of proof to the jurisdictions to prove nondiscrimination in their voting changes, the section 5 architecture rests on assumptions that preclearance determinations are nonpartisan in both intent and effect. As the South has become politically competitive and the federal bureaucracy more partisan across the board, those assumptions have become outdated.

As with the coverage formula, though, altering the DOJ's enforcement role would not have constituted mere tinkering around the edges of the structure of section 5. The preclearance procedures in section 5 are completely unlike anything else in the U.S. Code, given their inversion of the normal federal-state relationship. As mentioned above, there were good reasons for that extraordinary statutory architecture in the earliest incarnations of the VRA, and no doubt the preclearance regime still constrains many potential voting rights violators, particularly at the local level.¹⁶³ Were Congress to change this basic aspect of section 5, however, it would be passing a very different law, not simply a modified version of a law that has operated relatively smoothly for forty years.¹⁶⁴

IV. THE NEW STANDARD FOR RETROGRESSION

The congressional effort expended in building a record of discriminatory voting practices overwhelmed any discussion about what the most significant development in the law—the change in the retrogression standard—actually

163. See Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion To Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 612-14 (2005).

164. To avoid overstating the significance of altering the preclearance procedures, I should reemphasize one proposal I have made in earlier writing. See Persily, *supra* note 12, at 231-33. It may have been possible to excise certain types of voting laws from DOJ preclearance and force them into the courts in the first instance. For example, one could have envisioned a law that required statewide redistricting plans to be submitted to the courts while all other voting changes, which are usually immediately precleared, could be given to the DOJ. Doing so would not get out of the problem of replicating section 2 litigation in the judicial preclearance of redistricting plans. However, it might avoid the problem of unmanageability were all voting changes thrust into the courts. It also might combat partisanship in the preclearance process in the contexts where it is most likely to be present.

means.¹⁶⁵ Congress intended this revision to overturn the Supreme Court's decision in *Georgia v. Ashcroft*, which allowed jurisdictions more flexibility in how minorities could be distributed in new redistricting plans.¹⁶⁶ The new retrogression standard or “*Ashcroft* fix” makes clear that preclearance should be denied to any redistricting plan (or any voting law) that “has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color [or language minority status] . . . to elect their preferred candidates of choice”¹⁶⁷ How one determines such diminution remains an open and central question concerning the proper operation of the amended VRA.

165. I do not explore in great detail here the other major change in the law: the overruling of *Reno v. Bossier Parish School Board (Bossier Parish II)*, 528 U.S. 320 (2000), to establish that a discriminatory purpose, not merely a retrogressive purpose, constitutes grounds for a denial of preclearance. This change was less controversial, but its potential impact should not be understated. Before *Bossier Parish II* took the legs out of the DOJ's purpose inquiry in the preclearance process, discriminatory purpose constituted the basis for 43% of objections in the 1990s. See McCrary, Seaman & Vallery, *supra* note 104, at 20 (calculating the impact *Bossier Parish II* had on the rate of preclearance denials). It is quite possible that the *Bossier Parish* fix may turn out to be more important than the *Ashcroft* fix when it comes to (re)expanding DOJ authority. There is a risk that the purpose inquiry will turn into another opportunity for partisan infection of the preclearance process—for example, with a Democratic-leaning DOJ determining that all Republican gerrymanders in jurisdictions with heavy minority populations have discriminatory purposes or finding that the failure to maximize the number of majority-minority districts constitutes discriminatory purpose. I suspect that the Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny will act as a constraint on an overly aggressive DOJ. The purpose inquiry provides a lot of discretion to the DOJ, however. Jurisdictions may feel that they must accede to DOJ pressures applied in the short, stressful period preceding an election.

166. See *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

167. 42 U.S.C.A. § 1973c(b) (West Supp. 2007). By its terms the *Ashcroft* fix (like the current retrogression standard) does not limit itself to racial minorities. It only specifies the prohibited grounds (namely, race) for diminution of voters' ability to elect their preferred candidates. In theory, this means that one cannot diminish either the ability of whites or that of minorities to elect their preferred candidates. Of course, if this were the correct interpretation then most redistricting changes would be illegal, given that an increase in one group's ability to elect its preferred candidates usually entails the decrease of another group's similar ability. Neither the DOJ nor any court has interpreted section 5 to apply to whites, and no one has even speculated that the new retrogression standard might apply to whites as well. However, before last year almost no one thought section 2 of the VRA would apply to whites either. Yet, in *United States v. Brown*, the DOJ launched its first section 2 lawsuit on behalf of white voters. See Complaint at 3, *United States v. Brown*, No. 4-4:05-cv-33-TSL-LRA (S.D. Miss. Feb. 17, 2005), available at http://www.usdoj.gov/crt/voting/sec_2/noxubee_comp.pdf (alleging that Noxubee County systematically treated white voters differently from similarly situated black voters).

As explained above, there are good reasons why Congress left this important provision undefined. The fractious Senate Report makes clear that Democrats and Republicans hold dramatically differing views as to what this standard requires. The other available legislative history elides the likely political effects of various valid interpretations. The potential interpretations of the law run the gamut from entrenching either Republican or Democratic gerrymanders. The central conceptual disputes revolve around the types of districts and candidates protected by the standard, the data necessary to evaluate the ability to elect, and the degree of flexibility jurisdictions should be accorded to adapt to political changes throughout the twenty-five year tenure of this law. This Part attempts to grapple with these conceptual difficulties and to propose a manageable interpretation of the new standard.

In arriving at such a standard, certain background principles are important to avoid constitutional difficulty, to prevent thwarting the intent (to the extent that it can be discerned) of the supporters of the law, to prevent perverse effects, and to ensure that the enforcement authorities can administer the new law. First, the interpretation of the new standard should not be a pretext for furthering the interests of one or the other political party. The racialization of partisan conflict through interpretation of the VRA should be avoided to the extent possible.¹⁶⁸ Every interpretation will bias preclearance determinations in favor or against one of the parties in a given instance, but at the initial stage of describing what the statute should mean, interpretations that do not have predictable partisan beneficiaries ought to be favored over ones that do. Second, given that the statute will be in place for twenty-five years, the standard ought to be flexible enough to adapt to changing political realities. An interpretation of the standard that would freeze the current minority percentages in all covered districts, for example, ignores the realistic possibility that the percentages required for minorities to elect their preferred candidates will likely change over time. This leads to the final, and perhaps most controversial, initial principle: the interpretation of section 5 ought to further the goal of moving toward an electoral system less plagued by racial polarization.¹⁶⁹ Each phrase of the new retrogression standard can be

168. This is especially true given the danger that the preclearance process will be used for partisan gain by whichever party's appointees control the Voting Section at the Department of Justice.

169. See *Ashcroft*, 539 U.S. at 490-91 ("While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.").

interpreted in such a way as to make racial polarization and racial bloc voting central to the meaning of the new section 5.¹⁷⁰ The capacity of a redistricting plan to diminish minorities' ability to elect their preferred candidates depends on the extent of racially polarized voting, which is widespread today but might not be throughout the twenty-five-year tenure of this law.

The standard proposed in this Part allows for tradeoffs in minority percentages among districts, while at the same time focusing on minorities' ability to elect, rather than to influence, candidates. Section 5 should be read as preventing new districting plans that reduce the aggregated probability across districts that minorities will elect the candidates that they prefer and that whites generally disfavor. This standard escapes the charges of partisan bias or racial essentialism that would rightly be lodged against alternatives. Moreover, throughout the twenty-five year tenure of this law, it will not hamstring jurisdictions into a legal framework predicated on the persistence of outdated assessments of racial polarization in the electorate.

A. Preferred Candidates of Choice

Arriving at a proper interpretation of the standard requires that we begin, somewhat counterintuitively, at the end. If we can identify "preferred candidates of choice,"¹⁷¹ we can then begin to understand how a redistricting plan might diminish the ability of citizens to elect them. This phrase in the new section 5 mirrors the operative phrase in section 2 of the VRA, which ensures that racial minorities will not have "less opportunity than other members of the electorate . . . to elect representatives of their choice."¹⁷² Despite the fact that Congress enacted the amended section 2 twenty-five years ago, considerable debate exists as to what "representatives of their choice" means. To put the interpretative dilemma coarsely, the provision may mean minority candidate,

170. The findings in the bill itself warrant this special concern with racial polarization. Section 2(b)(3) of the bill identifies the congressional finding that "[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions . . . demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965." VRARA, Pub. L. No. 109-246, § 2(b)(3), 2006 U.S.C.C.A.N. (120 Stat.) 577, 577 (to be codified at 42 U.S.C. § 1973 note).

171. 42 U.S.C.A. § 1973c(b) (West Supp. 2007).

172. 42 U.S.C. § 1973(b) (2000). Section 2 follows on this phrase by explaining that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

Democratic candidate, or something more complicated that depends on an analysis of the actual behavior of voters and their representatives.

In evaluating which of these alternatives makes sense, it is important to understand that the identification of a “candidate of choice” is necessarily endogenous to the way districts have been drawn and to which candidates have emerged to compete. We never know who the minority’s truly preferred candidate is, given that we never have survey data asking all minority voters who their *ideal* candidate would be.¹⁷³ Rather, what we have are election data with respect to a constrained set of candidates and then heuristics (or perhaps evidence) as to whether certain candidates are bona fide “candidates of choice” of the minority community. The central questions involved in these inquiries are whether merely garnering the votes of the minority community is enough to characterize a candidate as “preferred,” and if not, what other types of evidence would be necessary.

Identifying the minority’s candidate of choice serves two purposes. The first is to assess which districts under the plan currently in effect (the “benchmark” plan) are, in fact, “performing” for minority voters. If a minority candidate of choice is able to win in a particular district, then reconfiguring such a district to decrease the probability of such a candidate winning again may be retrogressive. However, both “performing” districts and districts where the minority candidate of choice does not win are relevant in a second way for the retrogression inquiry. Data from all districts, let alone from a variety of other types of elections, will be useful in assessing what minority voting percentages are necessary for a minority group to elect its preferred candidates. Only with these data can one develop an accurate assessment of how population shifts between districts will affect the minority’s ability to elect. Identifying candidates of choice, however, is the first step in determining which elections will be useful in making inferences about the likely effect of new districts on voters.

1. *Minority Candidate*

Although sections 2 and 5 of the VRA are about voters, not candidates, the race of the candidate is very often shorthand for identifying which voters may have preferred that candidate. Of course, the minority community will often prefer certain white candidates, just as whites will often prefer certain minority

173. Even if we did have such survey data, we could not get around the Arrow theorem-like problems of identifying a single preference from a range of choices presented to a nonmonolithic group of people. See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

candidates. The recent case dealing with the 2003 Texas re-districting is illustrative on this point. In that case, appellants argued that a Hispanic Republican was actually not the candidate of choice of the Hispanic community in his district (given that he only won 8% of the Hispanic vote), while a white Democrat was the candidate of choice of the African Americans in a different district.¹⁷⁴ Indeed, the line attorneys at the DOJ agreed with that assessment.¹⁷⁵

In the course of evaluating racial polarization in the electorate under section 2, it is commonplace for courts to assume that minority candidates are the minority community's candidates of choice.¹⁷⁶ When expert witnesses aggregate data across a range of elections over time, they rarely examine every particular race to evaluate the authenticity of minority candidates as the minority's preferred candidates or include white candidates as minority-preferred candidates in their evaluations of the extent of racial polarization.¹⁷⁷ The same was often true with DOJ determinations of retrogression: minority candidates were presumed to be the candidates of choice of the minority community, unless there was a good reason not to make that assumption based on which voters supported the candidate.¹⁷⁸

Whether minority candidates should be considered presumptive "candidates of choice" of the minority community constituted a foundational, but unanswered, question in the first Supreme Court case to interpret the

174. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2613, 2625 (2006) (adjudicating challenges to Henry Bonilla and Martin Frost's districts); Sylvia Moreno, *Runoff in Tex. 23rd May Show Impact of 2006 Redistricting: Longtime GOP Rep. Bonilla in Tight Race*, WASH. POST, Dec. 11, 2006, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121001007.html> (explaining that Bonilla received only 8% of the Hispanic vote in his 2002 reelection).

175. DOJ Memo, *supra* note 160, at 37-53.

176. See Katz et al., *supra* note 122, at 665-68 & nn.110-12 (discussing the use of candidate race in section 2 litigation and assembling cases); Scott Yut, Comment, *Using Candidate Race To Define Minority-Preferred Candidates Under Section 2 of the Voting Rights Act*, 1995 U. CHI. LEGAL F. 571, 583-86 (explaining that the Fifth and Seventh Circuits have rejected the use of elections including only white candidates as proof, or lack thereof, of racial bloc voting).

177. See, e.g., Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 136-37 (1985) (describing the expert witness reports in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1855-56 & n.111 (1992) (citing cases where racially polarized voting was found based on candidates' race).

178. See Issacharoff, *supra* note 149, at 1725 (explaining that the expert witnesses for the United States in *Georgia v. Ashcroft* assessed the probability of electing an African American candidate).

amended section 2 of the VRA.¹⁷⁹ Justice Brennan wrote for a plurality on this point in *Thornburg v. Gingles*,¹⁸⁰ while Justice White's concurrence specifically disagreed.¹⁸¹ For Brennan, "it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important."¹⁸² Ignoring the race of the candidate, argued Justice White, would violate congressional intent to allow certain types of interracial coalitions, as when a coalition of white voters and a minority of black voters supports a black candidate.¹⁸³ The lower courts have been divided since *Gingles* on the extent to which candidate race ought to be a determining factor in the "candidate of choice" inquiry.¹⁸⁴ Some find it determinative,¹⁸⁵ while others follow Brennan's approach and also consider elections that include minority candidates to be "most probative" of racial polarization.¹⁸⁶

At least two senators in the reauthorization debate were bold enough to make the former interpretation of the new retrogression standard explicit. Senator Mitch McConnell from Kentucky and Senator John Cornyn from Texas both emphasized the relevance of candidate race to determining

179. See 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, 1526 n.22 (2002) (discussing the various views of the Justices in *Gingles* and concluding that minority versus white contests have usually proven most probative in racial polarization hearings); Yut, *supra* note 176, at 576-89 (discussing the various views of the Justices and lower courts on whether race of the candidate matters). Races between minority and white candidates are often seen as the most probative for purposes of proving racial polarization. See, e.g., *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) (finding that "a candidate's race can be relevant to a § 2 inquiry"); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir. 1993) ("As a general matter . . . elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates.").

180. 478 U.S. 30 (1986).

181. *Id.* at 82 (White, J., concurring).

182. *Id.* at 68 (plurality opinion).

183. *Id.* at 83 (White, J., concurring). Justice O'Connor's concurrence specifically agreed with Justice White's on this point. *Id.* at 101 (O'Connor, J., concurring).

184. See Pildes, *supra* note 179; Yut, *supra* note 176.

185. See, e.g., *Barnett v. Chicago*, 141 F.3d 699, 703 (7th Cir. 1998) ("It may be highly regrettable that a candidate's race should matter to the electorate; but it does; and the cases interpreting the Voting Rights Act do not allow the courts to ignore that preference."); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987).

186. See, e.g., *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015-17 (2d Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc) (plurality opinion); *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1129 (3d Cir. 1993); *Sanchez v. Bond*, 875 F.2d 1488, 1495 (10th Cir. 1989).

candidates of choice. As Senator McConnell put it, “[t]he term ‘preferred candidates of choice’ has a clear meaning in the court’s precedents: Minority candidates elected by the minority community.”¹⁸⁷ Senator Cornyn explained that the new standard could not be applied “to require preservation of anything other than districts that allow naturally occurring minority-group majorities to elect minority candidates.”¹⁸⁸ The race of the candidate, under this view, was one way to limit the potential application of the standard to any candidate that might receive minority votes.¹⁸⁹

2. Democratic Candidate

One of the reasons courts often assume minority candidates are minority-preferred candidates is that otherwise the Voting Rights Act begins to look like it is a Democratic candidate protection program.¹⁹⁰ In general elections, racial minorities tend to prefer Democrats. If the VRA requires the construction or preservation of districts where minority-preferred candidates win, then one might plausibly say that the VRA prevents the elimination of Democratic leaning districts in any covered racially heterogeneous community. The DOJ need only ask whether the candidate minorities voted for in the general election under the benchmark plan is equally likely to win under the new plan. If not, then minorities’ ability to elect their preferred candidate is diminished.

This potential interpretation did not escape witnesses in the Senate hearings nor, as the Committee Report makes clear, several Senate Republicans. The testimony of Republican lawyer Michael Carvin provided some of the only comments before the Senate Judiciary Committee concerning the potential partisan bias of the new standard.¹⁹¹ He warned that “Democrats are almost always minorities’ preferred candidates of choice and therefore, a federal statute would prohibit diminishing the ability to elect Democratic

187. 152 CONG. REC. S7980 (daily ed. July 20, 2006) (statement of Sen. McConnell).

188. *Id.* (statement of Sen. Cornyn).

189. *See also id.* at S7979 (statement of Sen. Hatch) (“It is important to emphasize this language does not protect just any district with a representative who gets elected with some minority votes.”).

190. *Cf. Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (“The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party’s candidates.”).

191. *See Section 5 Renewal Senate Hearing*, *supra* note 32, at 135-43 (statement of Michael A. Carvin, Partner, Jones Day).

candidates, whether they are minority or non-minority.”¹⁹² Heeding that warning, the Senate Report emphasized the point:

This legislation definitively is not intended to preserve or ensure the successful election of candidates of any political party, even if that party’s candidates generally are supported by members of minority groups. The Voting Rights Act was intended to enhance voting power, not to serve as a one-way ratchet in favor of partisan interests.¹⁹³

This fear expressed by the Republicans and the correlative need to limit the scope of the retrogression standard to “naturally occurring majority-minority districts” arose from concerns related to which kinds of districts the new retrogression standard protects. Does it protect any district in which minorities have some influence over an election, or is it somehow limited to districts in which minorities currently control the outcome? A longer discussion of this dilemma is provided below with respect to the definition of “ability to elect.” However, these questions are also relevant to defining “preferred candidate of choice” because the process used to identify such candidates will determine the minority percentages required in protected districts. In other words, if all one needs to show is that minority votes were critical in electing a Democratic candidate in a general election, then eliminating such a district would presumably diminish minorities’ ability to elect their preferred candidate. By this standard, for example, John Kerry was African Americans’ preferred candidate of choice in the 2004 presidential election, given that the overwhelming majority of African Americans voted for him instead of President Bush.¹⁹⁴

192. *Id.* at 138-39.

193. S. REP. NO. 109-295, at 21 (2006); *see also id.* at 22-23 (additional views of Sen. Kyl) (“[I]n jurisdictions in which the protected group of voters largely supports one party, a requirement that those voters be placed in districts where their candidates and party will prevail would introduce severe distortions into the redistricting process. In effect, that jurisdiction would be required to create and retain as many districts as possible that would reliably elect candidates of the party favored by the protected group of voters.”).

194. One might temper the complete politicization of the standard by requiring that only candidates who have also garnered minority support in a competitive primary can be designated minority-preferred candidates of choice. *Cf. League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2624-25 (2006) (arguing that Martin Frost was not a minority candidate of choice under section 2 because he had never confronted a primary challenger). This would avoid protection of the white Dixiecrat incumbent who garners minority votes in the general election but receives none when confronting a minority challenger in the primary. However, most minority incumbents from majority-minority districts also do not face competitive primary challenges. If only candidates whose support from the minority community has been proven in a competitive primary can earn candidate-of-choice status,

As perverse and perhaps unintended as this interpretation might be, it probably hews closer to the language of the statute than other alternatives. Indeed, the new law's addition of the word "preferred" to the phrase "candidate of choice" suggests that the candidate need not be the ideal or only possible candidate of choice for the minority community. Instead, such candidates need only be "preferred" to others that will run or have run against them. To be clear, the interpretation is not that all Democratic districts are protected. Rather, in any district where it can be shown that minority voters tend to prefer and to elect candidates of one party (usually Democrats today, but perhaps Republicans in the future), the state cannot redraw the district to diminish their ability to elect such candidates. In some contexts, it will be difficult to demonstrate which candidates minorities prefer. Exit polls in the 2004 presidential election, for example, showed that President Bush received about 40% of the Hispanic vote, so it would be difficult to suggest that Senator Kerry was Hispanics' generally preferred candidate of choice.¹⁹⁵ Nevertheless, in most elections, particularly at the district level, the rough alignment of minorities behind one or the other party is easily recognized.

Should the implicit partisan bias of the new retrogression standard be considered a problem? One might argue that if Republicans do not want Democrats to earn protected candidate-of-choice status, then they should run candidates who appeal to and win over minority voters. Until they do so, the new section 5 protects against diminution of the reelection prospects of Democratic candidates in jurisdictions with some percentage of minority voters. Even if this constitutes the best plain language reading of the statute, it is surely not the interpretation for which most Republicans voted.¹⁹⁶

then few candidates would qualify. One might simply adopt a double standard for minority-preferred candidate of choice that includes minority candidates and those white candidates who have received the bulk of the minority vote when they have run against a minority candidate in a primary. However, white candidates who have never faced a minority challenger have not yet proven themselves to be the minority preferred candidates of choice. David Epstein and Sharyn O'Halloran have proposed a definition of "candidates of choice" that includes any candidate who wins the minority vote and is either a minority candidate or a white candidate elected from a majority-minority district. David Epstein & Sharyn O'Halloran, *Measuring the Electoral or Policy Impact of Majority-Minority Voting Districts*, 43 AM. J. POL. SCI. 367, 371 (1999).

195. See ROBERT SURO, RICHARD FRY & JEFFREY PASSEL, *HISPANICS AND THE 2004 ELECTION: POPULATION, ELECTORATE AND VOTERS*, at ii (2005), available at <http://pewhispanic.org/files/reports/48.pdf> (showing that Hispanic support for President George W. Bush in 2004 was close to 40% but also that there is considerable controversy regarding the degree to which Hispanics supported Bush as opposed to Kerry).

196. See 152 CONG. REC. S7987 (daily ed. July 20, 2006) (statement of Sen. Sessions) ("We must remember that we are reauthorizing the Voting Rights Act not creating a 'gerrymandering

Moreover, Democrats' concerns about the current politicization of the Voting Section of the DOJ are just as well taken as Republican fears of a DOJ under a Democratic administration with a specific mandate to protect Democratic candidates. If the new law is going to be successful (let alone upheld as constitutional¹⁹⁷), it cannot be seen as a tool for the systematic furtherance of certain partisan interests.

3. *The DOJ's Most Recent Approach and the One Likely To Be Followed*

As revealed most recently in the leaked preclearance memo concerning the Texas re-redistricting, the DOJ has adopted an approach that does not expressly rely on either the race or the partisanship of the candidate.¹⁹⁸ Although the DOJ was interpreting the old section 5 under the now overruled *Georgia v. Ashcroft* standard, its historic method of determining candidates of choice is likely to rule the day once again under the new retrogression standard.¹⁹⁹ That method, as far as it can be discerned, focused on whether indicia apart from mere minority votes in the general and primary elections suggested that minorities were satisfied that the candidate represented their interests. In particular, the DOJ would consider opinions of minority politicians and other elites as to whether the candidate was an authentically preferred, as opposed to a reluctantly supported, candidate of choice of the minority community.

Minority support in both the general and primary elections, as well as racial polarization analysis, still represents the beginning for the DOJ approach to identifying the minority's candidate of choice. Unless a candidate wins a commanding majority of the minority vote in both the primary and general elections, she cannot be considered the community's candidate of choice.

rights act.' The bipartisan support for this bill indicates that both Republicans and Democrats do not expect or intend it to be interpreted to advantage one party or the other.").

197. In his opinion in the Texas re-redistricting case, Justice Kennedy seemed to hint that section 2 of the Voting Rights Act should not be interpreted to protect the mere ability to aid in the election of a Democratic candidate. "If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2625 (2006) (opinion of Kennedy, J.) (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

198. See DOJ Memo, *supra* note 160, at 25-33.

199. In the memo, the DOJ attorneys make explicit that they think *Ashcroft* does not alter the way that they should determine ability-to-elect districts. It only forces them to consider the rise and decline of influence districts in addition to the ability-to-elect districts. *Id.* at 26.

However, since most districts are not competitive, merely winning the minority vote does not necessarily indicate whether minorities prefer such candidates per se or reluctantly support them because their ideal candidate is not in the race. Otherwise, as explained above, almost all incumbent Democrats would qualify as minority candidates of choice.

Therefore, to establish a candidate as the minority candidate of choice, the DOJ must be able to point to some indication of the satisfaction of the minority community with the candidate. The best piece of evidence, as mentioned earlier, would be a poll of all minority voters asking who their ideal candidate would be or what their preference is among realistic alternatives. In its stead, the DOJ considers the comments of leaders of minority organizations, civic activists, and politicians as to whether a candidate is one of choice, as opposed to resignation.

In the Texas case, for example, these comments supported findings by the DOJ that four white Democratic Congressmen (Martin Frost, Lloyd Doggett, Gene Green, and perhaps Chris Bell) were minority candidates of choice, while Hispanic Republican Henry Bonilla was not. Minority legislators, as well as Frost himself, described Frost as the African Americans' candidate of choice "because he is very responsive to the minority community."²⁰⁰ Similarly, Representative Gene Green claimed to be the Hispanic candidate of choice given his high ratings from the League of United Latin American Citizens (LULAC).²⁰¹ One local Hispanic official even described Green as "basically Hispanic himself" given the fact that he "grew up in Hispanic neighborhoods,

200. *Id.* at 15; *see also id.* at 33-35 (discussing data indicating that Frost was the minority candidate of choice); *id.* at 16 ("According to the 'scorecards' of minority groups, [Frost] has been exceptionally responsive to the needs of the minority community."). The memo notes that in the redrawn Twenty-Fourth District that captured the African American community that formerly chose Frost, Republican State Representative Kenny Marchant would likely win in the open seat (as he did). He was not considered a candidate of choice because he voted against a hate crimes bill while in office, and subsequently received an "F" on the NAACP scorecard for Texas state legislators. *Id.*

201. *Id.* at 22; *see also id.* at 40 (suggesting Chris Bell was also the minority candidate of choice in his district based on his high score received from the Texas NAACP and the contentions of minority elected officials as to his responsiveness to the minority community). The candidate-of-choice status of Lloyd Doggett, whose district was seriously reconfigured by the 2003 re-districting, presented an interesting twist on these other analyses. *Id.* at 52-55. Based on favorable scores from LULAC and comments from minority elected officials as to his responsiveness, he was seen as perhaps the candidate of choice of Hispanics in the Austin area. *Id.* at 53 n.45. However, his new district combined the Austin Hispanic community with one on the border with Mexico. The DOJ Memo therefore was equivocal as to whether he would be the Hispanic candidate of choice in the new district: "we have heard anecdotal testimony that while Doggett is the candidate of choice in Austin, he likely would not be the candidate of choice 300 miles away in Hidalgo County." *Id.*

went to a Hispanic high school, [and] knows the Hispanic culture.”²⁰² Henry Bonilla, on the other hand, was not the Hispanic candidate of choice in his district. Not only did he receive only 8% of the Hispanic vote in the previous election,²⁰³ but he was also regarded as “nonresponsive to the Hispanic community” as evidenced by the 18% rating LULAC gave him on issues concerning Hispanic voters.²⁰⁴

As subjective and unsettling as these determinations of “preferred” candidate status may appear, they reveal an inherent problem that plagues assessments of candidates of choice. If one does not trust the revealed choices of voters in elections because incumbency advantages and other factors constrain which candidates emerge to compete, then one must turn to outside indicators as to whether the candidate has the authentic support of the minority community.²⁰⁵ Elites then must shoulder the burden of giving their stamp of approval to the particular candidate, and the DOJ must pick which elite opinions matter and which issue positions are in line with the minority community.

As problematic as the DOJ’s picking of which white candidates constitute authentic candidates of choice of the minority community is in general, it becomes even more so when it has obvious partisan effects. Most white Democratic congressmen—even in the South—win an overwhelming majority of the minority vote in both the primary and general elections, and most receive high scores from the various civil rights organizations.²⁰⁶ Most come

202. *Id.* at 56. The memo also notes that Green’s congressional Web site is one of the few offered in Spanish.

203. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2613 (2006) (noting the declining percentage of the Hispanic vote received by Bonilla from 1996 to 2002); DOJ Memo, *supra* note 160, at 42 (same, and citing that regression analyses that estimate Bonilla’s share of the 2002 Hispanic vote at 6.6% and 3.5%).

204. DOJ Memo, *supra* note 160, at 18.

205. In other words, for purposes of assessing which candidates the minority prefers, general election data are “tainted” by the fact that voters do not have a wide range of choices presented to them. That range is constrained because very few high-quality challengers have the resources to take on an incumbent. As a result, the anemic set of choices appearing on the ballot and available to voters does not provide an accurate filter for what voters’ true candidate preferences would be if a greater variety of candidates could compete effectively. Given the lack of high-quality challengers, let alone minority candidates in general, additional information besides election results is necessary to distinguish which Democratic candidates would still have received minority votes if a broader range of choices had been presented.

206. This point is not as uniformly true when it comes to state legislators and local officials, and was not true concerning southern Democratic congressmen until the realignment of southern politics in the 1980s and 1990s.

from districts that are majority white. Very few face a minority challenger or, for that matter, any quality challenger that poses a real threat in the primary or general election. Therefore, in today's political world, the DOJ method appears very similar to the Democratic candidate model described before, and will become increasingly so as the parties in government become more homogeneous. The more that white Democrats behave and vote like minority Democrats, the more white Democratic candidates will appear as minority candidates of choice by these criteria.²⁰⁷

4. *Candidates Uniquely Preferred by Minorities*

The conceptual difficulties of defining minority-preferred candidates of choice in a way that does not assume that candidates of a certain race or party qualify for that label are almost impossible to overcome. However, I should not exaggerate the differences between this inquiry and the one the DOJ engaged in under the previous section 5, or the one the courts engage in under the current section 2. For the most part, courts have explicitly or implicitly adopted candidate race as the proper indicator under section 2. Although racial bloc voting analysis has always been part of the evaluation of a preclearance submission, the DOJ also has relied on candidate race or moved closer to the more partisan definition, as the Texas preclearance memo suggests. I fully expect that when experts make predictions about the probabilities of minority-preferred candidates getting elected in the abstract, they will continue to rely on the race of the candidate as an indicator of minority preference under the

207. In fairness to the DOJ approach, one might note that the responsiveness of elected officials to the minority community was one of the Senate Factors underlying the amended section 2. See Katz et al., *supra* note 122, at 722-24 (assembling cases that have assessed the Senate factor of "significant lack of responsiveness on the part of elected officials"). In interpreting section 2, the Third Circuit adopted a reading of "candidates of choice" similar to that emerging from the Texas preclearance memo. In *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103 (3d Cir. 1993), the court explained that section 2 required "a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice." *Id.* at 1129. The factors a court should consider would include: "the extent to which the minority community can be said to have sponsored the candidate," *id.*, "the level of minority involvement in initially advancing the particular candidate and in conducting or financing that candidate's campaign," *id.*, "the attention which the candidate gave to the particular needs and interests of the minority community, including the extent to which the candidate campaigned in predominately minority areas or addressed predominately minority crowds and interests," *id.*, "the rates at which black voters turned out when a minority candidate sought office as compared to elections involving only white candidates," *id.*, and "the extent to which minority candidates have run for office and the ease or difficulty with which a minority candidate can qualify to run for office," *id.*

new section 5. At the same time, when concentrating on particular incumbents from particular districts, assumptions about the “representativeness” and responsiveness of each party’s nominees also seem impossible to avoid.

Perhaps one could avoid both of these pitfalls by focusing on whether candidates are *uniquely* preferred by the minority community. A preferred candidate of choice, under this view, would be one supported by the overwhelming majority of minority voters, but not supported by the overwhelming majority of white voters. This would require, as is typical in litigation under section 2, demonstration of racial bloc voting patterns: in particular, proof that minorities and whites vote cohesively and differently.²⁰⁸ When evaluating changes in redistricting plans, then, courts or the DOJ would ask whether they lead to a smaller probability that the types of candidates preferred by minority voters and disfavored by whites will be elected. More importantly, in a context where minority candidate preferences are not distinct from those of whites, the retrogression standard would not apply. In other words, a candidate could only earn the status “minority-preferred candidate of choice” if it could be shown that she had been chosen (or would be chosen) by a supermajority of minority voters in an election where her opponent was the candidate of choice for a supermajority of white voters.

What constitutes a supermajority under these terms is an important devil in the details, of course. On the one hand, as in section 2 litigation, one cannot require that 100% of the minority population and 100% of whites vote for different candidates in order to prove racial bloc voting. At the other extreme, evenly divided white and minority communities would be evidence against racial bloc voting. The answer must lie somewhere in the middle. For the most part, evidence of minority political cohesion is not terribly difficult to identify, especially when African Americans are the minority in question.²⁰⁹ Quite often one will be able to identify cohesion at a level of 90% or more.²¹⁰ Whatever minimum level of cohesion the court requires to demonstrate minority bloc voting, however, should be the same as that required with respect to white bloc voting. If minority political cohesion in designating someone as a candidate of choice requires a demonstration that three-quarters of the minority vote goes to a particular candidate, the same level of cohesion ought to be required with respect to whites. Under section 2, plaintiffs did not need to show that whites

208. Cf. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

209. See Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, in *THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY* 43 (Nathaniel Persily ed., 2000).

210. Indeed, the Michigan study found that in over half of the elections in covered jurisdictions that were part of a section 2 lawsuit, white bloc voting existed at 90% or more. See Katz, *supra* note 77, at 220.

voted cohesively, only that they voted in sufficiently large numbers that would ordinarily defeat the minority-preferred candidate.²¹¹

I would endorse this as a starting point for the retrogression analysis because it has several advantages. It limits the potential number of “protected” districts and avoids either the racialization or politicization of determinations of candidates of choice, drawbacks of the previous two approaches. This approach falls in line with Justice Kennedy’s recent admonition to avoid interpretations of the Voting Rights Act that “unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”²¹² It also seems to get at the real problem that motivates the *Ashcroft* fix: the interaction between redistricting changes and voting behavior that lessens the probability that minorities will elect their preferred candidates.

However, this approach also has several disadvantages. This interpretation tortures the language of the new section 5, given that the actual words of the statute focus on a group’s preferred candidate of choice irrespective of whether whites may also prefer such a candidate. Simply because a racial minority prefers a candidate does not imply that whites disfavor him or her. Similarly, a showing that African American New Yorkers prefer the Yankees to the Mets does not imply that whites do not share the same preference—that is, the Yankees can be both the black- and white-preferred team of choice. The same could be said for politicians: Barack Obama may have been the preferred candidate of choice for all racial groups in his 2004 Senate bid, for example.

To get around this textualist critique one would need to emphasize that the words of the statute do not actually read “*minority*-preferred candidate of choice.” Rather, they refer to diminishing the ability of any citizens “on account of race or color” or language-minority status to elect their preferred candidates of choice. In other words, the statute does not merely focus on which groups prefer which candidates, but instead on whether the diminution in the group’s ability to elect its preferred candidates was on account of race. That different focus would imply an inquiry into the cause of the diminution (e.g., the fact that whites prefer different candidates) alongside an assessment of which candidates were preferred by which racial groups.

211. See *Gingles*, 478 U.S. at 50–51.

212. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2625 (2006) (opinion of Kennedy, J.) (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (Kennedy, J., concurring)). The Court rejected a section 2 claim made with respect to Texas’s twenty-fourth congressional district, a district that was minority black but in which blacks constituted a majority of the Democratic primary and allegedly elected Martin Frost (a white Democrat) as their candidate of choice.

Perhaps the more serious critique of this approach is that it does not present a complete solution. It only captures half of what is needed for the retrogression analysis. It deals with particular candidates in particular districts, but does not help with the larger analysis of how drops in racial percentages, in general, may affect minorities' ability to elect their preferred candidates, whether or not such candidates have yet to run in the district. This interpretation may get us out of the simple syllogisms of minority or Democratic candidate equals minority candidate of choice by forcing a demonstration that a particular candidate received most of the minority vote while his opponent received the white vote. However, it does not tell us in the abstract what type of candidate the statute protects from a reduced chance of being elected. If a minority-preferred candidate has never run in a given area, for example, this approach would not tell us whether changing a given district in the area reduces the ability of minorities to elect their preferred candidates.²¹³ In order to measure diminution in the ability to elect, one needs to be able to predict how a change in racial percentages will affect unknown candidates as well as known ones.

With these caveats, and the larger one that the statutory provision should be treated as a whole rather than as a collection of isolated phrases, attention to racial bloc voting should form the core of the new retrogression inquiry, regardless of how we define candidate of choice. Even if courts resign themselves to one of the earlier definitions, as I suspect they will, evaluating the effect of new districts on minorities' ability to elect either minority candidates or authentically representative (Democratic) candidates will require a sensitive analysis of different voting patterns among whites and minorities. Although conceptually very important in deciding what the Voting Rights Act is about, disagreement as to how to identify a minority-preferred candidate should not affect how we then assess whether new district boundaries diminish the chances that such a person will be elected.

213. Moreover, in a safe district for a minority incumbent, it might appear that the unchallenged incumbent receives a majority of both the minority and white vote. Therefore, because of the lack of a quality challenger to siphon off the white votes the minority candidate ordinarily might not receive, it would appear that the minority candidate is not *uniquely* preferred by the minority community. Therefore, one might argue that such a district could be reconfigured without a risk of diminishing the ability of minorities to elect a candidate they prefer and whites disfavor. The way around this problem is to recognize that more than one election must be incorporated into a determination of preferred candidates and that the inquiry ought to focus on whether the district elects candidates minorities tend to favor and whites tend to disfavor (irrespective of the current incumbent).

5. *The Role of Incumbency in Determining Candidate of Choice*

As mentioned above, the candidate-of-choice inquiry is relevant both for assessing which districts currently “perform” for the minority community as well as what racial percentage is necessary for a district, in general, to elect the minority’s preferred candidate. One variable that confounds each of these inquiries is the role of incumbency in the evaluation of retrogression (as well as dilution under section 2).²¹⁴ The weight a retrogression inquiry ought to attribute to incumbency in a determination of district performance represents a very important, but unresolved, issue in voting rights jurisprudence. The question, in a nutshell, is the following: when determining whether a district will elect the minority candidate of choice, should one assume that the existing incumbent will be running for reelection? Whether a district is an open seat, one represented by a minority incumbent, or one represented by a white incumbent, will greatly affect the minority percentage necessary for minorities to elect their preferred candidate.²¹⁵

In other words, do the words “preferred candidate of choice” refer to an identifiable individual or simply a candidate in the abstract? For a minority challenger to defeat a white incumbent, for example, districts historically needed to be redrawn to become a substantial majority-minority district (close to 60%, for example), whereas minority incumbents have been able to win reelection in districts that are minority-minority. In open seats, the required percentage may lie somewhere in between. Therefore, a change in district lines that draws a minority incumbent out of her district, for example, might be retrogressive, if, as a result, another minority candidate of choice cannot win from that district.

As is clear from the Texas preclearance memo, DOJ lawyers routinely ask whether a given incumbent is a minority candidate of choice and how the redrawing of districts will affect that specific candidate’s reelection prospects.²¹⁶ There is much to commend this approach, which includes an evaluation of the effect of a plan not only on a given incumbent, but also on any particular candidate likely to run from a redrawn district. The likelihood that a specific candidate of choice will be contending for the upcoming election will be very relevant to evaluating whether the racial percentages in the newly redrawn

214. See Katz et al., *supra* note 122, at 673 (assembling section 2 cases that deal with the confounding variable of incumbency).

215. Cf. Bernard Grofman, Lisa Handley & David Lubin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1407-09 (2001).

216. See *supra* notes 198-204 and accompanying text.

district affect the minority community's ability to elect him. If a new redistricting plan ensures the reelection of that specific candidate, then under this view the plan does not retrogress.

On the other hand, limiting the retrogression inquiry to the facts as they exist at the time of the redistricting runs the risk of creating districts that perform for a given candidate, but not for minority-preferred candidates in general. Keeping in mind that a redistricting plan is likely to govern elections for ten years, assessments of district performance based on a given set of candidates in the first election under the plan may become outdated by the end of the decade.²¹⁷ More importantly, those who draw districts with particular minority incumbents in mind are gambling on the likelihood that the incumbent will continue to run (and win) from that district. If one's predictions are off the mark, then a district that may not have diminished minorities' ability to elect their preferred candidate when it was drawn may nevertheless have that effect shortly thereafter when the candidate field changes.

B. *The Ability To Elect*

By adding the words "ability . . . to elect" to the new section 5, Congress attempted to overrule *Georgia v. Ashcroft* and return the retrogression inquiry to what it was under the *Beer v. United States* standard.²¹⁸ The problem is that there is disagreement about what the standard under *Beer* was and how one determines minorities' "ability to elect."²¹⁹ The central point of debate is whether it implies certain rigid numerical thresholds (such as districts that are

217. The same might be said with respect to likely population changes. Just as one might want to know which candidates will be running from the district, one might also want to know how the district's racial percentages might evolve over the course of a decade. In other words, if a district's minority population is likely to increase or decrease substantially over the course of a decade—through migration patterns, for instance—one might want to factor in the district's likely evolution when one is drawing the lines.

218. See H.R. REP. NO. 109-478, at 94 (2006) (pointing out that the new law partly overrules *Georgia v. Ashcroft*, 539 U.S. 461 (2003)); 152 CONG. REC. H5143, 5163 (daily ed. July 13, 2006) (demonstrating Representatives Sensenbrenner and Watt's agreement that the new retrogression standard reenacts *Beer* into law).

219. See David J. Becker, *Saving Section 5: Reflections on Georgia v. Ashcroft and Its Impact on the Reauthorization of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER, *supra* note 77, at 223, 227-30 (pointing to disagreement among academic commentators and the DOJ as to what the *Beer* standard meant in practice).

over 50% minority) or focuses on a more nuanced analysis of voting behavior and success of candidates of choice.

1. *No More Tradeoffs for Influence Districts*

Georgia v. Ashcroft relaxed the constraint of section 5 by allowing covered jurisdictions to trade off “ability to elect” districts with so-called influence districts.²²⁰ In practice (and on the facts of the case itself), this would usually mean allowing drops in the percentages in majority-minority districts so as to increase the probability of electing (usually white) Democrats across a greater number of districts. By overruling *Ashcroft*, the new section 5, at a minimum, seeks to prevent tradeoffs between influence districts and ability-to-elect districts.

What constitutes an influence district is not readily apparent,²²¹ and as the Court recognized in *Ashcroft*, the universe of districts is not filled merely with influence and ability-to-elect districts.²²² We know that an influence district is one in which minorities usually cannot elect their candidate of choice, but will have influence over who would likely win. Often this would mean that in a district otherwise evenly split between white Democrats and white Republicans, for example, minority Democrats could tip the balance in favor of the Democrat in the general election. That Democrat would not be the minority’s first choice if they had been more numerous in the district and their ideal candidate had run. However, the minority vote would be able to sway the outcome of the election between the Republican and Democratic nominees so as to avoid the election of minority voters’ least preferred candidate.

Other definitions of influence districts abound, however. One might read the Court’s treatment of such districts as encompassing any district in which minorities constitute some specified percentage: any district under 50% or between 25% and 50% minority.²²³ Moreover, the influence that minorities might exert may not be electoral influence per se, but influence over the decisions and policy positions of their representatives.²²⁴ In other words, an

220. See *Ashcroft*, 539 U.S. at 480-83.

221. See Pildes, *supra* note 179, at 1539 (“The concept of influence is nebulous and difficult to quantify.”).

222. Both the Senate and House reports emphasize the amorphousness of the definition of influence districts, which undermined the potential guarantee of section 5. See H.R. REP. NO. 109-478, at 68-72 (2006); S. REP. NO. 109-295, at 18-21 (2006).

223. See *Ashcroft*, 539 U.S. at 486-87.

224. See *id.* at 482.

influence district might be a district in which minorities constitute a share of the district significant enough such that they will not be ignored by the eventually elected representative, whether or not minorities voted for that person. Others have attempted to refine further the definition of influence districts and different definitions will be more or less concrete.²²⁵ For the supporters of the new section 5, however, *Ashcroft* opened the possibility that under the cloak of influence districts, jurisdictions would create districts in which minorities had no influence at all.²²⁶ Regardless of whether one agrees with that take on *Ashcroft*, it is clear that the bill's ability-to-elect language attempts to remove the possibility of a tradeoff with influence districts.²²⁷

That being said, *Ashcroft* recognizes at least one other category of districts, so-called coalitional districts. A coalitional district is one in which minorities constitute under 50% of the district, but with likely white crossover voting, they will be able to elect their preferred candidate. For example, a district that is 40% African American, 20% liberal white Democrat, and 40% Republican would be a coalitional district if the liberal whites ordinarily vote for the candidate preferred by the African American community. It might also be fair to say that a prerequisite for a coalitional district is that minorities constitute a majority of the Democratic primary, such that their preferred candidate will almost certainly be on the general election ballot and therefore electable with a combination of minority support and white crossover voting.²²⁸

Whether coalitional districts that fit this definition qualify as ability-to-elect districts under the new section 5 was a source of debate among members of Congress. Recognizing the potential partisan effect of protecting such districts, the Senate Report goes out of its way to group coalitional districts

225. See *Need for Section 5 Pre-Clearance Senate Hearing*, *supra* note 32, at 198-207 (statement of Richard Pildes); Bernard Grofman, *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control*, 5 ELECTION L.J. 250, 265-72 (2006); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 32-35 (2004).

226. See H.R. REP. NO. 109-478, at 70 (2006) (expressing concern over "testimony indicating that '[m]inority influence is nothing more than a guise for diluting minority voting strength.'").

227. In addition to the retrogression standard discussed at length above, see *supra* note 167 and accompanying text, the law, in extraordinary and emphatic language, goes on to clarify in section 5(d): "The purpose of [the new retrogression standard] is to protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C.A. § 1973c(d) (West Supp. 2007).

228. See generally Grofman et al., *supra* note 215, at 1407-09 (2001) (detailing the importance of primary elections for estimating the minority percentage necessary for electing minority candidates of choice).

with influence districts and emphasizes that neither is protected by the new retrogression standard.²²⁹ The House Report takes the exact opposite point of view: “Voting changes that leave a minority group less able to elect a preferred candidate of choice, *either directly or when coalesced with other voters*, cannot be precleared under Section 5.”²³⁰ From this sentence one might reasonably conclude both that a tradeoff of majority-minority districts with coalitional districts would not violate the new section 5, and that a reduction in the number of coalitional districts would in fact be retrogressive. In other words, ability-to-elect districts include both coalitional districts and “safe” minority “control” districts, in which minorities need not rely on white crossover voters to elect their preferred candidates.

2. “Naturally Occurring” Majority-Minority Districts?

Seeking to cabin the potential politicization of the retrogression standard and its widespread application to any district with a nonnegligible minority community, the Senate Report makes clear that the new retrogression standard merely protects “naturally occurring majority-minority districts”²³¹ from

229. See S. REP. NO. 109-295, at 21 (2006).

230. H.R. REP. NO. 109-478, at 71 (2006) (emphasis added).

231. S. REP. NO. 109-295, at 21 (2006). I am reliably informed by Morgan Kousser that the phrase “naturally occurring majority-minority district” was probably coined by Katharine Inglis Butler in a 1995 *Rutgers Law Journal* article. See Katherine Inglis Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 *RUTGERS L.J.* 595, 618 (1995) (“[I]f there were more ‘naturally occurring’ majority-minority districts, legislators would not have resorted to drawing bizarre ones.”). In the hearings on the new VRA, the phrase appears to have been first used by Republican attorney Anne Lewis in her testimony in the House. See *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30-37 (2006) (statement of Anne Lewis, Partner, Strickland Brockington Lewis LLP). The phrase is not present in any Supreme Court precedent in the redistricting or voting rights case law. One can see hints of the idea in two lower court cases, although neither of these cases was seriously discussed in the reauthorization debate. See *Garza v. County of Los Angeles*, 918 F.2d 763, 776 (9th Cir. 1990) (“[T]he district court objected to the placement of the Hispanic majority district in a section controlled by a powerful incumbent, rather than in the one section that had a naturally occurring open seat, an open seat that was ‘in the heart of the Hispanic core.’”); *Smith v. Beasley*, 946 F. Supp. 1174, 1201 (D.S.C. 1996) (“These two new majority-minority districts are Districts 29 and 37. Furthermore, Couick testified that one additional black-majority Senate district could be drawn from naturally occurring concentrations of black population; however, at trial, he could not specifically identify such an area.”). Several senators reemphasized this interpretation of the standard with speeches from the floor during reauthorization. See 152 *CONG. REC.* S7979 (daily ed. July 20, 2006) (statement of

elimination. Of course, there is no such thing as a “naturally occurring” district; all districts are artificial in that a linedrawer imposes them onto a population. By “naturally occurring” the Report means those districts “that would be created if legitimate, neutral principles of drawing district boundaries, such as attention to county and municipal borders, were combined with the existence of a large and compact minority population to draw a district in which racial minorities form a majority.”²³²

There is nothing in the words “ability to elect” that should limit it to “naturally occurring” districts of whatever racial percentages.²³³ Rather, the choice of words reveals both political impulses and constitutional constraints. The political impulse arises from the fact that freezing in place districts that capture large and compact minority populations benefits Republicans. Democratic gerrymanders often will try to disperse minority populations efficiently so as not to “waste” reliable Democratic votes. In many jurisdictions (Atlanta, for example), drawing districts within county lines will lead to the creation of several supermajority-minority districts. The only way to push the minority percentages in the districts down closer to 50% and prevent “packing” is often to join heavy concentrations of minorities in the core of the city with whites in the suburbs.²³⁴

Political impulses aside, the drive to limit the new retrogression standard to naturally occurring majority-minority districts is in line with the series of cases that question the constitutionality of drawing districts predominantly based on race.²³⁵ The *Shaw v. Reno* line of cases²³⁶ applied strict scrutiny to districts that subordinated traditional districting principles (such as compactness and respect for political subdivision lines) to race. Following *Shaw*, the Court struck down on equal protection grounds an array of majority-minority districts, which were bizarrely shaped and created pursuant to what the Court determined was the DOJ’s overzealous enforcement of section 5. These districts

Sen. Kyl) (emphasizing the limiting definition of naturally occurring majority-minority districts); *id.* at S7980 (statement of Sen. Cornyn) (same); *id.* at S7979 (statement of Sen. Hatch) (same); *id.* at 8010 (statement of Sen. Specter) (same).

232. S. REP. NO. 109-295, at 21 (2006).

233. *Cf.* 152 CONG. REC. S8010 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

234. In some cases, a supermajority-minority district can be avoided by joining urban minorities with urban whites, making the district appear less “unnatural.” However, these districts also turn out to be inefficient for Democrats given that the whites who live next to large minority populations in cities often are overwhelmingly Democrats.

235. *See* 152 CONG. REC. S7979 (daily ed. July 20, 2006) (statement of Sen. Hatch).

236. *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

were allegedly “unnatural,” because they cobbled together far-flung African American or Hispanic communities in order to create a majority-minority district. The new focus on naturally occurring majority-minority districts, then, is, in part, an admonition to the DOJ to avoid forcing jurisdictions to create or maintain *Shaw*-violative districts.²³⁷

The emphasis on “naturally occurring” majority-minority districts is also in line with the most recent Supreme Court decision interpreting section 2 of the

237. One of the ironies of reading *Shaw* and its progeny to require an interpretation of section 5 limited to naturally occurring districts is that compliance with section 5 has been the one thing that would allow a jurisdiction to create an “unnatural” majority-minority district. *Shaw* requires the application of strict scrutiny to districts drawn predominantly on the basis of race, but later cases assume that compliance with the VRA is a compelling state interest justifying the intentional creation of such districts. See *Vera*, 517 U.S. at 982; *Hunt*, 517 U.S. at 909-10. In other words, if the VRA commands the creation of a district so as to avoid retrogression, the state can surmount the usually fatal strict scrutiny by drawing a district narrowly tailored to avoid a violation of section 5. Even Justice Scalia most recently agreed with this constitutional interpretation, holding that a district drawn on the basis of race as part of the Texas re-redistricting passed strict scrutiny because it was drawn to avoid retrogression. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2666-67 (2006) (Scalia, J., concurring and dissenting); see also Nathaniel Persily, *Strict in Theory, Loopy in Fact*, 105 MICH. L. REV. FIRST IMPRESSIONS 43 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/persily.pdf>.

With the newly enacted section 5 the questions emerge whether compliance with a now-changed VRA continues to represent a compelling state interest or whether courts should interpret the new section 5 to discourage (or bar) the creation of districts predominantly drawn on the basis of race. Justice Scalia’s opinion in the Texas case suggests the intentional creation of an ability-to-elect district (which was not even required under *Georgia v. Ashcroft*, 539 U.S. 431 (2003)) can overcome strict scrutiny if drawn to avoid retrogression. Moreover, nothing in the cases describing compliance with section 5 as a compelling state interest indicates that the particular wording of the retrogression standard is what made compliance with it so compelling. Rather, allowing compliance with the VRA to serve as a compelling state interest was driven by a desire to avoid forcing jurisdictions into the impossible position of choosing whether to violate the Constitution or the Voting Rights Act.

The fact that *Georgia v. Ashcroft* relaxed the retrogression inquiry should not be relevant to whether forcing jurisdictions to retain ability-to-elect districts constitutes a compelling state interest. The Court treated compliance with section 5 as a compelling state interest before *Ashcroft* undercut the *Beer* standard, *Beer v. United States*, 425 U.S. 130 (1976), and the decision to retain an equal number of ability-to-elect districts even after *Ashcroft* was seen (at least by Justice Scalia in *League of United Latin American Citizens*, 126 S. Ct. at 2667-68 (2006) (Scalia, J., concurring and dissenting)) as constituting a compelling state interest. The return of the retrogression inquiry to the *Beer* standard should not alter the compelling nature of compliance with section 5. Nevertheless, if a jurisdiction goes too far—as did those disciplined by the *Shaw* cases—by creating districts that are not necessitated by the VRA or are not narrowly tailored to avoid a violation of the ability-to-elect standard, then such districts will fail strict scrutiny.

Voting Rights Act. Justice Kennedy's opinion for the Court in *League of United Latin American Citizens v. Perry* struck down the Texas congressional districting plan under section 2 because it had broken up a culturally cohesive Hispanic community in South Texas and attempted to compensate with a different majority-Hispanic district capturing two geographically distant and culturally distinct communities.²³⁸ Although not using the "naturally occurring" language, the opinion considers the state to have broken up a compact, almost organic, Hispanic community with "an efficacious political identity."²³⁹ At the same time, the plan tried to compensate for the elimination of that "natural" Hispanic district by creating an unnatural district that artificially stitched two different Hispanic communities together. The majority Hispanic district broken up by the redistricting plan appears to be what the Senate Report would deem "naturally occurring" and therefore protected from diminution under the new retrogression standard. On the other hand, the standard would not require the maintenance or creation of something like the "offset district," which stretched from Austin to the Mexico border and which would appear to be an *unnaturally* occurring majority-minority district.

3. *The Importance of Racial Bloc Voting to the Ability To Elect*

More important than its introduction of "naturalism" to the debate over the Voting Rights Act is the Senate Report's emphasis on majority-minority districts as the singular type of district protected under the ability-to-elect standard. By this interpretation, for the next twenty-five years a covered jurisdiction can never reduce the minority percentages in a district that is slightly over 50% minority. The 50% threshold is magical under this view because once a minority community passes it, at least in theory it can exercise control over the election if all of its members vote cohesively. Indeed, a similar

238. See *League of United Latin Am. Citizens*, 126 S. Ct. at 2613-20 (majority opinion); *id.* at 2619 ("We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact."); see also Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006), <http://students.law.umich.edu/mlt/firstimpressions/vol105/ortiz.pdf> (describing the theory undergirding Justice Kennedy's opinion).

239. *League of United Latin Am. Citizens*, 126 S. Ct. at 2619 ("[T]he Latino population of District 23 was split apart particularly because it was becoming so cohesive. The Latinos in District 23 had found an efficacious political identity, while this would be an entirely new and difficult undertaking for the Latinos in District 25, given their geographic and other differences.").

impulse underlies the first of the famed *Gingles* factors operationalizing section 2 of the VRA.²⁴⁰ If a minority community is large and compact enough to constitute a majority in a single-member district, then it may have a claim that the failure to draw a district around that community constitutes impermissible vote dilution.²⁴¹ The best arguments for this interpretation are that it would ensure some symmetry between sections 2 and 5, and it would constrain the potential range of districts that would be subject to the retrogression inquiry. However, as argued below, the minority share of a district's population, by itself, without considering the voting behavior of minorities and whites, is inherently incomplete as a metric of the minority community's ability to elect its preferred candidates.

The division between the Republican and Democratic senators on this point became clear in the floor debate over reauthorization. Senators Cornyn and Kyl presaged the position of the Committee Report, as well that to be expressed in their "additional views."²⁴² Senators McConnell and Hatch concurred that the Act only protected "naturally occurring majority-minority districts."²⁴³ This approach differed considerably from that of Senator Leahy: "The amendment to Section 5 does not, however, freeze into place the current minority voter percentages in any given district. . . . [T]here is no 'magic number' that every district must maintain to satisfy the 'ability to elect' standard"²⁴⁴

As an initial matter, the moniker "majority-minority" is not as concrete as it first sounds. The central question will often be: majority of what? That is, what should the denominator be for which minorities constitute over 50% of the given district? Should it be population, voting age population (VAP), citizen voting age population (CVAP), eligible voting population, registered voters, or likely voters? One cannot simply say the new section 5 protects

240. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

241. *See id.* at 50 n.16.

242. *See* 152 CONG. REC. S7979 (daily ed. July 20, 2006) (statement of Sen. Kyl) (emphasizing the limiting definition of naturally occurring majority-minority districts); *id.* at S7978-79 (statement of Sen. Cornyn) (same); *id.* at 8010 (statement of Sen. Specter) (same).

243. 152 CONG. REC. S7979 (daily ed. July 20, 2006) (statement of Sen. Hatch); *see id.* at S7979-80 (statement of Sen. McConnell).

244. *Id.* at S8005 (daily ed. July 20, 2006) (statement of Sen. Leahy); *see also id.* at S8010 (statement of Sen. Kennedy) ("Contrary to the suggestions of Senator Cornyn and Senator Kyl on the floor, while the standard rejects the notion that 'ability-to-elect' districts can be traded for 'influence' districts, it also recognizes that minority voters may be able to elect candidates of their choice with reliable crossover support and, thus, does not mandate the creation and maintenance of majority-minority districts in all circumstances. The test is fact-specific, and turns on the particular circumstances of each case.").

majority-minority districts from elimination without refining what is meant by such districts. This is not a dilemma unique to the new section 5; it presented itself with the old section 5²⁴⁵ and section 2.²⁴⁶ However, by focusing on the *ability* to elect, the new retrogression standard pushes to the forefront the question of which statistics will be most reliable in predicting how a given district will “perform” for the minority community.²⁴⁷

It would also seem beyond empirical dispute that population statistics by themselves are insufficient to estimate the minority community’s ability to elect its preferred candidates. In some cases, constituting 51% of a district’s population will not be enough for minorities to elect their preferred candidates (however we define them), and in others it will be much more than necessary. To assess accurately a group’s ability to elect its preferred candidates one must know not only the size, likely turnout, and voting preferences of the minority community, but also the political preferences and voting behavior of whites.²⁴⁸ If no whites will cross over to vote for minority-preferred candidates, then a larger minority presence in the district will be necessary for minorities to elect their preferred candidate.

If we recognize, as we must, that minorities often have the ability to elect their preferred candidates in districts in which they constitute a minority of the

245. See *Georgia v. Ashcroft*, 539 U.S. 461, 472, 473 n.1, 487-89 (2003) (urging that the retrogression inquiry look at total population, voting age population, and registered voter population).

246. See Katz et al., *supra* note 122, at 661 nn.80-82. (assembling cases that take divergent approaches as to the use of total population, voting age population, and citizen voting age population in section 2 cases).

247. Cf. *Ashcroft*, 539 U.S. at 480 (“No single statistic provides courts with a shortcut to determine whether a voting change retrogresses from the benchmark.” (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994))). The difference between the various statistics could be substantial depending on the region of the country and the particular minority concerned. It would be difficult to argue, for example, that a district with a 51% Hispanic total population is likely to elect a Hispanic candidate of choice if half of the Hispanics in the district are not citizens and voting in the district is racially polarized. Similarly, if legal barriers to voting, such as felon disenfranchisement, fall heavily on a particular minority community, then mere population figures might misrepresent the relative ability of the minorities to elect their preferred candidates. The point of this discussion is not to argue for any particular denominator; indeed, the “right” statistic to determine the “ability to elect” will depend on context. Rather, this discussion highlights that a simple rule of “over 50% minority” does not reveal whether the minority can actually elect its candidates of choice.

248. See 152 CONG. REC. S8005 (daily ed. July 20, 2006) (statement of Sen. Leahy) (“[T]here is no ‘magic number’ that every district must maintain to satisfy the ‘ability to elect’ standard; the percentages will vary depending on such variables as the extent of racially polarized voting and white crossover voting, registration rates, citizenship variables, and the degree of voter turnout.”).

district's population, then the new retrogression standard protects (or at least requires consideration of) so-called coalitional districts. In other words, districts in which the votes of whites ensure that the minority community can elect its preferred candidate are also protected under the new standard. More importantly, alongside population changes, the extent and effect of racial bloc voting in a benchmark and proposed districting plan becomes the central inquiry to determine retrogression. Assuming the world can be divided into ability-to-elect and non-ability-to-elect districts (an assumption complicated by the next Section), then the elimination of a coalitional district that "performs" for the minority community would be retrogressive (all else equal).

Therefore, the section 5 inquiry will force the DOJ to evaluate whether the shuffling of both the minority and white populations into new districts will lead to the election of fewer minority-preferred candidates. In the paradigmatic inquiry, the DOJ would assess whether population changes between districts coupled with the likely voting behavior of both whites and minorities will decrease the likelihood of minorities electing their preferred candidates. This will mean, perhaps controversially, that even maintaining the same minority percentages from the benchmark plan in proposed districts may nevertheless be retrogressive. If a plan replaces loyal white crossover voters in a coalitional district with white voters unwilling to vote for the minority's preferred candidate, then the plan may be retrogressive. Such a change, despite the maintenance of identical racial percentages, will have the effect of diminishing the ability of minority voters in that district to elect their preferred candidate.

Equally controversial, on the other hand, is the corollary: in areas where there is no racial polarization of the electorate, no change in district lines will be retrogressive. Not only would it be difficult under such circumstances to identify a candidate distinctly preferred by the minority community, but when candidate preferences do not correlate with race, minorities' ability to elect would not be affected by the decision of which population to include in their district. Breaking up a 60%-black district into two 30%-black districts, for example, would not be retrogressive if the white and black communities are identical in their candidate preferences.

4. *"Ability To Elect" as a Continuous or Dichotomous Variable?*

Given that no magic number exists to identify an ability-to-elect district, a more functional approach must guide the retrogression inquiry. Until this point, the discussion of the ability-to-elect standard has assumed that districts can be categorized as either ability-to-elect or no-ability-to-elect districts. In reality, the ability to elect preferred candidates, like the ability to play the violin, is a matter of degree, not a difference in kind. Some districts have a

near-100% ability to elect (so-called performing or safe districts); in others, minorities' ability to elect their preferred candidates might be closer to 50% or next to nothing. Districts can be arrayed along a continuum according to their ability to perform. *Diminishing* a district's ability to elect does not necessarily mean reducing it from a safe district to a hopeless district (i.e., a move from a guaranteed district to one where minorities have no chance of electing their preferred candidates). It could mean reducing a safe district to a competitive district, or a competitive district to a hopeless district or any downward shifts along that very wide spectrum. According to this interpretation, any district with some ability to elect a minority-preferred candidate must be part of the retrogression inquiry and is protected from diminution.

The Senate Judiciary Committee was well aware of these potential implications. Michael Carvin's testimony before the Committee warned:

[T]he bill prevents "diminishing the ability" to elect candidates of choice, so it clearly reaches and protects districts where minorities did not have a demonstrable pre-existing power to elect the candidate of choice under the old plan. If minorities had a 40% chance of electing their candidate in the old influence district and the new plan reduces that potential to 20%, then the ability to elect has been "diminished" by the plan.²⁴⁹

Because of such warnings and a recognition that this interpretation follows from the plain meaning of the words in the statute, the Senate Committee Report insisted that the only changes that might constitute retrogressive diminution would be the elimination of a naturally occurring majority-minority district. Senator Kyl's additional views drove the point home: "[T]he VRARA's changes to Section 5 of the Voting Rights Act ensure that the Act will protect the creation and retention of naturally occurring districts with a clear majority of minority voters—and nothing more."²⁵⁰ By contrast, Senator Leahy argued that "[t]he 'ability to elect' standard does not lock in districts that meet any particular threshold. Determinations about whether a district provides the minority community the ability to elect must be made on a case-by-case basis."²⁵¹

Although reading "ability to elect" as a continuous variable would broaden the retrogression inquiry to include any district where minorities have some

249. *Section 5 Renewal Senate Hearing*, *supra* note 32, at 140-41 (statement of Michael A. Carvin, Partner, Jones Day).

250. See S. REP. NO. 109-295, at 22 (2006) (additional views of Sen. Kyl).

251. 152 CONG. REC. S8005 (daily ed. July 20, 2006) (statement of Sen. Leahy).

chance of electing their preferred candidates, it is not completely clear who would benefit. The interpretation could be contrary to Democratic interests in that it would be retrogressive to replace a district with a 100% probability of electing the minority's preferred candidate with one with only a 90% probability, without compensating for the drop elsewhere in the plan. Democratic attempts to "unpack" inefficient districts would then violate section 5, and even heavily concentrated minority districts must be preserved. On the other hand, Republicans might be concerned that even reductions among districts at the lower end of the spectrum would constitute retrogression. If a 25% minority district has a 10% chance of electing the minority-preferred candidate, for example, section 5 would prevent decreasing the minority percentages in a way that might reduce that candidate's chances of election from slim to none.

Having raised the specter that the DOJ's retrogression inquiry may expand to virtually any district with some presence of minority voters with a nonzero probability of electing their preferred candidates, that hyperbole should be hedged by the fact that the range of districts in covered jurisdictions today where minorities have some intermediate ability to elect their preferred candidates is narrow. Moving from an 80% minority district to a 65% minority district will almost never have any effect on the minority community's ability to elect its preferred candidates. Similarly, decreasing a 25% minority district will rarely change that district's inability to elect the minority-preferred candidate. At least when we define the candidate of choice as the minority candidate (a controversial but oft-made decision, as argued earlier), the curve relating minority population shares to election of minority candidates in covered jurisdictions is S-shaped.²⁵² In other words, precisely due to racial polarization in the electorate, districts with small minority populations have little ability to elect minority candidates, and districts over 60% minority are virtually identical in their guaranteed election of the minority candidate. That being said, the new retrogression standard will be in place for twenty-five years, and over that period, as racial polarization declines, we should begin to see greater diversity at both ends of the spectrum.

252. See Epstein & O'Halloran, *supra* note 130, at 65. By S-shaped I mean that districts with minority voting age percentages below 30% have little chance of electing minority-preferred candidates, while those over 60% have an almost guaranteed chance of electing a minority-preferred candidate.

C. *Diminishing*

Even if we can arrive at some agreement as to who a candidate of choice is and when minorities have an ability to elect him or her, we still need to be able to assess how such ability can be diminished. The two principal questions here are whether the statute allows for tradeoffs between control and coalition districts and whether it protects against overconcentration of minority voters as well as underconcentration.

In the background of both of these questions is the uncertainty as to whether the Court's decision in *Georgia v. Ashcroft* has a constitutional component to it, in addition to existing as an interpretation of the extant Voting Rights Act. In particular, is the flexibility that the Court read into section 5 constitutionally required, or did it merely constitute an assessment of statutory meaning? If such flexibility is constitutionally required either by the Equal Protection Clause or the enforcement clauses of the Fourteenth or Fifteenth Amendment, then the overruling of *Georgia v. Ashcroft* with a new section 5 that grants less latitude to covered jurisdictions makes the statute vulnerable.²⁵³ However, a more flexible interpretation of section 5 necessarily expands the scope of the retrogression inquiry to include a greater number and variety of districts. Doing so might run afoul of Justice Kennedy's admonition that an interpretation that "unnecessarily infuse[s] race into virtually every redistricting, rais[es] serious constitutional questions."²⁵⁴

253. See *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003) ("[T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993))).

254. *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2625 (opinion of Kennedy, J.) (citing *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring)). Justice Kennedy's cryptic *Ashcroft* concurrence, which may constitute the best tea leaves for predicting how the Court might handle the new standard, similarly warned against interpretations of the VRA that excessively injected race into districting plans. He viewed the facts in that case in the following way:

[R]ace was a predominant factor in drawing the lines of Georgia's State Senate redistricting map. . . . Race cannot be the predominant factor in redistricting under our decision in *Miller v. Johnson*. Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.

. . . .

. . . There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive. This serious issue has not been raised here

1. Ability To Elect per District or Across Districts?

In overruling *Georgia v. Ashcroft*, the new section 5 squarely rejects the notion that ability-to-elect districts can be eliminated (or traded off with influence districts) as part of an overall plan to increase minority influence in the legislature as a whole. In *Ashcroft* itself, the state argued and the Court agreed that the extent of minority influence on the policymaking process (e.g., because of leadership positions held by minority-preferred representatives or the fact that minorities would be in the majority party controlling the legislature) was a factor to be considered in favor of a tradeoff between ability-to-elect and influence districts.²⁵⁵ It is clear from the findings in the law, the House and Senate reports, and all supporting legislative materials, that the new law rejects that factor as relevant to the new retrogression standard. The argument that minorities will be better off if Democrats control the legislature, for example, is now off the table when it comes to the retrogression inquiry.²⁵⁶

However, preventing reductions in the number of ability-to-elect districts to increase the number of influence districts or to capture control of the legislature is not the same as banning tradeoffs among ability-to-elect districts.

Ashcroft, 539 U.S. at 491 (Kennedy, J., concurring) (citation omitted).

One can read Justice Kennedy's opinions in *Georgia v. Ashcroft* and *League of United Latin American Citizens* as recognizing that the fewer districts to which the Voting Rights Act applies, the more likely it is to be constitutional. In other words, if every district with some minority population potentially raises an issue under section 5, then Congress has forced states to be excessively race-conscious in a way prohibited by the Equal Protection Clause. This might lead one to conclude that applying a pragmatic threshold, such as majority-minority districts, would be a constitutionally safer construction of the new VRA, because it limits section 5's scope.

On the other hand, one can read Kennedy as wanting to preserve state flexibility to comply with section 5. According to this view, *Ashcroft*'s allowance of tradeoffs among different types of districts is an effort to reduce the race consciousness inherent in some more rigid standard. If so, then the problem is not so much the number of districts to which the VRA would apply, but rather the likelihood that it will lead to the construction of districts unconstitutional under *Shaw*. Given that the Court has only struck down majority-minority districts under *Shaw*, an interpretation of the VRA that does not box jurisdictions into creating or maintaining such districts would be on safer constitutional ground.

255. See *Ashcroft*, 539 U.S. at 482-83.

256. I do not discuss this important change in depth here because no reasonable interpretation of the new standard could get around the repudiation of that particular aspect of the *Ashcroft* decision. By avoiding a discussion of that change, I do not mean to understate its political and theoretical importance. The effect of this move is to hinder the ability of Democrats to gerrymander for partisan advantage while avoiding retrogression. It also takes the side of advocates for descriptive representation in their debate with advocates for substantive representation.

If the “ability to elect” describes a spectrum, then the question becomes whether the decrease in ability to elect in one district can be compensated with an increase in the ability to elect in other districts. For example, if in one district minorities have a 100% ability to elect their preferred candidate and in another they have a 50% ability to elect, can the state replace those two districts with two that have an 80% probability of electing minority-preferred candidates? Does such a redistricting plan, which increases the aggregated probability that minority-preferred candidates will be elected, retrogress?

It is fairly clear that those who drafted the new section 5 were concerned about the possibility of certain types of tradeoffs. The problem they had with *Georgia v. Ashcroft* was that it allowed risking safe seats for more marginal ones for the good of the Democratic Party. Of course, the *Ashcroft* Court described this as a tradeoff between safe seats and influence districts.²⁵⁷ For those who worry about any decrease in minority descriptive representation, however, trading a few safe seats for a larger number of “probable to elect” districts would invite the same criticism as would such tradeoffs to increase the number of influence districts. Moreover, given that the greatest fear arising from *Ashcroft* was that a jurisdiction might call something an influence district as a pretext for minority vote dilution, civil rights lawyers would justifiably have the same fear when a jurisdiction says it is moving from a few high-probability-to-elect districts to a greater number of low-probability-to-elect districts. After all, the interpretation proposed here would allow the trading of one 100% ability-to-elect district for ten 10% ability-to-elect districts. Concerns with those kinds of tradeoffs are very similar to the ones that motivated the *Ashcroft* fix in the first place.

If the Court views the *Ashcroft* fix as treading close to the constitutional line, this interpretation offers a way to avoid constitutional difficulty.²⁵⁸ The constitutional challenge to the *Ashcroft* fix will be based on both the Equal Protection Clause and Congress’s power to enforce the guarantees of the Fourteenth and Fifteenth Amendments.²⁵⁹ An interpretation of the new section

257. See *Ashcroft*, 539 U.S. at 482-83.

258. See Michael J. Pitts, *Georgia v. Ashcroft: It's the End of Section 5 as We Know It (and I Feel Fine)*, 32 PEPP. L. REV. 265 (2005) (explaining why *Ashcroft* helps make section 5 constitutional).

259. See Katz, *supra* note 73 (suggesting that the *Ashcroft* fix makes the Court more likely to strike down the new section 5 on federalism grounds). I should be clear that I consider both this aspect of the new section 5 and the statute as a whole to be constitutional. Five members of the current Court, however, will give greater scrutiny to a federal mandate of certain types of districts than I would. I tend to agree with Pamela Karlan’s spin on what the proper analysis of the constitutionality of section 5 ought to be, although I am confident the Court will disagree with this position. See Karlan, *supra* note 73.

5 that seems to freeze majority-minority districts for twenty-five years raises concerns about racial predominance akin to those expressed in the *Shaw* line of cases. The decision to mandate a particular view of descriptive representation in a subset of states also raises concerns that Congress has exceeded its remedial and prophylactic authority under section 2 of the Fifteenth Amendment or section 5 of the Fourteenth Amendment.

An interpretation of the *Ashcroft* fix that allows for tradeoffs like those I have described avoids some of these potential pitfalls. The greater the flexibility given to states to comply with section 5, the less likely the Court will be to view it as either excessively race-based or beyond Congress's power to protect civil rights. One should not underestimate the significance of the fact that this statute will be in place for twenty-five years. The level of racial polarization in covered jurisdictions and the legitimate fears people have about vote dilution in today's political climate might not be present toward the end of the statute's lifespan; at least that should be the aspiration underlying the interpretation of the reauthorized VRA.

2. *Diminution Through Overconcentration and Underconcentration of Minority Voters*

One reason to adopt a long-view interpretation of section 5 is that the prevalent strategies for diminishing minority voting power will change over time. In particular, if racial polarization in the electorate declines, the overconcentration of minorities in districts will prove to be a more threatening strategy of diminution than will the underconcentration of minorities. In other words, as smaller and smaller minority percentages are necessary in a district for minorities to elect their preferred candidates, the corralling of minorities into overconcentrated districts ("naturally occurring" or not) will prove to be a greater threat than splitting minorities into too many districts. The ability of minorities to elect their preferred candidates can be diminished by "packing," as well as "cracking."²⁶⁰

The fact that minorities can be made worse off by packing them into too few districts, as well as cracking them among too many, is not disputed by anyone. The disagreement occurs as to whether and when the new standard prevents such overconcentration. If one takes the position that only majority-minority districts are protected under the new standard, then combinations of

260. See 152 CONG. REC. S8005 (daily ed. July 20, 2006) (statement of Sen. Leahy) (arguing that the new section 5 bars "all types of retrogressive changes, whether they come from the dispersion of a minority community among too many districts (cracking) or the overconcentration of minorities among too few (packing)").

districts that do not affect the number of majority-minority districts in a plan would not give rise to retrogression. For example, combining one 60% minority district with another 30% minority district into a single 90% minority district would be allowed.²⁶¹ Through such reconcentrations, however, it is possible to reduce the number of districts in which minorities can elect their preferred candidates or might have any reasonable chance of doing so.

Perhaps it is so obvious that it need not be stated, but allowing retrogression by way of “packing” but not “cracking” would prevent the most frequent types of Democratic partisan gerrymanders while leaving the most frequent strategy of Republican gerrymanders untouched. Democrats, as in the Georgia legislative plan upheld in *Ashcroft*, often try to spread reliable minority voters as thinly as possible to maximize the number of Democratic seats. Republican linedrawers do the opposite, concentrating minorities into as few districts as possible so that the remaining districts are more likely to elect Republicans. Given that Republicans are likely to control the next redistricting process in many Southern states, however, it is worth recognizing the types of redistricting changes on which the DOJ will most likely pass judgment in the immediate future.

3. *The Art and Science of Measuring Diminution in the Ability To Elect*

Until now, the analysis of the retrogression standard has assumed that one can point to a district and assign it a percent probability that it will elect the minority-preferred candidate. In litigation surrounding sections 2 and 5, as well as preclearance submissions to the DOJ, social scientists attempt to do just that. Based on voting behavior of different racial groups in past elections in the jurisdiction, experts can develop predictions about the likelihood that a given district with a given percentage of minority voters will elect the minority's preferred candidate. Different experts will develop different estimates and the decision maker (the DOJ or the courts) will evaluate which is most reliable. Often the debate will concern which past elections will be most probative of future performance and how much importance factors such as incumbency and candidate quality should have for predicting the future voting behavior in the district. We should expect the same process to unfold with the new retrogression standard.

However, we should all take with a grain of salt the precision with which experts can assign probabilities to redrawn districts based on past election

261. To be sure, in such instances the redistricting changes might run afoul of the discriminatory purpose prong of the new retrogression inquiry or the constraints of section 2 of the VRA.

behavior. Experts might be able to differentiate easily between 100% and 0% ability-to-elect districts, but no expert can assess with scientific accuracy the difference between a district with a 30% probability of electing a minority-preferred candidate and one with a 40% probability.²⁶² Especially if the new section 5 will force experts to evaluate probabilities for districts with even small minority populations, the art of describing minority voting power ought to temper the science of measuring retrogression.

By this I mean that in evaluating potentially retrogressive changes in redistricting plans, the DOJ and the courts ought to keep the purposes of the new section 5 in mind. In particular, jurisdictions that attempt to break up some safe minority districts into a greater number of districts with lower probabilities of electing minority-preferred candidates ought to be very confident that they have, in fact, maintained or increased the chances that a certain number of minority-preferred candidates will win. Over time, as racial polarization declines, it should become easier for jurisdictions to overcome that presumption, and in some covered jurisdictions we may have reached that point already. It is quite clear, however, that those who wrote and supported this new law would not want aberrant expert reports about relative probabilities of minority-preferred candidates' election to provide a blank check to jurisdictions to dilute minority votes.

Recognizing the proper weight of this burden of proof ought not to be seen as a cop-out from the nuanced analysis advocated in this Part. On the contrary, the need for a skeptical eye in evaluating claims of nonretrogressive tradeoffs among minority districts arises simply from a realistic appraisal of our capabilities or lack thereof in predicting election outcomes. The best interpretation of the new section 5 is one that will preserve some flexibility to account for political changes in the covered jurisdictions for the next twenty-five years. The interpretation still should be seen as an authentic constraint on retrogressive gerrymandering and one that is more severe than the constraint that existed under the law as previously interpreted by the Supreme Court.

CONCLUSION

Given the various objections critics have lodged against the reauthorization process and its eventual product, one might think the new VRA will be

262. This expertise is not limited to the minority voting rights context. Experts can easily point to most districts and declare them safe or unsafe for one or another party, for example. Before the nominees are chosen and the campaigns begin, however, no one can say with confidence that there is specifically a 40% chance that the Republicans will win a given seat, for example.

doomed when the Court considers its constitutionality. I am less sure than others about the fate of the new VRA. The VRA remains the gold standard for exercises of congressional power to enforce civil rights. More importantly, a decision striking down the VRA would be the most dramatic exercise of judicial review over a federal law since the *Lochner* era. As much hay as law professors have made over the series of federalism decisions emanating from the Rehnquist Court, the laws considered in those cases (e.g., the Gun Free School Zones Act,²⁶³ the Violence Against Women Act,²⁶⁴ the application of the Americans with Disabilities Act²⁶⁵ or Age Discrimination in Employment Act²⁶⁶ to damages actions against states) constitute the periphery of federal power. The VRA, on the other hand, lies squarely in the core. Were the Court to strike down the new VRA as exceeding congressional power (even based on the eminently reasonable arguments as to why Congress has overstepped its bounds) it would be exercising its muscle of judicial review to an unprecedented extent. Perhaps this is why even Justice Scalia has suggested that he would allow *stare decisis* to apply to congressional actions under section 5 of the Fourteenth Amendment that concern race²⁶⁷ and has recognized compliance with the VRA as a compelling state interest.²⁶⁸

Unlike the other statutes that form the recent federalism jurisprudence, the constitutionality of which the Court had not previously assessed, the Court *has* specifically upheld previous incarnations of the VRA. A court seeking to strike down the VRA will need to explain why a previously constitutional statute is now unconstitutional. Moreover, in passing the VRA Congress was both protecting a fundamental right and preventing discrimination against a suspect class—taken together these two conditions would suggest congressional power is exceptionally expansive. It is also potentially acting under both section 2 of

263. 18 U.S.C. § 922(q) (2000).

264. 42 U.S.C. § 13,981 (2000).

265. 42 U.S.C. §§ 12,111-12,117 (2000).

266. 29 U.S.C. §§ 621-634 (2000).

267. See *Tennessee v. Lane*, 541 U.S. 509, 560 (2004) (Scalia, J., dissenting) (“A lot of water has gone under the bridge since *Morgan*, and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina*.” (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966))); *id.* at 564 (“Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States.” (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819))).

268. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2666-67 (2006) (Scalia, J., concurring and dissenting); Persily, *supra* note 237.

the Fifteenth Amendment and section 5 of the Fourteenth Amendment.²⁶⁹ The unique position of the VRA precedent and the constitutional sources for congressional action make a challenge to the VRA a harder case to predict than if the Court were considering a statute with less potential for tectonic shifts in the relationship between the branches and between states and the federal government.

With that said, all involved realize that the new VRA walks close to the constitutional line the Court has drawn in the *Boerne* line of cases.²⁷⁰ More likely than striking the statute down outright and suffering the political fallout, the Court might interpret the law to avoid constitutional difficulty. Recognizing the importance of racial polarization in the electorate to the new section 5 could serve both to bolster its constitutionality and to give its central provision a meaning that would retain relevance throughout its twenty-five year tenure. The best way to distinguish the covered from the noncovered jurisdictions is the relative unwillingness of whites in the covered jurisdictions to vote for minority-preferred candidates of choice. At the same time, as that unwillingness subsides and the notion of a minority-preferred candidate becomes difficult to discern, the new retrogression standard ought to accommodate and celebrate these developments.

In particular, section 5 should be read as preventing alterations in districts that reduce the aggregated probability across districts that minorities will elect the candidates who they prefer and who whites generally disfavor. This interpretation is true to the purpose of preserving minorities' ability to elect their preferred candidates, while building in some flexibility as the law achieves its goal of reducing racial polarization in the electorate. Unlike others, this interpretation does not have clear partisan winners and losers, nor does it calcify present minority percentages in some or all districts. As such, it might be just the kind of limiting interpretation a court would search for to uphold this constitutionally contentious exercise of congressional power to enforce the guarantees of the Fourteenth and Fifteenth Amendments.

269. Let alone the Elections Clause. See Karlan, *supra* note 73.

270. See cases cited *supra* notes 71-72.