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HISTORY AND ENFORCEMENT OF THE VOTING RIGHTS ACT OF 1965

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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HISTORY AND ENFORCEMENT OF THE VOTING RIGHTS ACT OF 1965

TUESDAY, MARCH 12, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Scanlon, Dean, Garcia, Escobar, Jackson Lee, Johnson of Louisiana, Collins, Gohmert, Jordan, Reschenthaler, Cline, and Armstrong.

Staff Present: James Park, Chief Counsel; Keenan Keller, Senior Counsel; David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Will Emmons, Professional Staff Member; Paul Taylor, Minority Counsel, and Andrea Woodard, Minority Professional Staff Member.

Mr. COHEN. Good morning, everyone. The Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

Without objection, the chair is authorized to declare recesses of the subcommittee at any time.

I welcome each and every one of you, panelists and visitors, to today's hearing on the history and enforcement of the Voting Rights Act of 1965. I will now recognize myself for an opening statement.

The right to vote is the most fundamental right of citizenship in our democracy. Everything rests upon the voter and the constituent. Yet for most of our Nation's history, too many of our citizens, and particularly African Americans, were denied this most basic right, especially in my home district of the Deep South.

In large measure, it took an historic march and before that, an attempted march thwarted by the Alabama State Troopers, led by our own John Lewis, later joined by Dr. Martin Luther King, from Selma to Montgomery, to bring the Nation's attention to the horrific conditions faced in Alabama and throughout the South in denying people the right to vote and even to protest, to march. This protest really led to our Congress passing the Voting Rights Act.

On August 6, 1965, our Nation took that momentous step toward correcting the injustice when President Johnson signed into law the Voting Rights Act. John Lewis was there to witness that historic occasion.

One hundred years after the Civil War, 100 years after the Civil War, it took America to pass a Voting Rights Act to see to it that African Americans were not discriminated against. How many coins could be put in a bottle of water? Unless you could tell exactly how many coins might have been in a bottle of water, you couldn't vote in Alabama, Mississippi, other States in the South for 100 years.

It is because of the recent developments that we have seen in our country with our Supreme Court having ruled a Voting Rights Act unconstitutional and the failure to be able to pass an act in the most recent Congress to renew it, that this subcommittee will dedicate itself this Congress to, among other things, restoring those protections by reinvigorating enforcement of the Voting Rights Act, including through the revitalization of its most important enforcement mechanism, Section 5 preclearance provisions.

It is astonishing to me, as someone who witnessed, as a young person, the signing of the Voting Rights Act and the historic significance that that had in our country, the Civil Rights Act of '64 and the Voting Rights Act of '65, that here we are nearly 50 years later, over 50 years later, and we are dealing with it still.

This hearing is the first in a series of hearings on the Voting Rights Act before this subcommittee. Our focus today is on the history and enforcement of the act. We must understand how we arrived at this point in history so we can discern our best path forward.

Before the Voting Rights Act, the state of voting rights in the Deep South was, I have described, abysmal. That is probably the high point. In the mid '50s, more than 80 years after adoption of the Fifteenth Amendment, which prohibits States from denying citizens the right to vote on account of race, color, or previous condition of servitude and gives Congress the power to enforce this prohibition, only one in four eligible African-American voters in the South was registered. That was 80 years after the passage of that constitutional amendment.

This low number was the result of decades of backlash against political participation by African Americans, beginning after the Civil War and given a booster shot by Jim Crow and the awful 1876 presidential compromise. This backlash included political violence by the Klan and others who kept black voters away from the polls with guns, whips, lynching, and intimidation at all points.

After Reconstruction, short lived, Southern States enacted numerous measures to disenfranchise African-American voters as part what came to be known as "Jim Crow." These measures included poll taxes, literacy tests, the disqualification of convicts from voting, and many other measures designed to block African Americans from voting.

And I should mention also the construction of many statues venerating Confederate heroes as a symbol in many town squares and public areas to say to blacks, "Don't you even think about asserting

your rights because we are still in charge." That is what those statues meant.

As a practical matter, these tactics, combined with Congress' inaction, denied African Americans the right to vote, notwithstanding the Fifteenth Amendment's guarantee of equal voting rights. After almost a century, with the substantial efforts of the civil rights movement, Congress finally asserted its Fifteenth Amendment authority, passed the Voting Rights Act with Lyndon Johnson as President.

One of the key features was the Section 5 preclearance requirement. Under this requirement, certain jurisdictions, predominantly in the Deep South, that had a history of discriminatory voting measures were required to obtain the approval of the Justice Department or a three-judge panel before any proposed changes to voting practices or procedures could take effect.

The preclearance requirement was crucial to vigorous and effective enforcement of the act's guarantee of equal voting rights. It prevented widespread harm to minority voters and avoided expensive and cumbersome litigation by rightly settling as the default outcome the prevention of potentially discriminatory voting practices from going into effect. The preclearance requirement instead appropriately placed the burden of proof on the covered jurisdictions to show that changes to those voting practices would not be racially discriminatory.

Those States that had preclearance requirements were predominately in the Old South and those States that had white and colored drinking fountains, days for "coloreds" to go to public libraries and zoos and all of the other activities that were so opprobrious that were prevalent during that era.

With this robust preclearance requirement, the act had a dramatically positive effect on black voter registration in the South, which increased to 62 percent just 3 years after the act became law.

Six years ago, however, in *Shelby County* v. *Holder*, the Supreme Court effectively gutted the act's Section 5 preclearance requirement by striking down the coverage formula in Section 4 to determine which jurisdictions would be subject to preclearance. The Court's majority claimed that there was no evidence to support Congress' finding of continuing discrimination in voting in these States, notwithstanding the thousands of pages of recorded evidence compiled by this subcommittee in 2006 demonstrating the continuing need for this coverage formula.

And despite Congress voting on an overwhelmingly bipartisan basis to reauthorize these provisions. It was like 390 to 30 or something like that because it was American as apple pie. And it is still American as apple pie.

Tellingly, in response to the Court's decision, States that had been subject to the act's preclearance requirement wasted no time in pursuing voting restrictions that once again undermined minority voting rights. The measures included strict voter identification requirements, restriction or elimination of early voting or same-day registration, and bans on ex-offenders from voting, all of which make it disproportionately harder for racial and ethnic minorities to vote. In short, this was the "Jim Crow era Part 2."

In the absence of the preclearance requirement, it would be extremely difficult at best to challenge all of these new voting restrictions under what is left of the Voting Rights Act. As many of our witnesses will explain today, the remaining enforcement-related provisions of the act that are still in effect, while valuable, are much more limited in their impact and much more difficult and costly to pursue. And it means they go into effect, and people are affected by that election until some court declares them unconstitutional later on.

Moreover, in contrast to Section 5 preclearance, some of the voting rights amendments for many provisions allowed only for after-the-fact relief, meaning, as I said, that minority voters would first have to be harmed before any relief could be provided. And then you have got people in office that would possibly pass acts harmful to that minority population.

The results of all these factors will be the many practices and restrictions that undermine equal voting rights simply go unchallenged. The Supreme Court was wrong, in my opinion, to undermine the Voting Rights Act. Mr. Sensenbrenner and others had voluminous evidence of reason why the States were in the preclearance category.

Congress must now respond. It is imperative that Congress restore the Voting Rights Act preclearance requirement so as to stay true to the act's purpose of ensuring equal voting rights for all. It would be a crime if this Congress did not pass another Voting Rights Act not only because it is really as American as apple pie, but because it is going back and providing a remedy for what was 100 years of intolerance, discrimination, and Jim Crow segregation in most of these preclearance States.

We need to correct that, and we need to do it while John Lewis is still with us as a United States congressman, and he can be there when this is signed into law once again.

It is not enough to go to Selma with John Lewis. You need to vote with John Lewis, and you need to respect his opinion, his work, his life's work, and pass the Voting Rights Act.

I thank our witnesses for being here, and I look forward to their testimony.

And I now take great pleasure in recognizing the ranking member of our subcommittee, the gentleman from Louisiana, Mr. Mike Johnson, for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman.

And thank you to the witnesses for your time and your expertise today. It is very helpful to us.

I and my colleagues look forward to these hearings on protecting the fundamental right to vote in America because we believe this is an honor and a critical duty of the Congress.

In 2013, as you know, the Supreme Court struck down just one part of the Voting Rights Act in *Shelby County* v. *Holder* by outlining the constitutional weaknesses in Section 4 of the VRA. And I wanted to read just a portion of that opinion into the record as we start here because I think it is so relevant to what we are doing today.

I start by quoting this. "The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth

Amendment, the power to regulate elections. Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States. Indeed, the constitutional equality of the States is essential to the harmonious operation of the scheme upon which this republic was organized.

"Section 4 of the Voting Rights Act sharply departs from these basic principles. It suspends all changes to State election law, however innocuous, until they have been precleared by Federal authorities in Washington, D.C. In 1966, we found these departures from the basic features of our system of government justified. At the time, the coverage formula, the means of linking the exercise of the unprecedented authority with the problem that warranted it, made sense. Nearly 50 years later, however, things have changed dramatically.

"In the covered jurisdictions, voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of Federal decrees are rare, and minority candidates hold office at unprecedented levels. The test and devices that blocked access to the ballot have been forbidden nationwide for more than 40 years."

The Court continued, "The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race, and it gives Congress the power to enforce that command. The amendment is not designed to punish for the past. Its purpose is to ensure a better future.

"To serve that purpose, Congress, if it is to divide the States, must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot simply rely on the past."

The Court continued, "Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the pervasive, flagrant, widespread, and rampant discrimination that Congress faced in 1965 and that clearly distinguished the covered jurisdictions from the rest of the Nation at the time. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

That was the words of the Court, and of course, they were right. Indeed, over the past several decades, in a reversal of prior historical trends, African Americans have been moving to and not from Southern States. We are proud of that. And that now tends to offer greater opportunities in the South, and people recognize it.

In a recent Brookings article, William Frey outlined deteriorating working conditions that were the result of Jim Crow laws between 1910 and 1970, but the article then explains that the 2010 Census revealed that from the late 1980s to 2010, new generations of African Americans, including professional and college graduates, favored economically rising Southern States.

This brings us to the question again of Section 4 of the VRA and its problems. The data reveals that the South has been gaining on net hundreds of thousands more African-American residents over the last several decades, whereas other regions of the country are losing African-American residents as they move elsewhere.

The Southern cities in particular are the most popular destinations for African Americans and Hispanic Americans who are mov-

ing for greater opportunities. You look at Atlanta and Augusta, Georgia; El Paso and San Antonio, Texas; Columbia, South Carolina; Richmond, Virginia; Jackson, Mississippi; Durham, North Carolina; Memphis, Tennessee; and yes—in Memphis—and yes, New Orleans, Louisiana. We are all covered.

We should be forever vigilant——

Mr. COHEN. "N'awlins."

Mr. JOHNSON of Louisiana. "N'awlins." I love how everybody tries to be Cajun when it is useful.

We should be forever vigilant to oppose attempts to treat people differently on the basis of race, of course. We all agree on that when it comes to voting or anything else, and we should take comfort when there is evidence such discriminatory treatment is increasingly becoming a thing of the past.

We look forward to hearing from all our witnesses here today, and again, we thank you for the time.

I yield back.

Mr. COHEN. Thank you, sir.

I now recognize the chairman of the full committee, the distinguished gentleman from New York, Mr. Nadler.

Chairman NADLER. I thank you, Chairman.

Mr. Chairman, the Voting Rights Act is widely recognized as the crown jewel of our Nation's civil rights laws. Many Members, past and present, accord the act an almost sacred stature. Some, like our colleague John Lewis, shed their blood in support of its passage. Others owe their careers as legislators to its vigorous enforcement.

Today's hearing will provide an important opportunity for the subcommittee to explore the history, the impact, and the need for restoration of the full vitality of the Voting Rights Act. After the VRA was enacted in 1965, its effect was almost immediate, with registration of African-American voters more than doubling in the South within 4 years of enactment.

Similarly, African-American voters' turnout rose from only 6 percent to 59 percent in just 4 years in Mississippi, and it soared to 92 percent in Tennessee, 78 percent in Arkansas, and 73 percent in Texas during the same period.

The net impact of VRA enforcement also resulted in the election of minority candidates of choice throughout the Nation. The number of African Americans holding elected office jumped significantly from barely 100 prior to the VRA to more than 7,200 today, with 4,800 holding elected office in the South.

In national offices, the number of African Americans in Congress doubled from 5 to 10 almost immediately after passage, and today, 56 African-American members serve in the House and Senate. And of course, in 2008, this country elected its first African-American President.

Without question, the VRA has been an unqualified success. It helped to reduce discriminatory barriers to voting and expanded electoral opportunities for people of color to Federal, State, and local offices, thereby opening the political process to every American.

Despite decades of evidence of the VRA's success, however, and the record spanning many thousands of pages, compiled primarily

in this subcommittee documenting the continued need for the VRA, the Supreme Court in the disastrous and shameful *Shelby County* v. *Holder* decision in 2013 substituted its own judgment for that of Congress and effectively gutted the heart of the act, its preclearance provision.

Before the Voting Rights Act, States and localities passed a host of voter suppression laws, secure in the knowledge that it could take many years before the Justice Department could successfully challenge them in court, if at all. As soon as one law was overturned as discriminatory in the courts, another would be enacted, essentially setting up a discriminatory game of whack-a-mole.

Section 5 of the Voting Rights Act mandating preclearance broke this legal logjam by requiring States and localities with a history of discrimination against racial and ethnic minority voters to submit changes to their voting laws to the Justice Department or to a Federal court for approval prior to taking effect.

In Shelby County, the Supreme Court struck down the formula for determining which States and localities are subject to preclearance, which had the effect of striking down the preclearance provision itself, as there is no longer a basis for subjecting jurisdictions to its requirements, although the Court did very specifically say that Congress could enact a new formula for determining which States and localities are subject to preclearance, which is precisely what we should do.

As John Lewis eloquently stated, this decision plunged a dagger into the heart of the civil rights movement. Unless and until Congress acts, this decision has removed the single most effective tool in our voting rights arsenal and has permitted previously covered jurisdictions to immediately enforce racially biased election laws, some of which had already been deemed to have a discriminatory impact on minority voters without prior review.

In the absence of preclearance, predictably, the game of whack-a-mole has returned. Within 24 hours of the Shelby County decision, both Texas attorney general and North Carolina's General Assembly announced that they would reinstitute draconian and discriminatory voter ID laws.

Both of these States' laws were later held in Federal courts to be intentionally racially discriminatory, but during the years between their enactment and the court's final decision, many elections were conducted within the restrictions of those laws. In addition to Texas and North Carolina, at least 21 other States have enacted newly restrictive statewide voter laws since the Shelby County decision.

The loss of Section 5 preclearance cuts deep into the Federal protection of the right to vote. In 2006, Congress found that a majority of Southern States—2006, not 1965. In 2006, after extensive hearings in this subcommittee, Congress found that a majority of Southern States were still engaged in ongoing discrimination, as evidenced by some localities engaging in racially selective schemes to relocate polling places for African-American voters and some other localities annexing certain wards simply to satisfy white suburban voters who sought to circumvent the ability of African Americans to run for elective office in their respective cities.

In the wake of the Shelby County decision, we have also seen the rise of voter suppression measures. Burdensome proof of citizenship laws, significant scalebacks to early voting periods, restrictions on absentee ballots, and laws that make it harder to restore the voting rights of formerly incarcerated individuals are just a small sample of recent voting changes that have a disproportionate impact on minority voters.

While such actions may violate other provisions of the Voting Rights Act, time and experience have proven that it takes far longer and is far more expensive to pursue after-the-fact legal remedies. And once a vote has been denied, it cannot be recast. The damage to our democracy is permanent, and the game of whack-a-mole has resumed.

That is why I hope the Members on both sides of the aisle and in both chambers of Congress will come together and pass legislation to restore the full vitality of the Voting Rights Act. Today's hearing will provide an important opportunity to renew our understanding of the importance of the Voting Rights Act and to set the stage for additional oversight hearings on the issues presented by the current legal regime.

We must use this opportunity to promptly craft a legislative solution that enables the Justice Department to effectively enforce the rights of minority voters within the contours of the Constitution. While this is not an easy challenge, given the gravity of the issues involved and our long history of bipartisan cooperation in this endeavor, it is one that I believe our committee will and must meet with success.

I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler. Appreciate you working this area over the past when you were chairman of this subcommittee and as a Member of Congress.

It is now my pleasure to recognize the ranking member of the full committee, the gentleman from Georgia, Mr. Collins, for his opening statement.

Mr. COLLINS. Thank you, Mr. Chairman. I do appreciate it. And I appreciate the words of not only both you and Mr. Johnson, but also the full committee chair as well.

This is the first of many of these hearings, and we are looking forward to going forward.

The right to vote is what makes democracy a democracy. America's Federal law has protected this right from discriminatory barrier since the Civil War and, more recently, through the Voting Rights Act of 1965. Americans oppose racial discrimination as incompatible with democracy, and our current laws reflect that conviction.

In 2013, the Supreme Court struck down a single part of the Voting Rights Act, Section 4. That provision automatically put certain States and political subdivisions under the act's Section 5 preclearance requirements. Those preclearance requirements presented—prevented voting rules changes covering jurisdictions from going into effect until the new rules have been reviewed and approved, either following a Federal lawsuit or, more often, by the Department of Justice.

When the Voting Rights Act was enacted, Section 4 identified the jurisdictions automatically subject to those special preclearance requirements by formula. The first part of the formula provided that a State or political subdivision would be covered if maintained on November 1, 1964, a test or device restricting the opportunity to register and vote.

The second part—piece provided that a State or political subdivision would also be covered if the Director of the Census determined that less than 50 percent of persons of a voting age were registered to vote on November 1, 1964, or less than 50 percent of the persons of voting age participated or voted in the presidential election of November 1964.

In its Shelby County decision, the Supreme Court struck down the automatic preclearance provision because the original coverage formula was "based on decades-old data and eradicated practices." In 1965, the States could be divided into two groups, those with a recent history of voting test and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction.

Today, the Nation is no longer divided along those lines. Yet the Voting Rights Act continued to treat it as if it were. The courts further criticize Section 4's formula as relying on decades-old data relevant to decades-old problems rather than current data reflecting current needs.

In Shelby County, the Supreme Court only struck down that single outdated provision of the Voting Rights Act. Significantly, the other very important provisions of the Voting Rights Act remain in place, including Sections 2 and Sections 3.

Section 2 applies nationwide and prohibits voting practices or procedures that discriminate on the basis of race, color, or the ability to speak English. Like other Federal civil rights laws, Section 2 is enforced through Federal lawsuits, and the United States and civil rights organizations have brought cases under Section 2 to the court, and they may do so in the future.

Section 3 of the Voting Rights Act also remains in place, authorizing Federal courts to impose preclearance requirements on States and political subdivisions that have enacted voting procedures that treat people differently based on race in violation of the Fourteenth and Fifteenth Amendments. If the Federal court finds a State or political subdivision to have treated people differently based on race, then the court has the discretion to retain supervisory jurisdiction and impose preclearance requirements until a future date at the court's discretion.

This means that such State or political subdivision would have to submit all future voting rule changes for approval to either the court itself or to the Department of Justice before enacting those changes. Per the Code of Federal Regulations, under Section 3(c) of the Voting Rights Act, a court in voting rights litigation can order as relief that a jurisdiction not subject to preclearance requirements of Section 5 preclear its voting changes by submitting them either to the court or to the Attorney General.

Again, Section 3's procedures remain available today so people can challenge voting rules as discriminatory. In 2017, for example, U.S. District Judge Lee Rosenthal issued an opinion in requiring

the Justice Department to monitor the City of Pasadena, Texas, because it had intentionally changed its city council districts to decrease Hispanic influence.

The city, which the court ruled had a long history of discrimination against minorities, was required to have their future voting rules changes precleared for the next 6 years, during which time the Federal judge retains jurisdiction to review both before enforcement any change to the election map or plan that was in effect in Pasadena on December 1, 2013.

A change to the city's election plan can be enforced without review by the judge only if it has been submitted to the U.S. Attorney General and the Justice Department has not objected within 60 days. This is the basis of this hearing, and I am glad that we are having it. And I look forward to the witnesses and the questions that will come.

And with that, I yield back.

Mr. COHEN. Thank you, Mr. Collins.

We welcome our witnesses, our panel, and thank them for participating in today's hearing. I will now introduce the witnesses. But the way I do it, I don't introduce all the witnesses at first. I introduce the witness before the witness speaks. So it is a little different.

So I will soon introduce is it Ms. Lhamon? Lhamon. And then you give your oral testimony. Your written statement will be entered into the record in its entirety.

I ask you to summarize your testimony in 5 minutes. You have got a little light in front of you. Green means go. Yellow means you are in the 1-minute, about to enter the penalty zone, and red is you are in the penalty zone. You have got to stop. When the light turns red, get it done.

Before proceeding with your testimony, I remind each witness that all of your written and oral statements made to the subcommittee in connection with this hearing are subject to penalty of perjury, pursuant to 18 U.S.C. 1001, which could result in the imposition of fine or imprisonment up to 7 years—5 years or both.

Our first witness is Catherine Lhamon, who is chair of the U.S. Commission on Civil Rights. President Obama appointed her to a 6-year term on the Commission in December 15, 2016, and the Commission unanimously confirmed the President's designation on December 28.

She also has served—she serves in the cabinet of California Governor Gavin Newsom, where she has been legal affairs secretary since January 2019. Ms. Lhamon previously served as Assistant Secretary for Civil Rights at U.S. Department of Education from June 2013 until January 2017. Prior to that, she practiced with the ACLU of Southern California as public counsel.

She received her J.D. from Yale University. She was Outstanding Woman Law Graduate and graduated summa cum laude from Amherst. She clerked for the Honorable William A. Norris, United States Court of Appeals for the Ninth Circuit, recipient of numerous professional honors. We are privileged to have her here, and we recognize you for 5 minutes.

STATEMENTS OF CATHERINE LHAMON, CHAIR, U.S. COMMISSION ON CIVIL RIGHTS; THOMAS SAENZ, PRESIDENT AND GENERAL COUNSEL, MALDEF; PEYTON MCCRARY, PROFESSORIAL LECTURER IN LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL; AND PAIGE WHITAKER, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE

STATEMENT OF CATHERINE LHAMON

Ms. LHAMON. Thank you. Chair Nadler, Chair Cohen, Ranking Member Johnson, Ranking Member Collins, members of the subcommittee, thank you very much for inviting me to testify.

As mentioned, I chair the United States Commission on Civil Rights, and I come before you today to speak about our report released last September, titled "An Assessment of Minority Voting Rights Access in the United States," which I ask to be submitted for the record alongside my testimony today.

With this report, the Commission returned to a topic that was a core basis for Congress' creation of our Commission now 62 years ago, advising the U.S. Congress, the President, and the American people about voting rights—and civil rights more generally—and making recommendations for improved policy. Over the years, the Commission's work has supported the basis for the 1965 Voting Rights Act, provided evidence on which the United States Supreme Court relied to uphold the constitutionality of the Voting Rights Act, and issued 20 previous reports over 62 years specifically focused on voting rights.

This most recent report offers an independent, comprehensive, detailed analysis of the current status of voting discrimination in the United States and voter access in the United States and of the efficacy of United States Department of Justice enforcement of the Voting Rights Act since Congress' 2006 reauthorization and, in particular, since the Supreme Court's June 2013 decision in *Shelby County* v. *Holder*.

Drawing from Commission research and investigations and memoranda from 13 of the Commission's State advisory committees who analyzed voting discrimination in Alabama, Alaska, Arizona, California, Illinois, Indiana, Kansas, Louisiana, Maine, New Hampshire, Ohio, Rhode Island, and Texas, this report documents current conditions evidencing ongoing discrimination in voting.

On every measure the Commission evaluated, which includes litigation success, data regarding discrimination incidents, investigations from State advisory committees, and Commission testimony from 23 bipartisan voting rights experts and advocates, as well as in-person and written public comment, the information the Commission received underscores that discrimination in voting persists now.

Our report found that at least 23 States have enacted newly restrictive statewide voter laws since the Shelby County decision in 2013. These statewide voter laws range from strict voter identification laws; voter registration barriers such as requiring documentary proof of citizenship, allowing challenges of voters on the rolls, and unfairly purging voters from rolls; cuts to early voting; to moving or eliminating polling places.

The conclusions the report draws are bleak, leading to unanimously voted Commission findings, including that during the time period we studied, race discrimination in voting has been pernicious and endures today. Likewise, voter access issues and discrimination continue today for voters with disabilities and limited English-proficient voters. The right to vote, which is a bedrock of American democracy, has proven fragile and to need robust statutory protection in addition to constitutional protection.

Following the Supreme Court's decision in Shelby County, in the absence of preclearance protections of Section 5 of the Voting Rights Act, voters in jurisdictions with long histories of voting discrimination faced discriminatory voting measures that could not be stopped prior to elections because of the cost, complexity, and time limitations of the remaining statutory tools. The Shelby County decision had the practical effect of signaling a loss of Federal supervision in voting rights enforcement to States and to local jurisdictions.

The number of successful lawsuits brought pursuant to the Voting Rights Act to the nationwide prohibition in the Voting Rights Act of any voting practices and procedures that discriminate on the basis of race or membership in a language minority group has quadrupled in the 5 years following Shelby County, as compared to the 5 years that preceded. These Federal court findings of discrimination followed extensive evidence and rigorous litigation.

As a result, the Commission recommends that Congress should amend the Voting Rights Act to restore and/or expand protections against voting discrimination that are more streamlined and efficient than the provisions of the act. The new coverage provisions should take account of the reality that voting discrimination tends to recur in certain parts of the country, and the voting discrimination may arise in jurisdictions that do not have extensive histories of discrimination.

I see that my time has expired. I will reserve and look forward to questions.

[The statement of Ms. Lhamon follows:]

STATEMENT OF
CATHERINE E. LHAMON
CHAIR, U.S. COMMISSION ON CIVIL RIGHTS
BEFORE THE
U.S. HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

TUESDAY MARCH 12, 2019

Chair Nadler, Chair Cohen, Ranking Member Johnson, and Members, thank you for inviting me to testify. I chair the United States Commission on Civil Rights, and I come before you today to speak about our report released just last September, *An Assessment of Minority Voting Rights Access in the United States.*[1]

With this report, the Commission returned to a topic that was a core basis for Congress' creation of our Commission now 62 years ago: advising the U.S. Congress, the President, and the American public about the status of voting rights, among other civil rights, and making recommendations for improved federal policy. We at the Commission are proud to have supported the basis for the 1965 Voting Rights Act ("VRA"), to have provided evidence on which the Supreme Court relied to approve its constitutionality, and to have issued 20 previous reports over our 62 years specifically focused on voting rights.

This report offers an independent, comprehensive, detailed analysis of the current status of voter access and voting discrimination in the United States and of the efficacy of United States Department of Justice ("DOJ") enforcement of the Voting Rights Act since Congress' 2006 Reauthorization and in particular, since the Supreme Court's June 2013 decision in *Shelby v. Holder.*

The conclusions the report draws are bleak, leading to unanimous Commission findings, including that, during the time period studied:

- Race discrimination in voting has been pernicious and endures today.
- Likewise, voter access issues and discrimination continue today for voters with disabilities and limited English proficient voters.
- The right to vote, which is a bedrock of American democracy, has proven fragile and to need robust statutory protection in addition to Constitutional protection.

[1] U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States*, Sept. 12, 2018, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [hereinafter "Report"]. The Commission produced this report under the direction of Katherine Culliton-Gonzalez, Esq., Director of Office of Civil Rights Evaluation, who performed principal research and writing with Dr. LaShonda Brenson, Civil Rights Analyst.

- Following the Supreme Court's decision in *Shelby County*, in the absence of the preclearance protections of Section 5 of the Voting Rights Act, voters in jurisdictions with long histories of voting discrimination faced discriminatory voting measures that could not be stopped prior to elections because of the cost, complexity and time limitations of the remaining statutory tools.[2]

- The *Shelby County* decision had the practical effect of signaling a loss of federal supervision in voting rights enforcement to states and local jurisdictions.[3]

The report summarizes the current status of voting rights: "the umbrella of protection has been taken down, and voters are being drenched in jurisdictions that have attempted (and temporarily succeeded) to discriminate in their election procedures."[4]

As a result, the Commission recommends:

- Congress should amend the VRA to restore and/or expand protections against voting discrimination that are more streamlined and efficient than existing provisions of the Act.

- This new coverage provision should take account of the reality that (1) voting discrimination tends to recur in certain parts of the country and (2) voting discrimination may arise in jurisdictions that do not have extensive histories of discrimination.

- The DOJ should pursue more VRA enforcement, recognizing that VRA litigation requires significant resources that only the federal government is able to expend.[5]

These findings and recommendations, and the report itself, are also informed by investigations and memoranda from 13 State Advisory Committees ("SAC") to the Commission, each of whom analyzed voting discrimination in their states: Alabama, Alaska, Arizona, California, Illinois, Indiana, Kansas, Louisiana, Maine, New Hampshire, Ohio, Rhode Island, and Texas.[6]

Current Condition of Voter Access

Drawing from Commission research and the work of the SACs, this report documents current conditions evidencing ongoing discrimination in voting. On every measure the Commission

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[2] Report at 12-13.
[3] Report at 12, 279.
[4] Report at 235.
[5] Report at 13-14.
[6] Each of the Commission's Advisory Committee reports, advisory memoranda, and briefing transcripts are available on the Commission's website at https://www.usccr.gov/pubs/sac.php. A compendium of the reports and memoranda published at the time of the Commission's report release is available at https://www.usccr.gov/pubs/2018/20181031-Notice-SAC-Compendium.pdf.

The bipartisan expert volunteers who are SAC members, and the Commission regional staff who support these committees' work, performed invaluable service to their states and to the Commission in excavating voting rights challenges specific to their states.

evaluated – litigation success, data regarding discrimination incidents, investigations from SACs, Commission testimony from 23 bipartisan voting rights experts and advocates, and in-person and written public comment – the information the Commission received underscores that discrimination in voting persists.

Our report found that at least 23 states have enacted newly restrictive statewide voter laws since the *Shelby County* decision in 2013.[7] These statewide voter laws range from strict voter identification laws; voter registration barriers such as requiring documentary proof of citizenship, allowing challenges of voters on the rolls, and unfairly purging voters from rolls; cuts to early voting; to moving or eliminating polling places.[8]

Some examples from the extensive information in the 275-page report:

- The number of successful lawsuits brought pursuant to the VRA nationwide prohibition of "any" voting practices and procedures that discriminate on the basis of race or membership in a language minority group has **more than quadrupled** in the 5 years since *Shelby County* (23 total cases), compared to the 5 years that precede it (5 total cases).[9] These federal court findings of discrimination follow extensive evidence and rigorous litigation.

- The report documents ongoing, repetitive voting discrimination in states such as Alaska, Florida, Georgia, North Carolina, and Texas.[10] The Commission found that Texas has the highest number of recent VRA violations in the nation.[11] Loyola Law Professor Justin Levitt characterized Texas as "an unrepentant recidivist" regarding racial misconduct in voting rights during his Commission testimony.[12] The Commission also investigated and documented that while the litigation challenging Texas' strict voter ID law was still pending – a law that a court ultimately found to be intentionally discriminatory against black and Latino voters – Texas elected almost 500 officials, as NAACP LDF Director Counsel Sherrilyn Ifill testified to the Commission: "a U.S. Senator in 2014, all 36 members of the Texas delegation to the U.S. House of Representatives, Governor, Lieutenant Governor, Attorney General, Controller, various statewide Commissioners, four Justices of the Texas Supreme Court, candidates for special election in the state Senate, state boards of education 16 state senators, all 150 members of the state House, over 175 district judges, and over 75 district attorneys."[13]

- Bishop Barber from Repairers of the Breach testified during our briefing in North Carolina in February about "visible presence of KKK members and swastikas on streets

[7] Report at 82.
[8] Report at 83-183.
[9] Report at 227.
[10] Report at 234.
[11] Report at 74.
[12] Report at 80-82.
[13] Report at 80 (quoting U.S. Comm'n on Civil Rights Briefing Meeting Transcript, Feb 2, 2018, at 90 (statement by Sherrilyn Ifill)).

near pro-voting marches as well as derogatory comments from bystanders" in North Carolina elections following the *Shelby County* decision.[14]

- In New York State in 2015, 30 Chinese American voters, many of whom were college students, suffered baseless citizenship and voter registration challenges, impeding their right to vote.[15] As Jerry Vattamala from the Asian American Legal Defense and Education Fund told the Commission: "Racist sentiment towards Asian Americans is not a passing adversity but a continuing reality" necessitating strong voting rights protection.[16]

- The Commission received significant testimony regarding voting rights challenges specific to Native American voters and communities, including long distances to travel to polling places[17] and lack of access to ballots resulting from rural residences without physically deliverable mailing addresses.[18]

- The report documents widespread problems with inaccessibility for voters with disabilities, including for example that 100% of voters with disabilities were unable to vote privately and independently in municipal elections in New Hampshire in 2013 because none of the polling locations had set up an accessible voting system.[19]

The Commission's report, as well as news reports[20] leading up to and following the 2018 midterm elections that problematic practices identified by the Commission – including strict voter identification laws, unfair purging, cuts to early voting, and eliminating polling places – were in use in many states and jurisdictions throughout the country, prompted the Commission to reiterate some of its most urgent recommendations regarding voting rights to the 116th Congress.[21] The Commission's North Dakota State Advisory Committee also issued a statement in light of a Supreme Court decision allowing a new voter ID requirement to take effect, even though it had the potential to particularly adversely affect Native American voters living on

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[14] Report at 73.
[15] Report at 140-41.
[16] Report at 191-192.
[17] Report at 178-179.
[18] Report at 182.
[19] Report at 195.
[20] *See, e g*, Amy Gardner and Beth Reinhard, *Voting problems emerge across the country on Election Day*, Washington Post, Nov. 6, 2018, https://www.mercurynews.com/2018/11/06/as-country-goes-to-the-polls-voting-problems-emerge/; Peggy Lowe, *Missouri Voters Report Long Lines, Broken Machines and Confusion Over Photo ID Law*, KCUR 89.3, Nov. 6, 2018, https://www.kcur.org/post/missouri-voters-report-long-lines-broken-machines-and-confusion-over-photo-id-law#stream/0; Mark Nichols, *Closed voting sites hit minority counties harder for busy midterm elections*, USA TODAY, Oct. 30, 2018, https://www.usatoday.com/story/news/2018/10/30/midterm-elections-closed-voting-sites-impact-minority-voter-turnout/1774221002/; Johnny Kauffman, *6 Takeaways From Georgia's 'Use It Or Lose It' Voter Purge Investigation*, NPR, Oct. 22, 2018, https://www npr.org/2018/10/22/659591998/6-takeaways-from-georgias-use-it-or-lose-it-voter-purge-investigation.
[21] U.S. Commission on Civil Rights, *U S Commission on Civil Rights Urges Congress to Prioritize Civil Rights Oversight and Legislation*, Dec. 7, 2018, https://www.usccr.gov/press/2018/12-07-Priorities-for-116th-Congress pdf at 3.

reservations, as many do not have residential addresses.[22] The Committee expressed its concern that the restrictive voter ID law targeted Native American voters, and also pointed out that the change in law for the general election, from the law in place for the primary election, would likely result in confusion and "serious risk of large-scale disenfranchisement."[23]

DOJ Enforcement Efforts

Notwithstanding the recurrence of this ongoing discrimination in voting, the report shows that DOJ enforcement lags behind even available tools. Whereas the DOJ has statutory authority to enforce VRA and congressional appropriations annually to staff such enforcement, the DOJ's actual enforcement work in this area well lags private enforcement that is much more expensive and onerous to mount.[24]

Since the *Shelby County* decision in 2013, the DOJ has filed four of the 61 Section 2 cases filed, one language access case, and zero cases about the right to assistance in voting.[25] The ACLU alone has brought more Section 2 cases than the DOJ;[26] so has the Lawyers' Committee for Civil Rights Under Law.[27] The DOJ has shown a sharp decline in the number of language access cases it has filed, filing only one such case since the *Shelby County* decision, in contrast to an ongoing need for language access protections.[28] The DOJ has not filed any cases to enforce Section 208 of the VRA, which provides for voters' rights to assistance, including for voters with disabilities and limited-English proficiency, since 2009.[29]

These distressing data and information regarding ongoing voting discrimination form the basis for my fellow Commissioners' and my unanimous call for Congress to improve our voting protections and for the DOJ to increase its enforcement to ensure that ours is a real democracy.

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[22] North Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Statement of the North Dakota Advisory Committee Concerned by Potential for Voter Suppression*, Oct. 26, 2018, https://www.usccr.gov/press/2018/20181026-North-Dakota-Voting-Rights.pdf.
[23] *Id*
[24] Report at 254-56.
[25] Report at 10. The Section 2 cases were filed in 2013 and 2017 and the language access case in 2016. Report at 253, 259.
[26] Report at 80, 265.
[27] Report at 265.
[28] Report at 259.
[29] Report at 260-62.

Mr. COHEN. Thank you. Thank you so much.

Mr. Thomas Saenz is the president and general counsel of the Mexican American Legal Defense and Educational Fund, a position he has held since 2009. Prior to that, he served as counsel for the mayor of Los Angeles.

Prior to that, he was a litigator for 12 years with the group acronym MALDEF, which is the Mexican American Legal Defense and Educational Fund. He was lead counsel, a successful challenge to California's anti-immigrant Proposition 187, and he led numerous civil rights cases in the area of immigration, immigrants' rights, education, employment, and voting rights.

He served as lead counsel in the 2001 challenge for the congressional redistricting in California. He served as MALDEF's lead counsel in two court challenges to Proposition 227, a California English-only education initiative, lead drafter of amicus brief on behalf of Latino organizations supporting affirmative action in the Supreme Court case of *Grutter* v. *Bollinger*.

He received a J.D. also from Yale, his undergraduate degree summa cum laude from Yale. But he was not named the top woman graduate of Yale. [Laughter.]

Mr. COHEN. He later served as law clerk for the Honorable Harry L. Hupp of the United States District Court for the Central District of California, to the Honorable Stephen Reinhardt of the United States Court of Appeals to the Ninth Circuit.

For 8 years, he taught civil rights litigation as an adjunct lecturer at the University of Southern California Law School and has been widely published.

You are now recognized, sir, for 5 minutes.

STATEMENT OF THOMAS SAENZ

Mr. SAENZ. Thank you. Good morning, Honorable Chair and members of the subcommittee.

I am Thomas Saenz, president and general counsel of MALDEF. MALDEF is currently commemorating 50 years of promoting the civil rights of all Latinos living in the United States. And through that half century of service, we have focused on specific issues. Most prominent among these is voting rights.

We have focused from the beginning on securing the right to vote for members of the Latino community, initially through the courts under the Constitution and then after, working in Congress to have the 1975 amendments of the Voting Rights Act extend its protections to the Latino community. We have litigated in court under Section 2, the central protection against minority vote dilution, under Section 203 governing the provision of bilingual ballot materials, and under Section 5 prior to its ignominious dismantling by the Shelby County decision.

Specifically, we litigated under Section 5 because, most importantly, the entire State of Arizona, the entire State of Texas, and significant counties in California were covered jurisdictions prior to the Supreme Court decision. We have challenged at-large systems. We have challenged discriminatory redistricting. We have challenged new barriers to voter registration. We have challenged new barriers to ballot access, and we have challenged the failure to provide bilingual ballot materials where they are required.

The Voting Rights Act has been an important tool to secure the civil rights of the Latino community for at least two reasons in two circumstances. First, in the Southwest and isolated communities around the country, there is a long, long history of a significant Latino population and significant representation in the voter pool, and those communities have seen for decades significant histories of efforts to prevent the full participation of Latino voters in elections.

There have been practices followed in those communities that very much parallel the circumstances in the Deep South described by the chair for the African-American community. But separate, there are new communities across the country in virtually every region of the country where there are now prominent Latino populations. And as those populations reach a position of power, political power, there are often efforts by those in charge to prevent them from taking significant political power.

In attempting to prevent newly growing Latino communities from achieving voting power, these communities often adopt the same strategies and practices that we have seen over the decades in the Deep South and in the Southwest particularly faced by the Latino community. It is safe to say that MALDEF, since 1975 amendments applied the protections of the Voting Rights Act to the Latino community, MALDEF has been the most prolific enforcer of Latino voting rights in the country.

However, that term "prolific" largely overstates what we have been able to do, and that is simply because of the burden and expense of enforcing the Voting Rights Act. Section 2 and its operative test of assessing the totality of the circumstances means that it is difficult for MALDEF or any of the many other organizations that enforce through private actions the Voting Rights Act to fully pursue what needs to be pursued to preserve the right to vote for minority communities. I will provide one example.

After the last redistricting in California, MALDEF identified nine counties throughout the State of California where the Board of Supervisors should have drawn an additional Latino majority supervisorial district warranted by the growth of the Latino community, its concentration, therefore the ability to draw a district, and evident manners of racially polarized votings, all nine of those counties should have drawn different redistricting maps than they drew. All of them were subject to a potential Section 2 challenge.

Recognizing, however, that the totality of the circumstances test meant that we would be unable to challenge all nine jurisdictions, we sought to change State law in California unsuccessfully to streamline the ability to challenge those discriminatory redistrictings, and we were left with challenging only one of the nine counties successfully. Kern County was ordered last year to change its redistricting maps and to create a second Latino majority district.

But that means essentially that eight counties in California this decade gambled, understood they might be violating Section 2, but gambled they would not be targeted because of the expense of Section 2 litigation, and so far, they have basically succeeded in that gamble. That's a result of the loss of the preclearance mechanism through the Shelby County decision.

Preclearance is not only a most effective civil rights device. It is efficient and effective. It is, in essence, one of the first alternative dispute resolution mechanisms in Federal law that saves literally millions of dollars primarily for the defendant jurisdictions that would otherwise have to pay the cost of their own and those of their opponents.

MALDEF is proud to have been the litigator in the Pasadena, Texas, case mentioned by Mr. Collins, the only contested order—judicial order requiring a jurisdiction to be subject to preclearance. However, that came after an arduous and expensive trial, including the gathering of evidence of experts and nonexperts alike over many, many months.

The circumstances of that case indicate what we are unable to challenge as effectively. In Pasadena, Texas, the mayor, after the Shelby County decision, citing that decision, recognizing that the change would not be subject to preclearance, changed or sought to change and successfully obtained a change in the composition of the city council from eight districted members to six districted members and two at-large.

The purpose of that change was to stem the growth in the power of the Latino vote. That is what the judge decided and subjected that small jurisdiction to preclearance. It is the only jurisdiction thus far subjected to a contested order of preclearance. That is an indication of what we face without the strong, strong measure, an effective and efficient measure of preclearance.

Thank you.

[The statement of Mr. Saenz follows:]

Testimony of Thomas A. Saenz
President and General Counsel, MALDEF

Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary

Hearing on the
History and Enforcement of the Voting Rights Act of 1965

March 12, 2019

Good afternoon. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which is currently celebrating 50 years promoting the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where we were founded; and Washington, D.C.

Since its founding, MALDEF has focused on securing equal voting rights for Latinos, and promoting increased civic engagement and participation within the Latino community, as among its top priorities. MALDEF played a significant role in securing the full protection of the federal Voting Rights Act (VRA) for the Latino community through the 1975 congressional reauthorization of the 1965 VRA. MALDEF has over the years litigated numerous cases under section 2, section 5, and section 203 of the VRA, challenging at-large systems, discriminatory redistricting, ballot access barriers, undue voter registration restrictions, and failure to provide bilingual ballot materials. We have litigated significant cases challenging statewide redistricting in Arizona, California, Illinois, and Texas, and we have engaged in pre-litigation advocacy efforts, as well as litigation related to ballot access and local violations, in those states, as well as in Colorado, Georgia, Nevada, and New Mexico. As the growth of the Latino population expands, our work in voting rights expands as well.

Before the split Supreme Court decision in *Shelby County v. Holder*, MALDEF relied heavily upon the application of the section 5 pre-clearance requirements – particularly in Arizona, Texas, and portions of California – to deter violations of Latino voting rights and to block discriminatory proposals that make it to pre-clearance submission. These beneficial effects of pre-clearance – and others, including the basic tracking of electoral changes with potential impacts on the right to vote – have been absent following *Shelby County* because of the failure to enact a new coverage formula after the 2013 Court decision.

This has affected MALDEF's ability to respond to the many challenges faced by the growing Latino voting community. For example, while MALDEF played a significant role in litigation before the *Shelby County* decision in which the state of Texas sought to pre-clear its newly restrictive voter identification law, we decided to forego participating as counsel in the section 2 litigation challenging the same law after *Shelby County*. While we have great confidence in our colleagues who have litigated that challenge, we were unable to provide our perspective as the longstanding legal representative of the Texas Latino community in voting rights issues. Our efforts were instead channeled to a successful, though costly, challenge to a change in the city council electoral system in Pasadena, Texas – a change tied directly by the mayor to the lifting of the pre-clearance obligation by the *Shelby County* decision.

As a rapidly growing population, Latinos are regularly and increasingly seen as a threat to those in political power. In anticipation of this perceived threat to incumbents, the Latino community regularly faces violations of the VRA in several election-related areas. Those in power, whether at state or local level, think about the perceived threat from the growing Latino voter pool in racial terms, even if that perspective is not explicitly acknowledged, and the violations of the VRA take conspicuously racialized forms even if justified in other terms – of seniority protection for incumbent legislators, of competitiveness, or of continuity of representation, for example.

One area where MALDEF continues to see and to challenge this phenomenon is in the failure – or better described, refusal – of map drawers to create new Latino-majority districts where the growth of the community and the extent of racially polarized voting warrant such districts. For example, this decade, as in previous decades, MALDEF has had to challenge the refusal of the Texas state legislature to recognize the growth of the state's Latino voter population by creating additional Latino-majority districts. Even with four additional congressional districts earned after the 2010 Census, following a decade when the Latino community accounted for the vast majority of the state's population growth, Texas initially drew none of the new congressional districts as a Latino-majority district.

Our litigation, joined by others, to challenge Texas statewide redistricting in the case of *Perez v. Abbott*, continues even now, with two trips to the Supreme Court already having occurred, as the three-judge trial court considers final remedies, including adjudicating a request for a judicial order that Texas be subject again to pre-clearance. While an interim remedy has been in place, the length of this case's lifespan provides a prime example of the cost and inefficiency of litigation under section 2 of the VRA, as compared to the streamlined pre-clearance process.

Even in California, viewed with some accuracy as a progressive bastion in policy areas including voting rights, the impulse to protect empowered incumbents has proved a formidable obstacle. After the 2011-12 redistricting cycle following the 2010 Census, MALDEF identified at least nine counties in California where the governing board of supervisors should have created

an additional Latino-majority seat, and failed to do so. In a five-person body, the tendency to protect incumbents, even across party lines in a technically non-partisan board, appears to be overwhelming, if the statewide results are an accurate indication. After three failed attempts to secure California state legislation that would streamline litigation challenging such discrimination against minority voters, MALDEF commenced a VRA section 2 challenge to one of those nine counties in *Luna v. Kern County Board of Supervisors*. That litigation, which proved hard-fought and expensive, did result in a post-trial victory and subsequent settlement creating a second, new Latino-majority supervisorial district.

At-large electoral systems have also continued to be an area where Latino voting rights are regularly threatened. The perpetuation or introduction of at-large electoral systems, in a context of racially-polarized voting, can ensure that those in power retain a near-complete stranglehold on local government until a minority group becomes a substantial majority of the eligible voter population. For this reason, many jurisdictions seem to cling to at-large systems even when it results in heavy concentration of elected officials from a single neighborhood or results in large electoral pools, with concomitantly expensive electoral campaigns that strongly favor incumbents over any and all challengers.

The post-*Shelby County* case against Pasadena, Texas, mentioned earlier, involved the conversion of a city council comprised of eight members elected from districts, to a council with six district representatives and two seats elected at large. This change was plainly undertaken to prevent the growing Latino voting population from electing a majority of the city council; participation differentials virtually ensured that the white population would elect its choices for the at-large seats in elections characterized by a racially-polarized vote. The case went to trial, following which the district court judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to accomplish that aim. This resulted in the first contested "bail in" order, requiring Pasadena to pre-clear future electoral changes. However, again, that favorable outcome followed lengthy and costly trial preparation and trial, all of which would likely have been avoided had the challenged change itself been subject to pre-clearance review, as it would have been before the *Shelby County* decision.

In California, 16 years ago, the legislature enacted the California Voting Rights Act (CVRA) to streamline challenges to at-large local elections in any jurisdiction experiencing racially-polarized voting – where the voting preferences of those from a minority group ordinarily diverge from the choices of voters who are not members of the minority group. In the years since the CVRA legislation, which was co-sponsored by MALDEF, took effect, dozens and dozens of local jurisdictions – cities, school districts, community college districts, and special districts – have converted to district elections. Almost without exception, these conversions have been accomplished in pre-litigation or early litigation settlements, prior to expensive discovery and trial preparation, once a challenger demonstrates racially-polarized voting, which is not only a central concern under the CVRA but under section 2 of the federal VRA as well. However, by focusing on racially-polarized voting as the main determinative

factor, the CVRA accomplishes the same aims with respect to at-large voting systems as the VRA, but at much lower cost and in much less time.

In the last two decades, the nation has witnessed an accelerating pattern of ballot-access restrictions enacted to address baseless myths of widespread voter fraud. Like Donald Trump's post-election false accusations of millions of improper votes – all extraordinarily for his opponent, who won the popular vote by a significant number – many of these propagated fallacies have implicitly or explicitly targeted the growing Latino vote. Increasingly restrictive voter identification requirements, proof-of-citizenship requirements for new voter registrants, and restrictions on who and when voter registration drives may occur are all state electoral changes seemingly implemented to stem the growing Latino vote in Texas, Arizona, and other states.

As some of these attempts to restrict ballot access and to deter voter participation have been less effective than their architects would like -- both because of successful legal challenges and concentrated counter-organizing -- some states have turned to unwarranted voter purges. For example, MALDEF is currently challenging the Texas attempt to remove voters from the rolls, and not incidentally to deter voter participation more broadly, by targeting naturalized citizen voters through a completely faulty method of identifying potential ineligible voters. This focus on qualified, immigrant voters is an increasing danger in light of rhetoric from the White House that regularly, and without any factual basis, depicts immigrants as fraudulent voters.

In the aftermath of the *Shelby County* decision, MALDEF and others in the small nationwide contingent of non-profit organizations that engage in voting rights litigation have challenged these ballot-access restrictions in federal court under section 2 of the VRA and other provisions of federal law. This has been expensive and arduous litigation, straining limited agency resources, both human and material. Under an operational pre-clearance regime, such ballot-access restrictions could have been quickly and efficiently blocked if adopted in covered jurisdictions, simultaneously deterring adoption of similar proposals in non-covered jurisdictions.

These examples demonstrate the dual nature of the pre-clearance provision in section 5 of the VRA. It has accurately been characterized as perhaps the most effective civil rights provision ever written into federal law. It has prevented the implementation of many, many electoral changes that would have dealt significant harm to minority voting rights. From discriminatory precinct changes to dilutive redistricting, section 5 likely deterred substantially more proposed or conceived electoral changes than the many hundreds it blocked or modified through pre-clearance review. Its civil rights effectiveness is acknowledged by all, even those who wrongly believe it is no longer needed. Indeed, imagine how much more our nation might have progressed in achieving equal educational opportunity had Congress implemented as a part of the Elementary and Secondary Education Act a similar pre-clearance regime for school districts and states with a history of discriminatory practices and an expanding achievement gap.

Yet, apart from its success as a civil rights protection, section 5 should also be celebrated as perhaps one of the first and most effective alternative dispute resolution (ADR) provisions ever written into federal law. Like more typical ADR mechanisms, pre-clearance permits a faster, less costly resolution of disputes that would otherwise be resolved in more cumbersome and resource-intensive court litigation. Like other ADR mechanisms, pre-clearance involves streamlined review by a non-judicial officer who considers the contentions of both sides on the matter at issue. Unlike mandatory ADR in other contexts, section 5 allows jurisdictions to opt out and go directly to court proceedings, in the D.C. federal court, with in-court expedited review that bypasses the intermediate appellate court.

Like effective ADR, pre-clearance saved lots of money when it was broadly in effect, most of it for taxpayers in covered jurisdictions. VRA litigation generally involves fee awards for prevailing plaintiffs. Thus, covered jurisdictions under pre-clearance received quick decisions without having to pay their own attorneys – ordinarily outside counsel who charge a premium for their VRA expertise – and expert witnesses, and without also having to pay a prevailing plaintiff's fees and costs. It is no exaggeration to assert that pre-clearance saved taxpayers of covered jurisdictions billions of dollars through avoiding costly litigation.

It is one of the unexplained ironies of modern policymaking that those who champion mandatory ADR in consumer and employment contexts are often among those who most vehemently oppose the revivification of section 5 of the VRA through enactment of a new coverage formula following the *Shelby County* decision.

Given these benefits of a fully operational pre-clearance regime and the ongoing and escalating challenges to Latino voting rights, it is imperative that Congress enact a substitute coverage formula for the one in section 4 that the Supreme Court narrowly struck down in *Shelby County*. To meet the needs of the growing Latino voting community – and not incidentally to continue to save state and local defendants from the high and rising costs of defending against litigation under section 2 of the VRA and under other provisions of federal law – the best coverage formula would again include rolling measures of recent historical experience to ensure that recent voting rights violators with significant voter participation differentials among racial groups are required to avail themselves of pre-clearance ADR before implementing any electoral changes.

In addition, however, the new coverage formula must also address the Latino community's experience of facing tried and true obstacles to equal electoral participation just as the Latino voter population approaches critical mass to threaten the future prospects of those currently in power. In these circumstances – a fast-growing but only newly significant minority population – a history-based coverage formula alone would not suffice to prevent and deter, or to quickly and cost-effectively evaluate, changes that could seriously harm minority voting rights. Jurisdictions seeking to disenfranchise an insurgent political threat posed by a fast-growing minority group should also be required to pre-clear certain, but not all, electoral changes. Here,

pre-clearance would focus on suspect practices and dangerous situations arising in the context of rapid growth of a minority group, rather than on the specific history of a single jurisdiction. "Known practices coverage" would single out for pre-clearance specific practices or situations that pose a significant potential, demonstrated by broad historical experience, for violations of voting rights. Creation of at-large seats, annexations of suburban populations, and redistricting completed by incumbents all raise concerns when they occur in a jurisdiction that has experienced recent, significant growth of a specific minority population. Utilizing pre-clearance ADR rather than costly and time-consuming litigation in these and other situations would save taxpayers from paying significant sums to defend entrenched, powerful incumbents.

To be clear, the optimal coverage formula would incorporate both specific, history-based criteria to subject all of certain jurisdiction's electoral changes to pre-clearance, and a "known practices" formula to subject only certain changes to pre-clearance anywhere in the context of rapid and significant growth of a minority voter population. In the effort to efficiently and cost-effectively eliminate voting rights violations, we should target both serial violators and copy-cat violations for pre-clearance ADR.

Mr. COHEN. Thank you, sir.

Our next witness is Mr. Peyton McCrary. He is a professional lecturer in law at George—professorial lecturer in law at George Washington University here in Washington. From 1990 until 2016, he was an historian in the Voting Section of the Civil Rights Division of the United States Department of Justice.

From '68 to '89, he taught history at the University of South Alabama, the University of Minnesota, and not Yale and not Harvard, but at the Harvard of the South, Vanderbilt University. Before joining the Government in 1990, he testified as an expert witness in 14 voting rights cases, beginning in 1981 with *Bolden* v. *City of Mobile* on remand from the Supreme Court.

In '98 and '99, he took leave from the Government to serve as the Eugene Lang Visiting Professor at Swarthmore, where he taught courses in voting rights law and civil rights policy in the Department of Political Science.

In 2011, he was honored by receiving the Maceo Hubbard Award for sustained commitment to the work of the Civil Rights Commission. He received his Ph.D. from Princeton, his B.A. and M.A. from the University of Virginia, and he is recognized for 5 minutes and welcomed.

STATEMENT OF PEYTON MCCRARY

Mr. MCCRARY. Thank you, Mr. Chairman.

Mr. Chairman, Mr. Vice Chairman, distinguished members of the subcommittee, thank you for inviting me to testify before you today. It is an honor to have this opportunity to speak briefly about the history of the Voting Rights Act.

When the Shelby County decision came down from the Supreme Court in 2013, the majority opinion was focused almost entirely on the coverage formula set out in Section 4, which it found unconstitutional. The only part of the voluminous record before Congress in 2005–2006 on which the majority focused was the participation rates, which were the focus of the formula as adopted in 1965, and the majority took the view that because participation rates in the covered jurisdictions were substantially approaching white voter registration and turnout levels and were not particularly different from jurisdictions that were not covered in the rest of the country, that the formula no longer met the needs of current protection of minority voting rights.

The four dissenters have an entirely different view of the record before Congress in 2006. To the dissenters, the question before the Court was whether problems with racial discrimination in voting continued to exist within the previously covered jurisdictions. And that was also the focus of the voluminous record before Congress in 2006, which some of the members of this committee well recall.

Now the elimination of preclearance review leaves minority plaintiffs with only one option, filing lawsuits under Section 2 of the act. There is no geographic coverage formula for Section 2. Its coverage is nationwide. Yet Section 2 litigation is time-consuming and expensive, and I can testify to that through my long years of involvement in voting rights cases under Section 2. And of course, minority voters have more limited financial resources than white.

The reason why the abysmal racial disparities in voter registration at the time the Voting Rights Act was adopted have largely been eliminated is, of course, the operation of the Voting Rights Act itself, initially suspending the literacy test and other discriminatory devices, sending Federal examiners down to plantation counties to register voters when recalcitrant registrars would not meet their responsibilities under the act, sending Federal observers to monitor elections where problems were anticipated based on preliminary investigations.

And of course, successful court orders and successful objections to voting changes through the administrative review of the Department of Justice or by the Federal courts in the District of Columbia. Thus, the fact that there is essential parity between minority and majority voters in some areas of the covered jurisdictions is due to the successful implementation of the Voting Rights Act.

In 1969, the Supreme Court evaluated the coverage formula of Section 5 and how it should be applied. Adding to protections against vote denial, which was the focus of the formula itself, all other voting changes, the express language of Section 5 says that any voting changes are subject to preclearance responsibilities.

In the 1970s, the primary focus of many objections, both by the Department of Justice and by the Section 5 courts in the District of Columbia, was vote dilution problems. That is the kinds of laws adopted by Southern jurisdictions after 1965, as they had before 1965, that diluted minority voting strength once African Americans began to register and vote in larger numbers in the late 1960s.

Vote dilution is a major part of the record before Congress in 2005 and 2006, and the problem with the elimination of Section 5 review by the Shelby County decision is that it leaves the problem of vote dilution to be solved only through the rigorous court proceedings under Section 2 of the Voting Rights Act.

Since the—since the decision by the Supreme Court, of course, another major kind of voter discrimination has been tried under Section 2, problems of voter abridgement through the adoption of photo ID requirements, changes in early voting procedures, and other ways of abridging the right of minority voters to cast their ballots. Those take even more complicated paths in the litigation process, requiring expert testimony, using complex database methodology matching techniques to investigate statewide voter registration and driver's license databases and Federal databases and other data that are extremely complicated to carry out.

But in some of those cases, the plaintiffs have been successful. They have been successful most dramatically in the North Carolina case, to which there was reference earlier, where the Fourth Circuit Court of Appeals found that the requirements set out by the North Carolina law adopted just after the Voting Rights Act was changed by Shelby County had been adopted with racially discriminatory purposes.

I have no advice to the Congress about how to change the coverage formula. The coverage formula is one that I am sure the committee will be addressing in serious terms. I can only tell you how the Voting Rights Act operated over the years since its adoption in 1965.

Thank you.

[The statement of Mr. McCrary follows:]

Testimony of Dr. Peyton McCrary

Before the House Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

When the United States Supreme Court decided *Shelby County v. Holder* in 2013,[1] it effectively eliminated one of the key provisions of the Voting Rights Act. The "preclearance" requirements set forth in Section 5 of the Act applied only to certain jurisdictions – for the most part former Confederate states – which were required to obtain prior federal government approval of all voting changes before they could be enforced. The Court found, by a 5-4 vote, that the formula determining which states and counties were covered by the preclearance requirement unconstitutional.[2] In the view of the five conservative justices in the majority, the coverage formula no longer identified the parts of the country where present-day racial discrimination affecting voting are concentrated. Chief Justice John Roberts, writing for the five justices in the majority, described the coverage formula as out of date, an artifact from an earlier time. In his view much had changed in the South since the systematic racial discrimination affecting registration and voting in the years preceding adoption of the Act.[3]

The coverage formula had not changed substantially since its original enactment in 1965, when Congress based the targeted jurisdictions on data showing where literacy

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[1] 57 U.S. 529 (2013).

[2] The coverage formula was found in Section 4(b) of the Act.

[3] 57 U.S. 529 (2013).

tests or other discriminatory devices were accompanied by low voter registration and turnout rates in the presidential election of 1964. The formula, by design, focused pre-clearance coverage on states in the American South, where federal courts had made numerous findings of official racial discrimination affecting registration and voting – that is, *vote denial.* Congress extended the pre-clearance provisions in 1970, 1975, 1982, 1992 and finally, for an additional 25 years, in 2006. In 1975 the concept of "tests or devices" was expanded to include jurisdictions that had supplied English-only election information but had significant numbers of non-English speaking voters.[4] Despite these changes, the coverage formula continued to be based on political participation rates, as did its geographic reach: it largely covered the old Confederacy.

The formula adopted in 1965 was designed to identify states and counties where racial discriminatory vote *denial* exists. Many of the Department of Justice objections to voting changes beginning in the 1970s – as well as denials of preclearance by three-judge courts in the District of Columbia – addressed problems of minority vote *dilution* instead. Because the coverage formula was not altered by using new data to identify jurisdictions where *both* vote denial or abridgement *and* vote dilution were sufficiently harmful to justify a preclearance requirement, it appears, the majority in *Shelby County* chose to ignore the extensive record of discriminatory voting changes that would have diluted minority voting strength – including intentionally discriminatory changes – enacted by states and counties but blocked by Section 5 objections. The only part of

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[4] United States Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (Washington, D.C., 1981), 206-44.

the record on which the majority focused was evidence that voter participation had approached parity between whites and African Americans – the evidence that demonstrated systematic vote denial of the sort that justified finding Section 5 constitutional in past Supreme Court decisions.[5]

The four dissenters had an entirely different view of the record before Congress in 2006. To the dissenters the question before the Court was, as four legal scholars put it, "whether problems with racial discrimination in voting continue to exist *within the previously covered jurisdictions*."[6] That was also the focus of the voluminous record before Congress in 2006.

The decision in *Shelby County* removed a uniquely powerful tool for combating laws that threaten "backsliding" in minority voting rights and signaled the end of an era. What is left for advocates of minority voting rights is filing lawsuits under Section 2 of the Act, which authorizes affirmative attacks on new election laws believed to have the potential of minimizing the voting strength of minority citizens or of abridging their opportunity to register and cast a ballot.[7] There is no geographic "coverage formula" for

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[5] 570 U.S. at 547-48.

[6] Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, and Nathaniel Persily, *The Law of Democracy: Legal Structure of the Political Process* (Fifth Edition. St. Paul, MN, 2016), 762.

[7] Where minority plaintiffs are challenging the use of at-large elections or racially discriminatory redistricting plans, the case law includes many decisions favorable to their claims of minority vote dilution. The key factor in such cases has been statistical assessment of the degree to which voting patterns are polarized along racial lines. The greatest impact of Section 2 was in the 1980s in the largely Southern jurisdictions previously defined by the VRA's Section 4(b). Chandler Davidson and Bernard

Section 2; its coverage is nationwide. Its constitutionality has been upheld in numerous lower court decisions over the last three decades.[8]

I have been asked to explain how the Voting Rights Act worked from the time of its adoption in 1965 until now. Let me begin by describing the immediate circumstances in which President Lyndon B. Johnson and the Congress joined forces to enact what has been called the most significant civil rights legislation in the nation's history.[9]

In 1960 African Americans in the South were substantially disfranchised by racially discriminatory registration procedures. Fewer than one out of three blacks of voting age in the region were registered, and whites were registered at substantially

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Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994). Racially-polarized voting may, moreover, sometimes be as extreme in the second decade of the 21st century as it has ever been. Stephen Ansolabehere, Nathaniel Persily and Charles Stewart, "Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act," 123 *Harv. L. Rev.* 1385 (2013).

[8] See, e.g., *United States v. Blaine County, Montana,* 157 F. Supp. 2d 1145 (D. Mont. 2001), *aff'd* 363 F.3d 877 (9th Cir. 2004).

[9] Daniel McCool, "Meaningful Votes," in McCool (ed.), *The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act* (Bloomington, Indiana University Press, 2012), 4-5; Timothy G. O'Rourke, "The 1982 Amendments and the Voting Rights Paradox," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C., The Brookings Institution, 1992), 85; Hugh Davis Graham, "Voting Rights and the American Regulatory State," *ibid.*, 177. Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago, University of Chicago Press, 2004), 3, refers to the Act as "the turning point in the second Reconstruction." At his last press conference President Lyndon B. Johnson told reporters passage of the Voting Rights Act was his proudest accomplishment in the White House: Steven F. Lawson, *In Pursuit of Power: Southern Blacks & Electoral Politics, 1965-1982* (New York, Columbia University Press, 1985, 4.

higher rates. In Alabama, for example, only 14 percent of African American adults were registered, as compared with 64 percent of white adults.[10] Not surprisingly, state legislatures in the region were all white, although a few local governments had elected a black person to public office from time to time in the years since World War II.[11]

By 1990 this portrait of inequality had been transformed beyond recognition. Formal barriers to registration and voting no longer existed, and in some localities African American registration and turnout approached parity with whites. Black officeholding had become routine and in some jurisdictions approached proportionality, as a result of the elimination of racially discriminatory at-large election procedures.[12]

How can we account for this remarkable transformation in Southern electoral politics in a period of only 30 years? One aspect of this change is well understood: the substantial elimination of racial barriers to registration and voting, was due primarily to

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[10] David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act Of 1965* (New Haven, Ct., Yale University Press, 1978), 11; United States Commission on Civil Rights, *Voting* (Washington, D.C., G.P.O., 1961), 252-58, 260-63, 266-69, 278-83, 302-07 (Tables 1, 2, 4, 6, 9, 13). The Commission's data for certain states are incomplete.

[11] United States Commission on Civil Rights, *Political Participation* (Washington, D.C., G.P.O., 1968), 214-21 (Appendix VI); Donald R. Matthews and James W. Prothro, *Negroes and the New Southern Politics* (New York, Harcourt, Brace, and World, 1966), 52, 176-77; Everett Carl Ladd, Jr., *Negro Political Leadership in the South* (Ithaca, N.Y., Cornell University Press, 1966), 29-30; Numan V. Bartley, *The New South, 1945-1980* (Baton Rouge, Louisiana State University Press, 1995), 175.

[12] Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994). This is not to say, however, that all jurisdictions had proportionality in representation or that all discriminatory electoral rules had been eliminated.

the adoption and implementation of the Voting Rights Act of 1965.[13] The elimination of at-large election systems and racially discriminatory districting plans, on the other hand, resulted from a more complex process in which litigation in the federal courts played a key role, along with administrative preclearance review by the Civil Rights Division of the Department of Justice.[14]

By the beginning of 1965, both President Johnson and supporters of minority voting rights in Congress had decided that litigation by itself would never provide an effective franchise in the South. Not all federal judges were willing to disturb the status quo.[15] Even those judges who sought to eliminate discriminatory barriers found that every time the courts struck down one procedure Southern local officials or state legislators devised newer, more subtle ways of minimizing black voter registration. Frustrated with the slow progress of the jurisdiction-by-jurisdiction campaign before

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[13] National policy is explained in Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* (New York, Columbia University Press, 1976), and Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York, Columbia University Press, 1985). For the quantitative evidence, see James E. Alt, "The Impact of the Voting Rights Act on Black and White Voter Registration in the South," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 351-77, 452-59.

[14] In 1957 Congress adopted a Civil Rights Act that created a Civil Rights Division in the Department of Justice and gave it authority to bring constitutional challenges to racially discriminatory voting practices. Lawson, *Black Ballots*, 86-89, 93, 109-10, 115, 134-39; Warren M. Christopher, "The Constitutionality of the Voting Rights Act of 1965," 18 *Stan. L. Rev.* 3-4 (1965).

[15] See generally Charles V. Hamilton, *The Bench and the Ballot: Southern Federal Judges and Black Voters* (New York, Oxford University Press, 1973), and Donald S. Strong, *Negroes, Ballots, and Judges: National Voting Rights Legislation in the Federal Courts* (Tuscaloosa, University of Alabama Press, 1968).

often hostile Southern courts, the President asked the Civil Rights Division to draft a strong voting rights law substantially increasing the Department's enforcement powers.[16]

The key to understanding the structure of the Voting Rights Act is that the bill submitted to Congress by the administration of Lyndon B. Johnson - and ultimately enacted by Congress with only minor changes - was drafted by lawyers in the Appeals and Research Section of the Civil Rights Division. The lawyers had completed a draft bill by March 5, 1965, two days *before* state troopers assaulted civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama.[17] Not surprisingly, the bill was shaped by lessons the lawyers of the Civil Rights Division learned in winning 32 voting rights cases – decided under the Fifteenth Amendment – in the federal courts of the deep

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[16] Garrow, *Protest at Selma*, 36-39, 41-42; Christopher, "The Constitutionality of the Voting Rights Act," 5-9; Derfner, "Racial Discrimination and the Right to Vote," 546-50.

[17] I base this assessment on two careful and detailed reconstructions of the drafting process, David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (New Haven, Ct., Yale University Press, 1978), and Brian J. Landsberg, *Free At Last to Vote: Alabama Origins of the Voting Rights Act* (Lawrence, University Press of Kansas, 2007), as well as my own examination of drafts and memoranda from persons involved in the drafting process in the Harold Greene Papers in the Library of Congress. Working under the direction of Harold Greene, chief of the Appeals and Research Section of the Civil Rights Division, with significant input from the office of Solicitor General Archibald Cox and the Office of Legal Counsel, Landsberg, a lawyer with the Department for more than two decades and now a law professor, had access to documents unavailable to Garrow: the records of litigation that influenced decisions about what was needed in the Act, now in the National Archives, and the materials in the Harold Greene Papers while the collection was still in private hands.

South between 1957 and 1965.[18] As one law review article put it at the time, the Voting Rights Act "codifies the lessons of eight years of litigation."[19]

The Voting Rights Act departed from precedent by providing for direct federal action to enable African Americans in the South to register and vote. Section 4 of the Act suspended, initially for only five years, the use of literacy tests in six states and 40 counties in a seventh, North Carolina. To counter the broad discretion previously exercised by local registrars and poll officials, other provisions of the Act authorized the use of federal examiners to register persons in counties where few blacks were registered; federal observers were also sent to monitor the conduct of elections where trouble was expected. On the other hand, the Act also contemplated continued resort to the federal courts, instructing the Department of Justice to file lawsuits challenging poll tax requirements in states where they appeared to be used as a deterrent to minority voting.[20]

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[18] The 32 findings of unconstitutional racial discrimination are listed in Brief for the Defendants, *South Carolina v. Katzenbach* (Jan. 5, 1966), 44-45 n.33. The Department had filed 71 cases, but many were still pending at the time the bill's drafting began: H.R. Rep. No. 439, 89th Cong., 1st Sess., 9 (1965).

[19] Barry E. Hawk and John J. Kirby, Jr., Note "Federal Protection of Negro Voting Rights," 51 *Va, L.Rev.* 1051, 1196 (1965). Landsberg, *Free At Last*, 152, observes that "the earlier voting rights litigation provided the factual basis for the need for stronger legislation and also established the legal theories that shaped the contents of the legislation."

[20] Pub. L. 89-110, 79 Stat. 437 [42 U.S.C. 1971, 1973]. Chandler Davidson, "The Voting Rights Act: A Brief History," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C., The Brookings Institution, 1992), 17-21.

The most novel feature of the Act was the "preclearance" requirement set forth in Section 5. Here, too, the statute blended judicial enforcement with administrative implementation. Under its terms *all* changes in voting practices in states covered by the Act's special provisions had to be approved by either a three-judge panel in the federal courts of the District of Columbia or the Department of Justice before they can be legally enforced.[21] Administrative preclearance proved to be far speedier and less costly than judicial preclearance, and was almost always preferred by covered jurisdictions.[22]

In 1966 the Supreme Court ruled that the preclearance requirement, like other challenged provisions of the Act, was constitutional.[23] In the past, whenever the Justice Department had obtained favorable decisions striking down particular tests, Southern

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[21] Justice Department attorneys drafted the preclearance provision as a way of institutionalizing the "freezing principle" recently adopted by the federal courts as a way of coping with the constantly changing discriminatory devices used by Southern registrars and election officials. See also Strong, *Negroes, Ballots, and Judges*, 44, 49-52, 93; L. Thorne McCarty and Russell B. Stevenson, "The Voting Rights Act of 1965: An Evaluation," 3 *Harv. C.R.-C.L. L. Rev.* 361-62, Note 18 (1968). Applications of the freezing principle began with *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1961), *aff'd*, 371 U.S. 37 (1962), and *United States v. Penton*, 212 F. Supp. 193 (M.D. Ala. 1962), and *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964), and was adopted by the Supreme Court in *Louisiana v. United States*, 380 U.S. 145 (1965).

[22] *South Carolina v. Katzenbach*, 383 U.S. 301, 315-18, 334-35 (1966); *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969); *Morris v. Gressette*, 432 U.S. 491, 503 (1977). See generally Days and Guinier, "Enforcement of Section 5 of the Voting Rights Act," 167-80.

[23] "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures," wrote Chief Justice Earl Warren. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

states simply enacted new discriminatory devices, said the Court, and "Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."[24]

In the first three years, implementation of the Act by the Department of Justice, and by the federal courts, focused on removal of barriers to registration and voting. The Attorney General dispatched federal examiners to register blacks and federal observers to monitor elections in counties designated because of their record of obstruction and discrimination. As a result, most blacks were able to register and vote.[25] The federal courts also struck down the poll tax in four states that still used it as a prerequisite to voting in state elections.[26] The Justice Department also objected to various changes in

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[24] *South Carolina v. Katzenbach*, 383 U.S. 301, 314, 335 (1966).

[25] Initially, however, the Department of Justice had to go to court to prevent state court judges from blocking the work of federal examiners and private voter registration activists. U.S. Commission on Civil Rights, *The Voting Rights Act . . . The First Months* (Washington, D.C., 1965), App. E, 74-78; *idem.*, *Political Participation*, 162-65; Peyton McCrary, Jerome Gray, Edward Still, and Huey Perry, "Alabama," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 38-39, 398, citing *Reynolds v. Katzenbach*, 248 F. Supp. 593 (S.D. Ala. 1965), and *U.S. v. Bruce*, 353 F.2d 474 (5th Cir. 1965). Although examiners were used in only 60 counties, the threat that they might be dispatched, coupled with the fact that other provisions of the act provided criminal penalties for officials who interfered with voters' efforts to cast their ballots, brought substantial compliance throughout the region. U.S. Commission on Civil Rights, *Political Participation*, 153-62; Lawson, *Black Ballots*, 329-35; Garrow, *Protest at Selma*, 179-86, 190, 202-03, 300; Richard Scher and James Button, "The Voting Rights Act: Implementation and Impact," in Charles S. Bullock III and Charles M. Lamb (eds.), *Implementation of Civil Rights Policy* (Monterey, Calif., Brooks/Cole, 1984), 20-54.

[26] U.S. Commission on Civil Rights, *Political Participation*, 166-67; *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). Payment of the poll tax as a prerequisite for voting in federal elections had previously been struck down by the 24th Amendment.

state law or local practices that had the potential for restricting access to the ballot. The combination of administrative and judicial implementation brought a dramatic increase in voter registration among both black and white Southerners.[27]

Shortly after passage of the Act, the lower courts began to address the problem of minority vote dilution. The first instance in which the use of multi-member districts was found to be unconstitutional, as it happens, was in *Reynolds v. Sims*,[28] now on remand as *Sims v. Baggett*.[29] The court found that the legislature had combined counties in multi-member house districts so as to minimize the percentage of blacks in any one district "for the sole purpose of preventing the election of a Negro House member."[30]

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[27] Harold W. Stanley, *Voter Mobilization and the Politics of Race: The South and Universal Suffrage, 1952-1984* (New York, Praeger, 1987), 27, 94-9, 101-02.

[28] 377 U.S. 533 (1964).

[29] 247 F. Supp. 96 (M.D. Ala. 1965). The court found the state house redistricting plan unconstitutional in part because the deviation from population equality was higher than acceptable under the one person, one vote principle, and there was no rational basis for the deviation.

[30] 247 F. Supp. 96, 107-109 (M.D. Ala. 1965). One of the three judges who decided *Sims* was Frank M. Johnson, the chief district judge in the Middle District of Alabama, who played a role in most of the important civil rights decisions in the state for a quarter century. He also decided the first lawsuit filed to challenge local at-large elections as discriminatory vote dilution, *Smith v. Paris*. In this case the African American plaintiffs attacked the adoption of at-large elections for the Democratic executive committee of Barbour County, Alabama (George Wallace's home county). The party committee's defense was that they shifted to at-large elections because their old districts violated the one person, one vote principle. Dismissing this claim as "nothing more than a sham." Judge Johnson pointed out that the committee could simply have reapportioned its districts. 257 F. Supp. 901, 905 (M.D. Ala. 1966). The "clear effect" of the change, as

Where African Americans did manage to register and vote in significant numbers, moreover, Southern legislatures often adopted new electoral procedures designed to dilute minority voting strength. Use of at-large elections -requiring candidates to run city-wide or county-wide rather than from smaller districts or wards - was the cornerstone of the vote dilution structure, along with the use of multi-member legislative districts.[31] Because racial minorities tend to be residentially segregated, they often represent a majority of the prospective voters in one or two election districts or wards and thus have the potential for electing one or two candidates of their choice. Where elections are conducted at large, however, where whites are a majority of the electorate, and where whites vote as a bloc against candidates preferred by minority voters, the

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demonstrated in the 1966 elections, was that, because black voters comprised a majority of those registered in some districts but not countywide, minority voting strength would be diluted by the bloc votes of the white majority. The court also relied on the long history of racial discrimination in Barbour County and the fact that the change followed the rapid enfranchisement of the county's African American citizens by the Voting Rights Act. In light of this factual pattern, Judge Johnson ruled that the change was motivated by an unconstitutional racial purpose. 257 F. Supp. 901. 904.

[31] This was a frequent ploy even before the adoption of the Voting Rights Act. See Matthews and Prothro, *Negroes and the New Southern Politics*, 4-5, 143-44, 208, 220-21; Ladd, *Negro Political Leadership in the South*, 29-30, 102-03, 307; Garrow, *Protest at Selma*, 179-236, 298-328; Derfner, "Racial Discrimination and the Right to Vote," 553-55, 572-74; McCrary and Lawson, "Race and Reapportionment, 1962," 302-04, 315-18; Peyton McCrary, "The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1945-1986," *25 Journal of Urban History* 199 (1999); and J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, University of North Carolina Press, 1999), 139, 163-171-80, 184-93, 224-26.

candidate preferences of the minority community are submerged in the larger pool of white voters.[32]

Even when voting patterns are racially polarized, in a *simple* at-large system a cohesive minority group can use *single-shot voting* to elect one representative if several offices are to be filled.[33] By requiring all voters to cast ballots for a full slate of offices to be filled, single-shot voting becomes impossible. The same result occurs if each candidate is required to qualify for a separate *place* or *post* (i.e., Place No. 1, Place No. 2, etc.). Both anti-single shot procedures and numbered-place requirements enhance the discriminatory potential of at-large elections.[34]

The widespread use of laws requiring *runoff* elections where no candidate receives a majority of votes cast can also have a discriminatory effect in an at-large

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[32] Chandler Davidson, "Minority Vote Dilution: An Overview," in Davidson (ed.), *Minority Vote Dilution* (Washington, D.C. Howard University Press, 1984), 4-5; Peyton McCrary, "Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *14 Social Science History* 507 (1990); Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, Mass., Harvard University Press, 1963), 87-96, 307-09.

[33] The U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (Washington, D.C., G.P.O., 1975), 207, explains it succinctly: "Consider a town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes."

[34] Katherine I. Butler, "Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote," *42 La. L. Rev.* 863-67 (1982). Roy E. Young, *The Place System in Texas Elections* (Austin, Institute of Public Affairs, University of Texas, 1965), is a pioneering study.

system where voting is racially polarized. If the candidate receiving a plurality of the votes wins, one minority candidate can defeat several white candidates wherever white voters split their ballots sufficiently. Requiring a runoff in the event that no candidate receives a majority of the votes cast, however, eliminates that possibility by setting up a head-to-head contest between the top two choices, so that white voters can rally behind the white candidate as a bloc.[35] Advocates of white supremacy were like the proverbial lawyer who wears both suspenders and a belt: these dilutive devices served as layers of insurance for the status quo, to be called into play wherever black political participation rose to a level that threatened white monopoly of electoral office.

African American plaintiffs in Mississippi sought to persuade the courts that the preclearance requirements set forth in Section 5 of the Voting Rights Act, not just the Reconstruction amendments, covered changes with the potential of diluting minority voting strength. The focus of this effort was legislation authorizing a shift from single-member districts to at-large elections for county boards of supervisors and boards of education because, as one state senator put it, "countywide balloting will safeguard 'a white board' [of supervisors] and preserve our way of doing business."[36] The African

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[35] Butler, "Constitutional and Statutory Challenges," 865-67; Chandler Davidson, *Biracial Politics: Conflict and Coalition in the Metropolitan South* (Baton Rouge, Louisiana State University Press, 1972), 63-67.

[36] *Jackson Clarion-Ledger*, May 18, 1966, pp. 1, 16.

American plaintiffs contended that under the Voting Rights Act such voting changes were not legally enforceable without federal preclearance.[37]

In 1969 the Supreme Court agreed, ruling in *Allen v. State Board of Elections* that this Mississippi law, like all other voting changes in covered jurisdictions were subject to preclearance under Section 5.[38] A change from district to at-large voting for county supervisors could have a discriminatory impact, noted the Court: "voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." Under those circumstances at-large elections could, if voting patterns followed racial lines, "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[39] The decision in *Allen* fundamentally altered enforcement of the Voting Rights Act.

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[37] Plaintiffs' legal strategy is discussed in Denison Ray to Frank R. Parker, Oct. 22, 1967, cited in U.S. Commission on Civil Rights, *Political Participation*, 23. Ray was chief counsel for the Lawyers' Committee for Civil Rights Under Law (representing some of the plaintiffs). Parker was the staff counsel for the Civil Rights Commission who wrote much of *Political Participation*. For a full discussion of the efforts of the 1966 Mississippi legislature to minimize the effects of the Act, see Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill, University of North Carolina Press, 1990), 34-66, 214-17.

[38] *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Four cases were consolidated in *Allen, three from Mississippi*. The case involving at-large elections was styled *Fairley v. Patterson*; *Bunton v. Patterson* dealt with a change from elected to appointed county school superintendents in certain counties; *Whitley v. Williams* concerned restrictions on independent candidates. *Allen* involved a restrictions on providing assistance to illiterate voters.

[39] 393 U.S. 544, 569 (1969).

The effects of *Allen* were profound. In Mississippi, for example, the Department of Justice refused to preclear the 1966 change to at-large elections.[40] Fourteen Mississippi counties nevertheless tried to switch to at-large supervisor elections, and another 17 counties to at-large school board elections, but the Department and, in some cases the federal courts, blocked all of these efforts.[41] The task of winning constitutional challenges on a case-by-case basis would have been formidable, and Mississippi was just one of the covered states.

Administrative reorganization in 1969 by the administration of President Richard Nixon produced a separate section within the Civil Rights Division specializing in voting rights. Prodded by liberal critics in Congress, the new Voting Section developed detailed guidelines for enforcing Section 5 that were, in turn, endorsed by the Supreme

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[40] Mississippi chose to seek pre-clearance from the Attorney General, rather than from a three-judge panel in the District of Columbia. See Lawson, *In Pursuit of Power*, 162. Two years later the state attempted to re-enact the authorization for county-wide supervisor elections struck down in *Allen*, and the Attorney General again objected. Frank R. Parker, "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," 44 *Miss. L.J.* 391 n. 32 (1973).

[41] Testimony of Frank R. Parker, *Extension of the Voting Rights Act: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate*, 94th Cong., 1st Sess. (1975), Ex. 3, p. 149; U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, 271-72. See also David H. Hunter, *The Shameful Blight: The Survival of Racial Discrimination in Voting in the South* (Washington, D.C., The Washington Research Project, 1972), 149-50, 209; Note, "Mississippi and the Voting Rights Act: 1965-1982," *52 Miss. L.J.* 803, 835-37 (1982).

Court.[42] The Department's procedures for enforcing Section 5 were also the subject of numerous unsuccessful court challenges during the 1970s.[43]

In 1971 the Supreme Court ruled that municipal annexations were among the voting changes covered by the Act.[44] The Court subsequently decided that municipalities facing objections to annexations which had the discriminatory effect of reducing the black or Hispanic percentage within the city could overcome that objection by adopting an election plan that fairly reflected minority voting strength for the enlarged city, normally a single member district system. Otherwise such cities would likely be condemned to declining tax revenues, as well-off whites moved to nearby suburbs to

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[42] The guidelines are found at 28 C.F.R. Sec. 51. Lawson, *In Pursuit of Power*, 162-78; Drew Days and Lani Guinier, "Enforcement of Section 5 of the Voting Rights Act," in Davidson (ed.), *Minority Vote Dilution*, 167-80.

[43] See two articles by former Voting Section attorneys, John J. Roman, "Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy," *22 Am. U. L. Rev.* 111 (1972), and John P. MacCoon, "The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965," *29 Cath. U. L. Rev.* 107 (1979).

[44] *Perkins v. Matthews*, 400 U.S. 379 (1971). opinions. Hiroshi Motomura, "Preclearance Under Section Five of the Voting Rights Act," *61 N. C. L. Rev.* 221 *(*1983*)*, reviews the case law regarding preclearance review of annexations and consolidations, as well as the effort of the Department to act as a surrogate for the D.C. court.

escape racial integration.[45] As a result, departmental objections to annexations played a significant role in persuading Southern municipalities to give up at-large elections.[46]

The Court's first major restriction on the scope of the Act was announced in its 1976 decision, *Beer v. United States*,[47] in which the city of New Orleans sought a declaratory judgement preclearing its redistricting plan. The three-judge trial court refused, on the grounds that under current Supreme Court doctrine the plan diluted minority voting strength.[48] The majority in *Beer* reversed the trial court, however, ruling

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[45] *City of Petersburg v. U.S.*, 354 F. Supp. 1021, 1023-24 (D.D.C. 1972), *aff'd* 410 U.S. 962 (1973); *City of Richmond v. U.S.*, 422 U.S. 358 (1975). Dissenting justices Brennan, Marshall, and Douglas would not have precleared the Richmond annexation because "the record is replete with statements by Richmond officials that prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a black population majority." 422 U.S. 358, 382 (1975). For ample evidence of this racial purpose, see John V. Moeser and Rutledge M. Dennis, *The Politics of Annexation: Oligarchic Power in a Southern City* (Cambridge, Mass., Schenkman, 1982), 88-93, 98-102, 107-09. Peyton McCrary, "The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History*, 26 (No. 4, 2014), 429-58. Newly appointed Justice Lewis F. Powell, Jr., abstained because he had earlier sought to persuade the Attorney General to preclear the annexation. Powell to John N. Mitchell, August 9, 1971 (public file, Voting Section, Civil Rights Division, Department of Justice).

[46] During the years 1975-80, for example, annexations accounted for the largest single type of voting change to which the Department of Justice objected, and most were withdrawn only when the municipality switched from at-large to single-member district elections. U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (Washington, D.C., G.P.O., 1981), 65, 69 (Table 6.4).

[47] 425 U.S. 130 (1976).

[48] The trial court relied throughout its opinion on *White v. Regester,* 412 U.S. 755 (1973), and other vote dilution cases decided on constitutional grounds: 374 F. Supp. 363, 384, 387-90, 393-99, 401-02 (1974).

that the term "effect" has a different meaning under Section 5 than under the Constitution. The Court determined that, in the context of a preclearance review, "effect" is to be defined as "retrogression," a newly minted term to describe changes that place minority voters in a *worse* position than under the status quo. Ameliorative changes that do not make matters worse for minority voters are, under *Beer*, not discriminatory in effect.[49]

On the other hand, *Beer* did not affect the purpose prong of Section 5.[50] As the *Beer* majority put it in a key passage:

> We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate Sec. 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*.[51]

This wording appears understandable only as a reference to the purpose test in Fourteenth or Fifteenth Amendment cases. The reference to a constitutional violation could not refer to a dilutive effects test because, in endorsing the retrogression concept the *Beer* majority had rejected a dilutive effects test as inapplicable in the Section 5

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[49] 425 U.S. 130, 142 (1976).

[50] Because the trial court decided the case on the grounds that the redistricting plan had a dilutive effect, it did not reach the issue of whether the change had a discriminatory intent. 374 F. Supp. 363, 387 (D.D.C. 1974). Thus, the only issue before the Supreme Court was whether the lower court's ruling under the Section 5 effect standard was correct. "Even without retrogression, a covered jurisdiction will violate Section 5 if an impermissible racial purpose is behind an electoral change," explains conservative legal scholar James F. Blumstein "Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act," 69 *Va. L. Rev.*, 633, 685 (1983).

[51] 425 U.S. 130, 141 (1976), emphasis added.

context. As a result, federal courts interpreted this wording in *Beer* as referring to a constitutional "purpose" test for the next quarter century.[52]

The Department's implementation of Section 5 evolved in direct response to federal court orders and statutory requirements. In deciding whether to preclear or object to voting changes, the Department acted as a surrogate for three-judge district courts in the District of Columbia, to which the Voting Rights Act also assigns preclearance responsibility.[53] Both public officials and minority citizens have an opportunity to present comments regarding voting changes, but the decision-making is designed to follow the dictates of current Section 5 case law. Thus the Department's administrative review under Section 5 can properly be characterized as a quasi-judicial process of implementation.

In the 1970s vote-dilution lawsuits were decided under a constitutional standard set forth by a unanimous Supreme Court in a legislative redistricting case from Texas, *White v. Regester*.[54] The decision struck down the use of multi-member districts to elect members of the state house of representatives in Dallas and Bexar counties.[55]

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[52] See for example *City of Port Arthur, Texas, v. United States*, 459 U.S. 159, 168 (1982); *City of Pleasant Grove v. United States*, 479 U.S. 462, 471-72 (1987).

[53] The responsibility to act as a surrogate for the D.C. court is set forth in the Department's Section 5 guidelines at 28 C.F.R. 51.39.

[54] 412 U.S. 755 (1973).

[55] The case involved both malapportionment and racial vote dilution. The trial court had ruled that the redistricting plan, with a total deviation of 9.9 percent, violated the one person, one vote standard. *Graves v. Barnes*, 343 F. Supp. 704, 713, 717 (W.D. Texas, 1972). The Supreme Court reversed on the grounds that, except for congressional

The Court's opinion relied on evidence of a history of official discrimination against blacks in Dallas and Hispanics in Bexar, cultural and language barriers in Bexar and a discriminatory slating group in Dallas, a lack of responsiveness by elected officials to the needs of the minority community, and the use of numbered place and runoff requirements which enhance the discriminatory potential of at-large elections. Based on what it called "the totality of the circumstances," the Court found that minority voters in these two counties had "less opportunity than did other residents . . . to participate in the electoral processes and to elect candidates of their choice."[56]

Although in later decisions the Supreme Court interpreted *White* as incorporating an intent requirement, the majority opinion in the case did not state explicitly that proof of discriminatory intent was required under the totality of circumstances test.[57] The Fifth Circuit Court of Appeals, which handled by far the largest number of vote-dilution cases

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districts, where different constitutional provisions were at stake, deviations of less than 10 percent were acceptable, a ruling from which three liberal justices dissented. 412 U.S. 755, 763-64, 772-82 (1973).

[56] 412 U.S. 755, 766, 769 (1973). Previously African American plaintiffs had lost a challenge to the use of at-large elections for the Indiana legislature because that state lacked the history of racial discrimination or discriminatory slating present in Texas, leading the Court to conclude that, unlike in Texas, minority candidates lost because they ran as Democrats and not because they were black. In addition, the plaintiffs conceded there was no evidence of racially discriminatory intent. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

[57] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court subsequently found that *White* required proof of discriminatory intent. Blumstein, "Proving Race Discrimination," 669-70, observes that the wording in *White* supports *both* the view that proof of discriminatory intent is necessary *and* that it is not.

in the 1970s, initially treated the test as requiring proof of *either* purpose *or* effect, but not both, in deciding a Louisiana challenge to at-large elections, *Zimmer v. McKeithen*.[58]

Under this approach, plaintiffs in vote dilution cases were often able to win by documenting a history of racial segregation and discrimination in the jurisdiction and by showing that, due to racially polarized voting, the election system operated in such a way that minority voters did not have a reasonable opportunity to elect representatives of their choice.[59] The lower courts understood how to apply the standard.[60] Veteran Fifth Circuit Judge Irving Goldberg later characterized the standard as "a jurisprudence

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[58] *Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973)(*en banc*), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). As the majority opinion put it, plaintiffs must maintain the burden of showing that a plan was either "a racially motivated gerrymander" or that it "would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Because plaintiffs here showed the second, it was not necessary for the court to rule on the initial purpose prong of the test.

[59] *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)(*en banc*), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden*," 18-26; Bickerstaff, "Reapportionment by the State Legislatures," 646-49; Butler, "Constitutional and Statutory Challenges," 883-90; Timothy G. O'Rourke, "Constitutional and Statutory Challenges to Local At-Large Elections." *University of Richmond Law Review* 17 (Fall 1982), 51-57, 78-81. McCrary, "Racially Polarized Voting in the South," 510-14, explains the statistical procedures used in these cases to measure the degree of racial bloc voting.

[60] As one voting rights lawyer working in Mississipp in the 1970s put it, it was, the Zimmer standard was "flexible, fact-specific, precise, and workable." Frank R. Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 *Va. L. Rev.* 725 (1983).

produced by ten years of struggle and compromise between judges of varying political and jurisprudential backgrounds."[61]

In 1980, the Supreme Court ruled in *City of Mobile v. Bolden*, a challenge to that city's use of at-large elections, that plaintiffs must prove not only that the at-large system has a discriminatory effect due to racially polarized voting but also that it was adopted or maintained for the purpose of diluting minority voting strength.[62] The Court remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs ultimately prevailed under the intent standard, after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911. The case was in litigation for almost a decade, however, and required a large expenditure of time and money.[63]

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[61] *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981).

[62] *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Although supported by only a plurality, Justice Potter Stewart's opinion was the prevailing view on the Court. Not only did the opinion require proof of intent but it appeared to require a more difficult standard for inferring racial purpose through circumstantial evidence. The Fifth Circuit Court of Appeals had anticipated the intent requirement in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), and *Thomasville Branch of NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978). See O'Rourke, "Constitutional and Statutory Challenges," 56-57.

[63] *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982). Peyton McCrary, "History in the Courts: The Significance of *City of Mobile v. Bolden*," in Davidson (ed.), *Minority Vote Dilution*, 47-63, summarizes the testimony in both cases.

In the view of many observers, the Supreme Court's decision in *City of Mobile* was inconsistent with the intent of Congress when it adopted and expanded the Voting Rights Act in 1965, 1970, and 1975. A substantial majority in both houses revised Section 2 of the Voting Rights Act in 1982 to outlaw election methods that result in diluting minority voting strength, without requiring proof of discriminatory intent.[64] In creating a new statutory means of attacking minority vote dilution, Congress cited the "totality of circumstances" test of *White* and *Zimmer* as the evidentiary standard to be used in applying the Section 2 results test. Vote-dilution cases previously decided under the Fourteenth Amendment would henceforth be tried under the new statutory standard of amended Section 2.[65]

Even so, in a few complex lawsuits in the 1980s evidence of discriminatory intent proved critical to the court's decision, most dramatically in one Alabama case, *Dillard v. Crenshaw County*, which led to the elimination of at-large elections in more than 180

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[64] Frank R. Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 *Va. L. Rev.* 715 (1983); Thomas M. Boyd and Stephen J. Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," *40 Wash. & Lee L. Rev.* 1347 (1983); and Armand Derfner, "Vote Dilution and the Voting Rights Act Amendments of 1982," in Davidson (ed.), *Minority Vote Dilution*, 145-63. Thernstrom, who favors an intent standard, argues that Congress was misguided in adopting a results test. Thernstrom, *Whose Votes Count*, 79-136.

[65] McDonald, "The Quiet Revolution in Minority Voting Rights," 1265; Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v. Bolden,"* 31-32.

counties, municipalities, and school boards.[66] The plaintiffs presented historical evidence showing that whenever black voting strength was substantial state and local officials had a policy of using at-large rather than district elections, and that in the 1950s and 1960s the state, motivated explicitly by the goal of preventing the election of blacks to office, adopted laws requiring the use of an anti-single shot device called a "numbered place" requirement in all jurisdictions to enhance the dilutive power of at-large elections.[67]

In the decade following the revision of Section 2, voting rights lawyers successfully brought numerous successful lawsuits under the new results standard. The Supreme Court made clear in a 1986 decision, *Thornburg v. Gingles*, that minority plaintiffs could prevail without proving discriminatory intent. Plaintiffs first had to meet a three-pronged threshold test, by proving that: 1) the minority group is sufficiently

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[66] *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986). For the effects of the court's decision, see McCrary, et.al., "Alabama," 54-64. [Add citation to the Dillard article in the Hackney festschrift]

[67] For a summary of the evidence see McCrary and Hebert, "Keeping the Courts Honest," 118-21. The most colorful evidence was a speech by a member of the State Democratic Executive Committee explaining that without an anti-single shot law or a numbered place requirement "it would be easy under the single shot voting for all of them to come in, to put a scalawag or put a negro [sic] in there." He complained about "increasing Federal pressure to . . . register negroes [sic] en masse, regardless of . . . their criminal records." In one black belt county "where there were very few darkies [sic!] registered, there has probably increased 4 or 5 hundred percent already," he claimed. In such a context "it has occurred to a great many people, including the legislature of Alabama, that there should be numbered places." For other cases where intent evidence was important during the 1980s, see Peyton McCrary, "Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits," *28 How. L. J.* 463 (1985).

numerous and geographically concentrated so that a majority-minority district can be drawn; 2) minority citizens vote cohesively; and 3) that the racial majority votes as a bloc to the degree that minority candidates usually lose.[68] Once these preconditions were satisfied, plaintiffs had to provide evidence of the "totality of circumstances" factors Congress had delineated in amended Section 2. Under this new standard many defendants settled before trial and agreed to adopt single-member districts.[69]

Scholarly research on the impact of the Voting Rights Act in the South demonstrates that the substantial increases in minority representation since 1970 are due primarily to the elimination of at-large elections and other devices that can dilute minority voting strength.[70] Fairly drawn single-member district plans have provided an

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[68] *Thornburg v. Gingles*, 478 U.S. 30 (1986), *aff'g in part rev'g in part Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984). The "totality of the circumstances" test of amended Section 2 was lifted from the decision in *White v. Regester*. Only rarely have plaintiffs lost after proving the three *Gingles* prongs.

[69] See the various essays in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 35-36, 84, 120-21, 143, 171-73, 210-12, 247, 256, 284-87.

[70] Davidson and Grofman (eds.), *Quiet Revolution in the South*, *passim*. Pildes, "The Politics of Race," 1362-76, summarizes the findings of this collaborative study and relates them to voting rights case law as of the mid-1990s. As Pildes observes, these findings provide more definitive proof of the conventional view among political scientists that at-large elections serve as a significant barrier to minority representation." See for example Clinton B. Jones, "The Impact of Local Election Systems on Black Political Participation," *11 Urban Affairs Quarterly* 345 (1976); Albert K. Karnig, "Black Representation on City Councils," *id.*, 12 (Dec. 1976), 223-42; Margaret B. Latimer, "Black Political Representation in Southern Cities: Election Systems and Other Causal Variables," *id.*, 15 (Sept. 1979), 65-86; Albert K. Karnig and Susan Welch, *Black Representation and Urban Policy* (Chicago, University of Chicago Press, 1980); Richard L. Engstrom and Michael D. McDonald, "The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship,"

opportunity for African American or Hispanic voters to elect candidates of their choice – despite high levels of racially polarized voting – in districts where they constitute a majority of the voting population. In some localities the level of black representation by 1990 approached the black percentage of the population in the jurisdiction.[71] Very few African Americans were elected to council seats from white-majority districts. On the other hand, virtually all black-majority districts elected black council members.[72]

Nor are these results surprising to those familiar with the evidence of racial polarization produced in the hundreds of vote-dilution lawsuits tried or settled in the last quarter century. No court has ever found a violation in a voting rights case absent proof, typically presented through expert statistical analysis, that white or Anglo voters

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75 American Political Science Review 344 (1981); and Chandler Davidson and George Korbel, "At-large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence," *43 Journal of Politics* 982 (1981).

[71] Peggy Heilig and Robert J. Mundt, *Your Voice at City Hall: The Politics, Procedures, and Policies of District Representation* (Albany, State University of New York Press, 1984); Theodore S. Arrington and Thomas G. Watts, "The Election of Blacks to School Boards in North Carolina," *Western Political Quarterly*, 44 (Dec. 1991), 1099-1105, and Charles S. Bullock, "Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans," *Journal of Politics*, 56 (Nov. 1994), 1098-1105, which deals with Georgia county commissions. Two recent longitudinal studies by economists using advanced regression models confirm a continuing, though diminished, discriminatory effect to the use of at-large elections. T.R. Sass and S.L. Mehay, "The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections," *38 J.L. & Econ.* 367 (1995); Tim R. Sass and Bobby J. Pittman, Jr., "The Changing Impact of Electoral Structure on Black Representation in the South, 1970-1996," *104 Public Choice* 369 (2000).

[72] See the following tables in Davidson and Grofman (eds.), *Quiet Revolution in the South*: Tables 2.3, 2.7, 3.3, 3.7, 4.3, 4.3A, 4.7A, 5.3, 5.7, 6.3, 6.3A, 6.7, 6.7A, 7.3, 7.3A, 8.3, 8.7, 9.3, 9.7, 10.4, 10.5.

routinely defeat the candidates of choice of minority voters.[73] As a result, the only way to provide minority voters with a fair opportunity to elect their preferred representatives was to order a change to district elections or some alternative remedy. By 1990 the few at-large systems left in the South were primarily located in jurisdictions where white cross-over voting had resulted in a pattern of significant minority representation, thus making litigation unnecessary.[74] Increasingly, therefore, the focus of voting rights activists would be on the degree to which districting plans adopted earlier fairly reflected minority voting strength.

Before 1990 only a handful of vote dilution challenges were filed against single-member district plans.[75] The use of minority vote dilution in redistricting was most often

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[73] Abigail M. Thernstrom, *Whose Votes Count: Affirmative Action and Minority Voting Rights* (Cambridge, MA, Harvard University Press, 1987), 243, ignores this fundamental fact, claiming incorrectly that "the majority-white county, city, or district in which whites vote as a solid bloc against any minority candidate is now unusual." She also believes (p. 23) that blacks should in many cases be willing to settle for the fact that they "become a powerful swing vote when white candidates begin to compete." When Thernstrom discusses specific evidence of racially polarized voting presented in vote-dilution lawsuits (as in her discussion of the findings in *Thornburg*, pp. 207-08, 216), she often gets the facts wrong. See Karlan and McCrary,"Without Fear and Without Research," 759, n. 53. Pildes, "The Politics of Race," 1365-67, contends that, because of Thernstrom's indifference to the empirical evidence of racially polarized voting, judges and justices who rely on her for evidence on this subject are misguided.

[74] See Davidson and Grofman, "The Effect of Municipal Election Structure on Black Representation in Eight Southern States," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 320-21.

[75] See, however, *Kirksey v. Board of Supervisors of Hinds County*, 402 F. Supp. 658 (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd*, 554 F.2d 139 (5th Cir. 1977)(en banc); *Rybicki v. State Board of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982);

attacked in the context of preclearance reviews under Section 5. In evaluating a redistricting plan under Section 5, there are two distinct quantitative issues. First, do the districts identified by the submitting authority as majority-minority districts afford minority voters a reasonable or fair opportunity to elect candidates of their choice, based on empirical analysis (that is, are they electorally viable)? Second, does the plan minimize the number of effective majority-minority districts? A redistricting plan may minimize the number of majority-minority districts either by "packing" an unnecessarily high percentage of minority citizens (say 80 or 90 percent) into a single district or by fragmenting minority population concentrations so that the group's members are dispersed among several majority-white districts.[76]

Because black and Hispanic populations typically contain a high percentage of persons under the age of 18, the proportion of a district's voting-age population belonging to that group is usually lower than its percentage of the total population. Because minority citizens are typically registered at a lower rate than those of the majority community, the group normally forms a smaller proportion of the registered voters than of the voting-age population. Because minority voters, who are often significantly lower in socio-economic status and educational background, frequently turn

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Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).

[76] Frank R. Parker, "Racial Gerrymandering and Legislative Reapportionment," in Davidson (ed.), *Minority Vote Dilution*, 85-117; Motomura, "Preclearance Under Section Five," 233-36.

out at a lower rate than in the majority community, they often make up a smaller percentage of the turnout than of the registered voters.[77]

Recognizing those facts, the federal courts in the 1970s came up with a rule of thumb often dubbed "the 65 percent rule."[78] As minority registration and turnout rates have increased, however – by the twenty-first century often to a point approaching parity with whites – experts often recommend districts with a smaller percentage of minority population. And where a substantial percentage of white voters have demonstrated a regular tendency to support minority candidates, the minority threshold can be lowered accordingly.[79] For these reasons the Department of Justice and the courts assess district composition on a case-by-case basis.[80]

Both before and after the *Beer* decision, discriminatory purpose as defined in constitutional cases played a significant role in the Department's review of redistricting plans. In assessing the issue of racial purpose, a major issue is whether authorities have rejected alternative districting plans that would provide minority voters a better

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[77] Grofman, Handley, and Niemi, *Minority Representation*, 116-21.

[78] *Kirksey v. Board of Supervisors of Hinds County, Miss.*, 554 F.2d 139 (5th Cir. 1977)(en banc), *cert. denied*, 434 U.S. 968 (1977); *Moore v. Leflore County Bd. Of Election Commissioners*, 502 F.2d 621 (5th Cir. 1974); *Mississippi v. U.S.*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[79] Allan J. Lichtman and J. Gerald Hebert, "A Theory of Vote Dilution," *6 La Raza L.J.* 10-19 (1993); Bernard Grofman, Lisa Handley, and David Lublin, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," 79 *N.C.L. Rev. 1383 (2001).*

[80] Grofman, Handley, and Niemi, *Minority Representation*, 120.

opportunity to elect candidates of their choice. The courts and the Justice Department also focus on whether minority citizens were excluded from the redistricting process, or their requests for alternative plans rejected without substantial justification, and whether there is a departure from usual redistricting practices or criteria.[81]

In 2000 the Supreme Court reinterpreted the purpose prong of Section 5, defining it for the first time in a quarter century as restricted entirely to what the majority opinion by Justice Antonin Scalia termed "retrogressive intent"[82] Three years later the Court reinterpreted the retrogressive effect standard to be applied under Section 2.[83] When reauthorizing Section 5 in 2006, Congress rejected both reinterpretations by the Court as contrary to the intent of the statute, restoring the interpretation of retrogression in the dilution context to reducing the ability of minority voters to elect candidates of their

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[81] Days and Guinier, "Enforcement of Section Five," 170-71; Motomura, "Preclearance Under Section Five," 238-39, 241; Grofman, "Criteria for Districting," 95.

[82] *Bossier Parish School Board v. Reno*, 528 U.S. 320 (2000). See "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," co-authored with Christopher Seaman and Richard Valelly, *Michigan Journal of Race & Law*, 11 (Spring 2006), 275-323. [An unpublished version was printed in *Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. On the Constitution, H. Comm. On the Judiciary, 109th Cong., 96-181 (2005) (Serial No. 109-69).]*

[83] *Georgia v. Ashcroft*. 539 U.S. 461 (2003). See PamelaS. Karlan, "*Georgia v. Ashcroft* and the Retrogression of Retrogression," *Election Law Journal*, 3 (2004), 21-36.

choice and the interpretation of the purpose prong of Section 5 as "any discriminatory purpose.[84]

In the aftermath of *Shelby* County, battles over race in redistricting have been less common recently than controversies over election laws that appear to place barriers in the path of in-person voting – such practices as requiring voters to present photo identification at the polls or eliminating half of the period when early in-person voting is offered. Plaintiffs have offered proof that such barriers have a racially disparate impact. Because few Section 2 cases in the past have dealt with comparable issues, however, courts lack a body of relevant precedents to guide them. In many of these cases, moreover, experts must use, among other things, complex database matching methodology applied to very large data sets, such as statewide voter registration lists and state and federal ID databases.[85]

The results of these studies have been consistent with the theory that since black and Hispanic voters remain more likely to live in poverty and have lower educational attainment than white voters, they are more likely to lack required photo identification. Similarly, in many jurisdictions, minority voters use early voting at higher rates than whites. Geographic analysis of the difficulties faced by persons without access to

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[84] Pub. L. No. 109-246 § 5, 120 Stat. 580-81 (2006).

[85] See, e.g., Declaration of Charles Stewart," April 11, 2014, in *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C.)

vehicles when trying to acquire the photo identification they do not possess has also played a role in these cases.[86]

Advocates of minority voting rights have also begun exploring the use of a neglected provision of the Act – Section 3(c) – often called the "pocket trigger" or "bail-in" provision. When federal courts find liability in a Section 2 case, Section 3(c) provides judges the authority to require future voting changes by that jurisdiction to be "precleared," either by the court itself or by the Department of Justice. This could provide a small measure of the protections lost as a result of *Shelby*, but based on evidence of current racial discrimination in voting in the jurisdiction. Such a 3(c) remedy, however, can only be adopted where the court has determined that the election practice at issue in the case was adopted or maintained with a racially discriminatory purpose.[87] It remains to be seen whether courts will be willing to impose 3(c) remedies, and if they are, whether these remedies survive the appeals process.

Convincing a court that the defendants acted with a discriminatory intent has always been a major challenge for minority plaintiffs, or for the Department of Justice seeking to enforce Section 2 on behalf of minority voters. Judges are usually reluctant to make an intent finding, in part because the public typically sees such a ruling as paramount to calling public officials racists. Federal district court judges, after all, live

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[86] Declaration of Dr. Gerald R. Webster, August 15, 2014, *Veasey v. Perry*, C.A. No. 2:13-CV-193 (S.D. Tex.)

[87] Travis Crum, "Note: The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance," 119 *Yale L.J.* 1992 (2010)

and work with those same public officials. The difficulty of winning under an intent standard was in fact a major impetus for the congressional decision to amend Section 2 in 1982 so that courts could strike down election practices that have a discriminatory result without the need to prove intent. Another difficulty arises from what is undoubtedly a salutary change in the political climate. Over the years as minority citizens have come to register and vote in greater numbers, public officials have generally become more guarded in their speech than when the Voting Rights Act was adopted in 1965. Courts must typically rely on circumstantial evidence in determining the purpose of an election law.[88]. That is by no means impossible, as the Fourth Circuit Court of Appeals demonstrated in ruling that North Carolina's omnibus election law – introducing a highly

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[88] *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-66 (1977). Intent claims have sometimes been successful, however. The case in which the Supreme Court ruled that the Fourteenth Amendment requires proof that an election practice was adopted or maintained with a racially discriminatory purpose was *City of Mobile v. Bolden,* 446 U.S. 55 (1980). The Court remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs prevailed under the intent standard - at great cost - after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911. (Peyton McCrary, "History in the Courts: The Significance of *City of Mobile v. Bolden*," in Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., 1984), 47-63.) The most far-reaching example is another Alabama case, *Dillard v. Crenshaw County*, which led to the elimination of at-large elections in 176 counties, municipalities, and school boards. (Peyton McCrary, et.al., "Alabama," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 54-64.) The plaintiffs presented historical evidence showing that wherever black voting strength was substantial state and local officials had a policy of using at-large rather than district elections, and that in the 1950s and 1960s the state, motivated explicitly by the goal of preventing the election of blacks to office, adopted laws designed to enhance the dilutive power of at-large elections. (Peyton McCrary, "Minority Representation in Alabama: The Pivotal Case of *Dillard v. Crenshaw County*," in Raymond Arsenault and Orville Vernon Burton (eds.), *Dixie Redux: Essays in Honor of Sheldon Hackney* (Montgomery, Al., New South Books, 2013), 403-22

restrictive photo identification requirement for in-person voting, decreasing the availability of early voting opportunities, and eliminating other provisions that had facilitated African American parity with white voter turnout in recent elections – as intentionally discriminatory. Even so, the court did not impose a "bail-in" remedy under Section 3 of the Voting Rights Act [89]

There is much for the Congress to do if it is to restore the level of protection for minority voting rights that prevailed before 2013.

[89] *North Carolina State Conference NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).*

Mr. COHEN. Thank you, Professor.

We now recognize Ms. L. Paige Whitaker, legislative attorney in the American Law Division of the Congressional Research Service, author of a number of publicly available CRS products covering topics from campaign finance laws to congressional redistricting and the Voting Rights Act.

She received her J.D. from Catholic University of America Columbus School of Law and her B.A. from the University of Maryland.

Ms. Whitaker, thank you, and thank you for all your work with the Congressional Research Service, and you are recognized.

STATEMENT OF PAIGE WHITAKER

Ms. WHITAKER. Thank you, Chairman Cohen, Chairman Nadler, Ranking Member Johnson.

My name is Paige Whitaker, and I am a legislative attorney with the American Law Division of the Congressional Research Service. Thank you for inviting me to testify today regarding the Voting Rights Act of 1965.

CRS is available to serve all Members of Congress on an objective, nonpartisan basis. With these brief remarks, as requested, I will summarize a few key points from my written testimony regarding Sections 2, 4 and 5, and 3(c) of the Voting Rights Act.

The Voting Rights Act was first enacted in 1965 under Congress' authority to enforce the Fifteenth Amendment. Since then, Congress has amended the act in 1970, '75, '82, '92, and most recently in 2006. Section 2, a key provision of the law, applies nationwide. It authorizes the Federal Government and private citizens to challenge discriminatory voting practices or procedures, including minority vote dilution, which is the diminishing or weakening of minority voting power.

Section 2 prohibits any State or political subdivision from enacting a voting law that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. A violation is established if, based on the totality of the circumstances, a minority group has less opportunity than other members of the electorate to elect representatives of choice.

Courts have most frequently applied Section 2 in the context of challenges to redistricting plans. However, in the past few years, litigants have also invoked Section 2 to challenge certain State voting and election administration laws.

Next, Sections 4 and 5 worked in tandem. Section 4, known as the coverage formula, prescribed which States and political subdivisions with a history of discrimination were required to obtain preclearance before implementing a voting law. It covered any jurisdiction that used literacy tests and had low voter registration and turnout in the late 1960s and early '70s. For the 1972 date, the law covered any jurisdiction that provided election information in English only where members of a single-language minority constituted more than 5 percent of the voting age citizens.

As originally enacted, Section 4(b) was scheduled to expire, but in a series of amendments, the law was reauthorized and, most recently, in 2006 was extended for 25 years.

Then Section 5, known as the preclearance requirement, required prior approval, or preclearance, of a proposed change to any voting law and applied to those States and political subdivisions covered under Section 4(b). In order to be granted preclearance, the covered jurisdiction had the burden of proving that the proposed voting change neither had the purpose nor would have the effect of denying or abridging the right to vote or diminishing the ability to elect preferred candidates of choice on account of race, color, or membership in the language minority.

In 2013, in the case of *Shelby County* v. *Holder*, the Supreme Court invalidated the coverage formula in Section 4(b), thereby rendering the preclearance requirement in Section 5 inoperable. In Shelby County, the Court held that applying the coverage formula to certain States and jurisdictions departed from the fundamental principle of equal sovereignty among the States that was not justified in light of current conditions.

The Court ruled that in order for Congress to divide the country so as only to subject only certain States to preclearance, it must do so by showing that the statute's disparate geographic coverage is sufficiently related to the problem that it targets based on current conditions.

As a result of the Court's decision, nine States and jurisdictions within six additional States were previously covered under the formula are no longer subject to the Voting Rights Act's preclearance requirement.

And then, finally, Section 3(c), which is known as the bail-in provision of the VRA, provides that if a court determines that violations of the Fourteenth or Fifteenth Amendment to the U.S. Constitution, which justify equitable relief, have occurred in a State or political subdivision, the court shall retain jurisdiction for a period of time that it deems appropriate. During that period, the State or political subdivision cannot make an electoral change until the court determines, or the Department of Justice, that the change neither has the purpose nor will it have the effect of denying or abridging the right to vote on race, color, or membership in a language minority.

This concludes my brief remarks. Thank you for the opportunity to testify today, and I would be pleased to answer any questions.

[The statement of Ms. Whitaker follows:]

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee:

My name is L. Paige Whitaker and I am a Legislative Attorney with the American Law Division of the Congressional Research Service (CRS). Thank you for inviting me to testify regarding the Voting Rights Act of 1965 (VRA). As requested, my testimony will briefly address the history of the VRA and provide an overview of Sections 2 and 3(c) of the law. My testimony will not address pending legislation, but CRS would be pleased to provide such analysis in the future. Pursuant to congressional guidelines, CRS is available to serve all Members of Congress, and CRS testimony is provided on an objective, non-partisan basis.

Brief History of the VRA

The VRA was enacted under Congress's authority to enforce the Fifteenth Amendment to the U.S. Constitution, providing that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude.[1] When transmitting a draft of the legislation to the House of Representatives, President Lyndon B. Johnson stated that the bill would "help rid the Nation of racial discrimination in every aspect of the electoral process and thereby insure the right of all to vote."[2] Since it was first enacted in 1965,[3] the VRA has evolved through a series of amendments that were enacted in 1970,[4] 1975,[5] 1982,[6] 1992,[7] and 2006.[8] As originally enacted, the VRA contained 19 sections, including the following key provisions, as amended.

Section 2, which applies nationwide, prohibits any voting qualification or practice that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[9] As originally enacted, Section 2 prohibited voting restrictions based on race or color, but the 1975 amendments expanded its application to include language minority groups.[10] Section 2 is still in effect and is discussed in greater detail in the following section of this testimony.

Section 3(c), known as the "bail in" provision, provides that, if a court finds that violations of the 14th or 15th Amendment justifying equitable relief have occurred in a state or political subdivision, the court shall retain jurisdiction for a period of time that it deems appropriate.[11] As originally enacted in 1965, Section 3(c) covered violations of the Fifteenth Amendment justifying equitable relief, but the VRA was amended

[1] U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). Since its ratification in 1870, however, the use of various election procedures by certain states diluted the impact of votes cast by African Americans or prevented voting by African Americans entirely. As case-by-case enforcement under the Civil Rights Act proved to be protracted and ineffective, Congress enacted the Voting Rights Act of 1965. *See* H. REP. NO. 89-439, at 1, 11-12, 15-16, 19-20, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44, 2446-47, 2451-52 (discussing discriminatory procedures such as poll taxes, literacy tests, and vouching requirements).

[2] Communication From the President of the United States Transmitting a Draft of Proposed Legislation Entitled, "A Bill to Enforce the 15th Amendment to the Constitution of the United States," H.R. Doc. 89-120, at 1 (1965).

[3] Voting Rights Act of 1965, Pub. L. No. 89-110.

[4] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285.

[5] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73.

[6] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205.

[7] Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344.

[8] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246.

[9] Codified as amended at 52 U.S.C. §§ 10301, 10303(f).

[10] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73.

[11] 52 U.S.C. § 10302(c).

in 1975 to include violations of the Fourteenth Amendment.[12] Section 3(c) is still in effect and is discussed in greater detail in the following section of this testimony.

Section 4(b), known as the "coverage formula," prescribed which states and jurisdictions with a history of discrimination were required to obtain preclearance before changing any voting law.[13] It covered any state or political subdivision that maintained a "test or device" as a condition for voting or registering to vote on November 1 of 1964, 1968, or 1972, and either less than 50% of citizens of legal voting age were registered to vote or less than 50% of such citizens voted in the presidential election in the year in which the state or political subdivision used the test or device.[14] For the 1964 and 1968 dates triggering coverage, the terms "test or device" were defined to include requirements of literacy, educational achievement, good moral character, or proof of qualifications by the voucher of registered voters or others, as a prerequisite for voting or registration. For the 1972 date, the definition also included providing election information only in English in states or political subdivisions where members of a single language minority constituted more than 5% of the voting age citizens.[15] As originally enacted, Section 4(b) and, by extension, the preclearance requirement in Section 5, discussed below, were scheduled to expire in five years. In a series of amendments, however, the law was reauthorized and most recently, in 2006, was extended for 25 years.[16] As discussed below, in a 2013 ruling, *Shelby County v. Holder*, the Supreme Court invalidated the coverage formula in Section 4(b).[17]

Section 5, known as the "preclearance" requirement, required prior approval or preclearance of a proposed change to any voting law, and applied only to those states or political subdivisions covered under Section 4(b).[18] In order to be granted preclearance, the covered jurisdiction had the burden of proving that the proposed voting change neither had the purpose, nor would have the effect, of denying or abridging the right to vote, or diminishing the ability to elect preferred candidates of choice, on account of race, color, or membership in a language minority group.[19] In 2006, Congress amended Section 5 to provide that a proposed voting change would not be granted preclearance if it had the effect of diminishing racial minorities' "ability . . . to elect their preferred candidates of choice."[20] This amendment responded to a 2003 Supreme Court ruling, *Georgia v. Ashcroft*, holding that the standard for preclearance was met where majority-minority districts, in which minorities had the ability to elect a candidate of choice, were replaced with "influence districts," in which minorities could affect an election, but not necessarily play a decisive role.[21] Section 5 is inoperable as a result of the Supreme Court invalidating the coverage formula in Section 4(b).[22]

Until 2013, when the Supreme Court issued its ruling in *Shelby County*,[23] courts construed Section 5 of the VRA to require several states and jurisdictions covered under Section 4(b) to obtain prior approval or

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[12] Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 205.

[13] 52 U.S.C. § 10303(b).

[14] *Id.*

[15] *Id.*

[16] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, codified at 52 U.S.C. § 10303(a)(8).

[17] *See* 570 U.S. 529 (2013).

[18] 52 U.S.C. § 10303(a).

[19] *Id.*

[20] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, codified as amended at 52 U.S.C. § 10304(b).

[21] 539 U.S. 461, 483 (2003).

[22] *See* Shelby County, 570 U.S. at 557.

[23] 570 U.S. 529 (2013).

preclearance for any proposed change to a voting law, which included changes to redistricting maps.[24] In order to be granted preclearance, the state or jurisdiction had the burden of proving that the proposed map would have neither the *purpose* nor the *effect* of denying or abridging the right to vote on account of race or color, or membership in a language minority group.[25] Moreover, as amended in 2006, the statute expressly provided that its purpose was "to protect the ability of such citizens to elect their preferred candidates of choice."[26] Covered jurisdictions could seek preclearance from either the Department of Justice (DOJ) or the U.S. District Court for the District of Columbia.[27] If neither DOJ nor the court granted preclearance, the proposed change to election law could not go into effect.[28]

In 1966, the Supreme Court upheld the constitutionality of the VRA's preclearance regime in *South Carolina v. Katzenbach*,[29] characterizing it as an "uncommon exercise of congressional power" that was justified by the "exceptional conditions" of the states "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination."[30] In *Shelby County*, however, in 2013, the Court held that applying the coverage formula to certain states and jurisdictions departed from the "fundamental principle of equal sovereignty" among the states was not justified in light of current conditions.[31] Subjecting states to different burdens is justifiable in certain cases, the Court determined, but departing from the principle of equal sovereignty "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[32] According to the Court, continuing to base coverage on locales where literacy tests were once imposed, and on low voter registration and turnout statistics from the 1960s and early 1970s, does not make sense.[33] Observing that literacy tests have been banned for over 40 years and that voter registration and turnout statistics in covered jurisdictions now approach parity with non-covered jurisdictions, the Court characterized the coverage formula as relying on "decades-old data and eradicated practices" that do not reflect current conditions.[34] While such factors could appropriately be used to divide the country in 1965, the Court stated that the country is no longer divided along those lines.[35] The Court ruled that, in order for Congress to divide the country so as to subject only certain states to preclearance, it must do so on a basis that makes sense "in light of current conditions."[36]

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[24] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 905-06 (1995) ("The preclearance mechanism applies to congressional redistricting plans, and requires that the proposed change 'not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'") (internal citations omitted).

[25] 52 U.S.C. § 10304 (emphasis added). *See also* 28 C.F.R. § 51.52(a) (2018).

[26] *Id.* § 10304(d).

[27] *Id.* § 10304(a).

[28] *Id.*

[29] 383 U.S. 301 (1966).

[30] *Id.* at 334-35.

[31] Shelby County, 570 U.S. 529, 544 (2013) (characterizing the coverage formula as "based on 40-year old facts having no logical relation to the present day.") *Id.* at 554. (internal citations and quotations omitted).

[32] *Id.* at 542 (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

[33] *See id.* at 550-51.

[34] *Id.* at 551.

[35] *See id.* ("In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.")

[36] *Id.* at 557 ("Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an extraordinary departure from the traditional course of relations between the States and the Federal Government. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.") (internal citation and quotations omitted).

As a result of the Court's decision, nine states and jurisdictions within six additional states, which were previously covered under the formula, are no longer subject to the VRA's preclearance requirement. The covered states were Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; the six states containing covered jurisdictions were California, Florida, Michigan, New York, North Carolina, and South Dakota.[37]

Overview of Key Provisions of Current Law

As requested, this section briefly addresses Sections 2 and 3(c), two key provisions of the VRA that remain in effect. As noted above, Section 4(b) was held invalid by the Supreme Court, thereby rendering Section 5 inoperable.

Section 2

Section 2 of the VRA applies nationwide and authorizes the federal government and private citizens to challenge discriminatory voting practices or procedures, including minority vote dilution, the diminishing or weakening of minority voting power.[38] Specifically, Section 2 prohibits any state or political subdivision from applying or imposing a voting qualification or practice that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[39] Further, the law provides that a violation is established if, "based on the totality of circumstances," electoral processes "are not equally open to participation" by members of a racial or language minority group in that the group's members "have less opportunity than other members of the electorate to elect representatives of their choice."[40] Courts have most frequently applied Section 2 in the context of challenges to redistricting plans; however, in the past few years, litigants have also invoked Section 2 to challenge certain state voting and election administration laws.[41]

In the redistricting context, under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts in a congressional redistricting plan in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[42] A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid minority vote dilution by helping ensure that racial or language

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[37] *See* DEP'T OF JUSTICE, *Jurisdictions Previously Covered By Section 5*, https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 (last visited March 8, 2019). It does not appear, however, that the Court's decision affected Section 3(c) of the VRA, known as the "bail in" provision, discussed *infra*, under which jurisdictions can be ordered to obtain preclearance of voting laws if a court concludes that the jurisdiction has committed a violation of the Fourteenth or Fifteenth Amendments justifying equitable relief. 52 U.S.C. § 10302(c).

[38] 52 U.S.C. §§ 10301, 10303(f).

[39] *Id.* § 10301(a).

[40] *Id.* § 10301(b).

[41] In evaluating a challenge to a law eliminating straight-party voting under Section 2 of the VRA, the U.S. Court of Appeals for the Sixth Circuit observed that Section 2 is most frequently invoked "in assessing vote-dilution claims, rather than vote-denial or vote-abridgement claims." Mich. State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656, at 667 (6th Cir. 2016), *stay denied by* Johnson v. Mich. State A. Philip Randolph Inst., 137 S. Ct. 28 (2016). *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 25-26 (2009) (holding that in a vote dilution challenge to a redistricting map under Section 2 of the VRA, a minority group must constitute more than 50% of the voting population in order to satisfy the requirement of geographical compactness sufficient to constitute a majority in a district); *see also* DEP'T OF JUSTICE, *Cases Raising Claims Under Section 2 Of The Voting Rights Act*, https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0 (last visited March 6, 2019). *See generally* CRS Report R44675, *Recent State Election Law Challenges: In Brief*, by L. Paige Whitaker (discussing state election laws challenged under Section 2 of the VRA with mixed results).

[42] 52 U.S.C. §§ 10301, 10303(f).

minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice.

In its landmark 1986 decision *Thornburg v. Gingles*, the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA.[43] Under this test, (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority group must be able to demonstrate that the majority votes sufficiently as a bloc usually to enable the majority to defeat the minority group's preferred candidate absent special circumstances, such as the minority candidate running unopposed.[44] The *Gingles* Court also opined that a violation of Section 2 is established if, based on the "totality of the circumstances" and "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[45] The Court further listed the following factors, which originated in legislative history materials accompanying enactment of Section 2, as relevant in assessing the totality of the circumstances:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[46]

Elaborating on the *Gingles* three-pronged test, in *Bartlett v. Strickland*, the Supreme Court ruled that the first prong of the test—requiring a minority group to be geographically compact enough to constitute a majority in a district—can be satisfied if the minority group would constitute more than 50% of the voting

[43] 478 U.S. 30 (1986).

[44] *Id.* at 50-51 (citation omitted). The three requirements set forth in *Thornburg v. Gingles* for a Section 2 claim apply to single-member districts as well as to multi-member districts. *See* Growe v. Emison, 507 U.S. 25, 40-41 (1993) ("It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.")

[45] *Thornburg*, 478 U.S. at 44.

[46] *Id.* at 36-37 (quoting S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07). ("Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.")

population in a single-member district.[47] In *Bartlett*, the state officials who drew the map argued that Section 2 requires drawing district lines in such a manner as to allow minority voters to join with other voters to elect the minority group's preferred candidate, even if the minority group in a given district comprises less than 50% of the voting-age population.[48] Rejecting this argument, a plurality of the Court determined that Section 2 does not grant special protection to minority groups that need to form political coalitions in order to elect candidates of their choice.[49] To mandate recognition of Section 2 claims where the ability of a minority group to elect candidates of choice relies upon "crossover" majority voters would result in "serious tension" with the third prong of the *Gingles* test, the plurality opinion determined, because the third prong requires that the minority be able to demonstrate that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[50] Therefore, the plurality found it difficult to envision how the third prong of *Gingles* could be met in a district where, by definition, majority voters are needed to join with minority voters in order to elect the minority's preferred candidate.[51]

In sum, in certain circumstances, Section 2 can require the creation of one or more majority-minority districts in a redistricting plan. By drawing such districts, a state can avoid racial vote dilution, and the denial of minority voters' equal opportunity to elect candidates of choice. As the Supreme Court has determined, minority voters must constitute a numerical majority—over 50%—in such minority-majority districts.[52]

Section 3(c)

Known as the "bail in" provision of the VRA, Section 3(c) provides that if a court determines that violations of the Fourteenth or Fifteenth Amendment[53] to the U.S. Constitution justifying equitable relief have occurred in a state or political subdivision, the court shall retain jurisdiction for a period of time that it deems appropriate.[54] During that period, the state or political subdivision cannot make an electoral change until the court determines that the change neither has the purpose, nor will it have the effect, of denying or abridging the right to vote based on race, color, or language minority status.[55] In addition, if the state or political subdivision submits a proposed electoral change to the U.S. Attorney General, who does not object within 60 days, the new election procedure may be enforced.[56]

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[47] 556 U.S. 1, 25-26 (2009) (plurality opinion).

[48] *See id.* at 6-7.

[49] *See id.* at 15.

[50] *Id.* at 16.

[51] *Id.*

[52] In addition to the VRA, however, congressional redistricting plans must also conform to standards of equal protection under the Fourteenth Amendment to the U.S. Constitution. According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then a "strict scrutiny" standard of review is to be applied. *See* Miller v. Johnson, 515 U. S. 900, 916 (1995). *See also, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 348 (2004) (listing traditional redistricting criteria to include contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains).

[53] U.S. CONST. AMEND. XIV § 1 ("No State shall … deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. AMEND. XV § 1 ("The right of citizens of the United states to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.")

[54] 52 U.S.C. § 10302(c). *See* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J.1992 (2009) (characterizing the Section 3(c) bail in provision as the VRA's "most obscure provision").

[55] *Id.*

[56] *Id.*

As federal courts have determined, Section 3(c) requires a finding of intentional discrimination.[57] In contrast to the Section 5 preclearance regime, Section 3(c) preclearance can be imposed by a court in *any* state or political subdivision, and the period of time that the court will subject a jurisdiction to preclearance is within the court's discretion. For example, a federal district court in 2017 determined that as a starting point, five years could be an appropriate period to retain jurisdiction and require preclearance.[58] Also in contrast to Section 5, at least one federal court has interpreted Section 3(c) to authorize preclearance limited to certain types of voting changes, such as those relating only to majority-vote requirements.[59]

[57] *See, e.g.*, Jeffers v. Clinton, 740 F. Supp. 585, 588-89 (E.D. ARK. 1990), *appeal dismissed* 498 U.S. 1129 (1991).

[58] *See* Patino v. City of Pasadena, 230 F. Supp. 3d 667, 730 (S.D. TEX 2017) (identifying a five-year period of jurisdiction because it was "likely enough time for demographic trends to overcome concerns about dilution from redistricting.").

[59] *See* Jeffers, 740 F. Supp. at 586 (requiring preclearance limited to only those proposed changes to "laws, standards, or practices designed to enforce or enhance a majority-vote requirement").

Mr. COHEN. Thank you for your testimony.

Before we proceed to our questions, I want to recognize the Shelby County of Tennessee, not Alabama as in Holder, Tennessee Chapter of Delta Sigma Theta Sorority. And Ms. Johnnie Turner and your crowd, welcome. Honored that you are here today. And if you would stand and be recognized.

Thank you for your attendance.

[Applause.]

Mr. COHEN. And for all your good work that you do in Memphis and Shelby County.

Firstly, Ms. Lhamon, you mentioned there were 23 jurisdictions that had passed statewide laws that diluted the vote since the Shelby decision. What did those 23 States have in common, if anything? Were they particularly a political party controlled the General Assembly? Were they of any particular section of the country? Can you give us a little definition or——

Ms. LHAMON. Well, the main commonality among those 23 States is their willingness to make voting more restrictive and to make it more challenging for their citizens. And that, that, in itself, is a concern.

The reality is that these 23 jurisdictions are across the country, and are not defined by particular party control. The——

Mr. COHEN. So there were some States that had Democratic Party control in the House and Senate both that passed these restrictions?

Ms. LHAMON. I believe so. We can go back and give you that information with specificity. But the main concern is the electorate's decision in those States to make voting more restrictive for those States, and that is a serious concern, given the status of voting rights in this country, as we documented it in this report, and given that the history of this country and the degree to which those much more restrictive laws passed in a very, very short time period.

So that is a new turn for us as a country, and it is fairly sweeping.

Mr. COHEN. And the fact that we have gone from the more opprobrious pre-1965 how many seeds are there in a bottle or whatever to more invidious types of discrimination, does that in any way diminish the need for Section 5 preclearance in the jurisdictions that have those type of voting limitations?

Ms. LHAMON. Absolutely not, Chair. I am astonished by what we saw around the country in the choices to denigrate voters' access and ability to vote on the basis of race, on the basis of disability status, on the basis of language access. There are an astonishing variety of ways that our electorates have chosen to make it more difficult for some among us to vote.

Mr. COHEN. Mr. Saenz, let me ask you this. In California, you now have redistricting of the State legislatures, not of the county governing bodies, and those are the ones you specifically, I think, referenced in your testimony. Are they also mandated to take into consideration racial minority districts to try to create those in their redistricting when they are done by court order?

Mr. SAENZ. They are all covered by Section 2, which, of course, means if they have a pattern of racially polarized voting and the

rest of the Senate factors the totality of the circumstances indicate that there is vote dilution occurring, then they are mandated to create a Latino majority district in the context of racially polarized voting and the geographic concentration of Latino voters such that you can create a district that is compact, contiguous, meets all the usual criteria.

And I can assure you that every one of those counties has legal advice about specifically the issues under Section 2 of the Voting Rights Act. I think in many cases, they are, in essence, gambling, assuming that because of the expense and the time involved in a Section 2 challenge, they won't be the jurisdiction that is challenged.

And as I indicated, in the course of this decade, eight of those nine counties that we identified as potentially violating Section 2, essentially their gamble has paid off so far because they have not been targeted for litigation. Now Kern County, which was challenged by MALDEF, after very lengthy litigation and trial, it did result in liability finding against them, at great cost.

And that, I think, is something that is not often remarked about. The cost to the defendant jurisdictions under Section 2 litigation is substantial. If they were subject to Section 5 preclearance, their costs would be minimal in comparison. The Kern County Board of Supervisors ended up paying—it is a public number because it is a part of our settlement—$3 million to the plaintiffs for their attorneys' fees and expert costs.

You can assume that they have equivalent and probably even higher costs of their own. They had to hire outside counsel, employ their own experts——

Mr. COHEN. Let me ask you this. Do you think Section 5 is the most important section for enforcement?

Mr. SAENZ. Absolutely. And it permits efficient and effective——

Mr. COHEN. Ms. Lhamon, do you agree with that?

Ms. LHAMON. I do. Its loss is very significant.

Mr. COHEN. Mr. McCrary, can you tell us why Section 5 is so important and necessary, and while Section 2 exists for the country, Section 5 is the most essential part of the Civil Rights Act—Voting Rights Act, excuse me.

Mr. MCCRARY. With the way Section 5 operated before Shelby County, it gave quick decisions for jurisdictions about voting changes they were intending to make, and most of them were precleared and most of them within the 60-day clock that governs the operation of the preclearance review. It cost them practically nothing.

Moreover, it served an educational function that the Congress recognized in 2005 and 2006 when it was building that voluminous record. There were some States covered by Section 5 that actually supported the extension of the preclearance process in 2005 and 2006, and that is part of the record before Congress.

The reason was that it gave those States an opportunity to consider seriously the needs of minority voters, the views expressed by minority voters in the preclearance review, as well as the local jurisdictions' views and to make better decisions about how to change the electoral process in those jurisdictions. But where jurisdictions were not so well intentioned, it was possible to object to those

changes, and oftentimes, when Federal courts were asked to address this question, they reached the same conclusions as the Department of Justice.

It was efficient. It was educational. It stopped things in their tracks that were going to be problematic, but for the most part, it did not interfere with the electoral process in those jurisdictions that were covered by Section 5.

Mr. COHEN. Thank you, sir.

And I now recognize the ranking member for 5 minutes, Mr. Johnson.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman.

Mr. McCrary, Chris Coates is a former Chief of the Voting Section of the Department of Justice, and he testified before the U.S. Commission on Civil Rights about opposition within the Department of Justice to bringing a case under the Voting Rights Act because the victims of the discrimination happened to be white.

According to the Washington Post, "Coates has a pedigree different from that of many conservatives. He was hired at Justice during the Clinton administration in '96 and had worked for the American Civil Liberties Union." Sheldon Bradshaw, a high-level Civil Rights Division official in the Bush administration, said Coates is "nonpartisan in how he enforces voting rights laws."

Mr. Coates, in his testimony before the Commission said, and I quote, "Opposition within the Voting Section was widespread to taking actions under the Voting Rights Act on behalf of white voters in Noxubee County, Mississippi, the jurisdiction in which Ike Brown is and was the chairman of the local Democratic Executive Committee. What I observed on election coverage in Noxubee County was some of the most outrageous and blatantly racially discriminatory behavior at the polls committed by Ike Brown and his allies that I have seen or had reported to me in my 33 years-plus as a voting rights litigator."

A description of this wrongdoing is well summarized in Judge Tom Lee's opinion in that case and in the Fifth Circuit Court of Appeals opinion affirming the lower court judgment and the injunctive relief against Mr. Brown and the local Democratic Executive Committee.

I am continuing to quote him, "Of course, there is nothing in the statutory language of the Voting Rights Act that indicates that DOJ lawyers can decide not to enforce the race neutral prohibitions in Section 2 of the act against racial discrimination." Here is the relevant quote. "One of the social scientists who worked in the Voting Section and whose responsibility it was to do past and present research into a local jurisdiction's history flatly refused to participate in the investigation."

The question is, are you the social scientist to whom Mr. Coates was referring?

Mr. MCCRARY. The answer to that question, Representative Johnson, is yes. His testimony was, in fact, erroneous, as the Inspector General's report noted in the footnote. I, in fact, worked on that case. I was at trial in the case, and I will note that Chris Coates and I became friends beginning in 1980. I worked with him on voting rights cases as an expert witness.

I encouraged the Voting Section to hire Mr. Coates in the mid 1990s. I worked closely with him on all manner of cases, including the case in Noxubee County, which, in fact, reveals egregious behavior by the political leaders of the black community in that county. So, you know, the answer to the question is I was the person to whom you referred, but his information was false.

Mr. JOHNSON of Louisiana. Fair enough. Mr. Chairman, in a recent paper, the U.S. Commission on Civil Rights Commissioner Gail Heriot in Footnote 40 puts in context some of the examples used by the chair of that Commission, Catherine Lhamon, claiming to show instances in which a right to vote was denied.

I would ask unanimous consent that the paper be submitted for the record since Ms. Lhamon's report has been submitted also.

Mr. COHEN. Without objection.

[The information follows:]

MR. JOHNSON (LA) FOR THE OFFICIAL RECORD

Legal Studies Research Paper Series

Commissioner Gail Heriot Statement and Rebuttal in the U.S. Commission on Civil Rights'
An Assessment of Minority Voting Rights Access in the United States

Research Paper No. 18-361
2018

Gail Heriot

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Commissioner Gail Heriot Statement and Rebuttal

I found this report somewhat stronger than some recent Commission reports. It contains some useful information. Nevertheless, it suffers from some substantial flaws. Consequently, I could support neither the staff-generated part of the report nor the accompanying findings and recommendations.[1]

I will try not to get into the minutiae of what I see as the report's shortcomings—though some of my disagreement comes from its treatment of *Shelby County v. Holder*[2] and (in particular) the way in which it touches on the possibility of post-*Shelby County* legislation. Chief Justice Roberts has already ably explained the reasons for the Supreme Court's decision. Others have defended the position that additional legislation is not warranted at this time.[3] Since this is not my area of expertise, there is little I can add to the debate. Instead, I would like to make a few more general (and somewhat scattered) points about voting rights and the enforcement of those rights. On some of these points I suspect there will be substantial agreement.

THE IMPORTANCE OF VOTING RIGHTS

A good way to illustrate the importance of voting rights is to examine the behavior of actual politicians: Most of them will work hard to gain the goodwill of their constituents. By and large, that is a good thing. Non-voters, on the other hand, usually get less attention—except, as in the case of children, when actual voters have very strong desire to benefit them.[4]

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[1] Because of a death in my family, I was unable to attend the telephonic meeting at which Commissioners voted on the report. For the record, I would have voted no. My understanding is that the report was adopted by a vote of 6 to 0. All of those voting were appointed by Democratic office holders.

[2] 570 U.S. 529 (2013).

[3] *See, e g*, Ilya Shapiro, *Don't Use MLK to Push Harmful Election Laws*, Forbes (January 22, 2014), https://www.forbes.com/sites/ilyashapiro/2014/01/22/dont-use-mlk-to-push-harmful-election-laws/#26b47492750a. Although there have been proposals, no additional legislation has been enacted. Congressional leaders may have adopted something akin to Shapiro's position at least for the time being. That could, of course, change in the future.

[4] Whether the lack of voting rights is a problem in need of a solution will depend on the nature of the case. These days it would be difficult to find Americans willing to defend the concept of excluding voters based on their race. But other reasons for denying a group the vote are much more defensible. For example, children are a large non-voting population, but since parents almost always view themselves as protectors of their children rather than antagonists or competitors, this is rightly not viewed as a problem The number of 8-year-olds with the maturity to exercise the franchise responsibly is certainly verging on zero if it is not actually zero

Another non-voting population is non-citizens. For most people, this is in essence by definition A citizen is a member of the polity; a non-citizen is not. There are various rights and responsibilities that follow from that. One could argue that resident non-citizens are "affected" by the decisions made by voting citizens and their representatives. That's true. But it's also true of non-resident citizens. We live in an inter-connected world. Our nation's policies on foreign aid, immigration, and trade often have a profound effect on individuals around the world. Yet (so far) no one has argued that non-resident, non-citizens should have a say in the political decision-making of a country. (Indeed, the current investigation into whether Russia attempted to influence the 2016 election demonstrates the general consensus that non-resident, non-citizens should have no right to influence elections.)

Consider the case of Senator Thomas E. Watson of Georgia (1856-1922), whose political (and journalism) career spanned many decades, beginning prior to the disfranchisement movement in the South and concluding after disfranchisement was a fait accompli. The Tom Watson of the 1880s was a passionate fusion populist, seeking to unite poor whites and poor African Americans in order to gain what he saw as their fair share of the South's then-meager resources.[5] For reasons

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Where a polity chooses to draw the line (or, put differently, how it chooses to define "citizen" for the purposes of the franchise) may vary. But the fact that politicians will, all other things being equal, pay more attention to the citizen than to the non-citizen is considered by most to be a feature and not a bug. Once a non-citizen becomes a citizen, the commitment of the polity to him or her increases significantly, and so does his or her commitment to the polity. Note that some American municipalities allow non-U.S. citizens to vote in municipal elections. Rachel Chason, *Non-Citizens Can Now Vote in College Park, Md.*, Wash. Post (September 13, 2017). These municipalities are essentially defining "citizen" for municipal purposes differently from the federal government. There is no inherent reason that this cannot be done. Whether such an expansion of the electorate is permissible under the law in any particular state or locality is a subject beyond the scope of this report. I can offer only the observation that there are conflicts of interest between elected officials and existing voters in these matters. A requirement that such matters be put directly to the voters or a requirement that they secure a supermajority of the members of the municipal legislature would therefore hardly come as a surprise.

A third population that is sometimes disfranchised is felons. In part this is an element of the felon's punishment (and in part the motivation for it stems from a lack of confidence in the felon's wisdom and from doubt that his or her interests are compatible with the polity's). In an era that increasingly shrinks from incarceration, fines, and many other forms of punishment, stigmatizing felons by denying them the franchise is one of the milder punishments remaining. Objections come not so much from penologists as from political parties and activists who perceive, rightly or wrongly, that "the felon vote" will go to their coalition.

If the reason for felon disfranchisement were to deny as many African Americans the vote as possible rather than to deny felons the vote, this should be viewed as a Constitutional violation (even though Section 2 of the Fourteenth Amendment obviously anticipates that felons will be disfranchised in some states and that this will be permissible). See Const. amend. XV; Const. amend. XIV, § 2. But the argument that felon disfranchisement is simply a clever way to deny African Americans the vote without appearing to do so is weak. The first ten states to disfranchise felons were Kentucky (1792), Vermont (1793), Ohio (1802), Louisiana (1812), Indiana (1816), Mississippi (1817), Connecticut (1818), Alabama (1819), Missouri (1820), and New York (1821). There is no discernible pattern here. Some have questioned why these states took so long to disfranchise felons. If the states were not motivated by the existence of large populations of free African Americans in their midst, what was motivating them? Why didn't they disfranchise felons a century earlier? The answer here lies in the 18th century conception of felonies: They were punishable by death. Consequently, it was seldom necessary to consider whether felons should be disfranchised. Dead men, regardless of race, don't vote. See William Blackstone, IV Commentaries on the Laws of England 98 (University of Chicago 1st ed. Facsimile 1979)("The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform"). Moreover, prior to the ratification of the Fifteenth Amendment, a state that wanted to disfranchise African Americans could do so without resorting to an extraordinarily weak and clumsy proxy.

[5] The one Southern state in which fusion populism (in the form of an alliance of the Republican and Populist Parties) briefly took control of government was North Carolina. Unlike states in the Deep South, North Carolina had an African-American population of only about 35% in 1890. In addition, western North Carolina had a large population of small white farmers whose sympathies had been with the Union and who generally voted Republican. Together with members of the Populist Party, the group took control of North Carolina in the mid-1890s. Those who favored African-American disfranchisement usually saw it specifically as a way to defeat that coalition See Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 148-72 (2001). By contrast, in South Carolina, disfranchisement was spearheaded by Governor "Pitchfork" Ben Tillman, a Democrat with a strong populist streak, who feared the African-American vote would form an alliance with the "conservative" vote (i.e. what Tillman viewed as the Low Country landowning and commercial elite). See id. at 91-115.

beyond Watson's control, within a few years, African Americans had been effectively disfranchised in Georgia.[6] Attempting to appeal to the African-American vote was therefore no longer a useful strategy for an ambitious office seeker like Watson. At that point, he began to voice his approval of disfranchisement.[7] By the 1910s and 1920s, Watson had morphed into one of the most virulent racists one could ever encounter.[8] Referring to "the Negro," he remarked, "*In the South, we have to lynch him occasionally, and flog him, now and then, to keep him from blaspheming the Almighty, by his conduct, on account of his smell and his color.*"[9]

Compare Watson's career with that of Alabama Governor George Corley Wallace (1919-1998). Wallace straddled the other end of the history of African-American disfranchisement. After being elected governor for the first time, he said the following in his January 14, 1963 inaugural address:

That contrast illustrates the differing political currents leading to African-American disfranchisement in each state. See generally id. But if there is one unifying theme, it may be this: Political alliances were so fluid in the South during the 1890s that no one could state with certainty how they would turn out. Would African Americans and poor whites living in the Appalachian Mountains form an alliance? Or would the alliance be African Americans and the landowning and commercial elites of the Tidewater/Low Country/Black Belt counties? Or would alliances be formed on the basis of race? We all know that in the end it was the last of these alternatives. But that was by no means obvious in the politically and economically turbulent turn-of-the-century South. See generally Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 148-72 (2001); J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South 1880-1910 (1974).

[6] The Disfranchisement Movement in the South was a pivotal moment in American History. It began in earnest in about 1888, and came to head in each state in the South at different times. By the early 1900s, it had been mostly accomplished. See Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 (2001). A few non-obvious things are worth noting here: (1) In many locations in the South (including Watson's Georgia), the African-American vote had already been severely depressed on account of extra-legal violence and fraud (as well as laws that made that violence and fraud possible); this ultimately made things easier for the Disfranchisement Movement, which made disfranchisement an explicit part of state constitutions; (2) Many of those who advocated African-American disfranchisement would have preferred to disfranchise not just African Americans (most of whom were illiterate at the time), but also illiterate whites (of which there were many); they did not, however, always have the political clout to accomplish that end as to illiterate whites (though sometimes they did); (3) The movement was in part a reaction to the populism (and in particular fusion populism) of the late 19th century, in part a Progressive reaction to election fraud, and in part an effort to weaken the Republican party both locally and nationally; and (4) While raw racism was certainly part of the motivation for many, almost never did the laws relating to disfranchisement explicitly refer to race and some states (*e g.*, Arkansas and Tennessee) accomplished disfranchisement of African Americans mainly through the mechanism of the poll tax, which tended to depress the white vote too. See Perman at 5, 11-12, 19, 177; J Morgan Kousser, Shaping of Southern Politics 250-57 (1974). Also see Sheldon Hackney, Populism to Progressivism in Alabama 147 (1969); Jack Temple Kirby, Darkness at the Dawning· Race and Reform in the Progressive Party 4 (1972); Dewey W. Grantham, Southern Progressivism: The Reconciliation of Progress and Tradition (1983).

[7] Thomas E. Watson, *The New Georgia Encyclopedia*, http://www.georgiaencyclopedia.org/articles/history-archaeology/thomas-e-watson-1856-1922.

[8] For those who regard the Soviet Union and Nazi Germany as representing opposite ends of the political spectrum, Watson's transformation from class-based to race-based fanaticism may seem surprising. For those who regard the two as close cousins, his transformation seems far less remarkable.

[9] Michael Newton, *White Robes and Burning Crosses A History of the Ku Klux Klan from 1866* 38 (2014) (italics added).

> In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and *I say segregation now, segregation tomorrow, segregation forever.*[10]

But that was before the success of the Voting Rights Act of 1965. In just a few short years, African-American voter registration had skyrocketed in Alabama. By the 1970s, he was asking forgiveness for his past sins.[11] And, in a remarkable turn of events, he largely received it. He was re-elected to a third term as governor in 1982 with a huge share (90%) of African-American votes.[12]

Colman McCarthy was among those who thought Wallace's transformation to be sincere. He wrote in 1995:

> In the annals of religious and political conversions, few shiftings were as unlikely as George Wallace's. In Montgomery, Ala., last week, the once irrepressible governor—now 75, infirm, pain-wracked and in a wheelchair since his 1972 shooting—held hands with black southerners and sang "We Shall Overcome."
>
> What Wallace overcame is his past hatred that made him both the symbol and enforcer of anti-black racism in the 1960s. On March 10, Wallace went to St. Jude's church to be with some 200 others marking the 30th anniversary of the Selma-to-Montgomery civil rights march.
>
> It was a reaching-out moment of reconciliation, of Wallace's asking for—and receiving—forgiveness. In a statement read for him—he was too ill to speak—Wallace told those in the crowd who had marched 30 years ago: "Much has transpired since those days. A great deal has been lost and a great deal gained, and here we are. My message to you today is, welcome to Montgomery. May your message be heard. May your lessons never be forgotten."
>
> In gracious and spiritual words, Joseph Lowery, a leader in the original march and now the president of the Southern Christian Leadership Conference, thanked the former separatist "for coming out of your sickness to meet us. You are a different George Wallace today. We both serve a God who can make the desert bloom. We ask God's blessing on you."[13]

McCarthy wrote that Wallace "was using his waning political power to bond with those he once scorned." And maybe he was right about Wallace's sincerity. But whether Wallace was sincere or

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[10] *George Wallace's 1963 Inaugural Address*, Wikipedia,https://en.wikipedia.org/wiki/George_Wallace%27s_1963_Inaugural_Address (italics added).
[11] George C. Edwards, Martin P. Wattenberg & Robert Lineberry, Government in America: People, Politics and Policy 80 (14th ed. 2009)(Wallace stated in 1979 in connection with his infamous stand in the schoolhouse door, "'I was wrong. Those days are over, and they ought to be over.'")
[12] *Id*
[13] Colman McCarthy, *George Wallace—From the Heart*, Washington Post (March 17, 1995), https://www.washingtonpost.com/wp-srv/politics/daily/sept98/wallace031795.htm?noredirect=on.

insincere, there is a simpler point: In a reasonably well-functioning democratic republic, successful politicians spend a lot of time trying to please voters; they seldom spend as much time trying to please non-voters. In Wallace's final term as governor, he appointed more than 160 blacks to state governing boards. He worked to double the number of black voter registrars in Alabama's 67 counties and hired African Americans as staff members.[14] In that sense at least, he was a changed man.[15]

The lesson? At least from the standpoint of discrete and insular groups that are sufficiently large to matter on Election Day, the right to vote may well be our most important right.[16] Without it, everything else will be in jeopardy.[17] The Jim Crow Era in Watson's Georgia and Wallace's Alabama, with its unhinged devotion to racial segregation, would have been unthinkable without disfranchisement.[18] Many of the Deep South's laws designed to keep African Americans working on the plantation (instead of migrating north where their prospects were often better) would have been similarly impossible.[19]

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[14] *Id*

[15] In some ways this was a return to Wallace's early career as a judge on the Third Judicial Circuit of Alabama. There, interestingly enough, he had a reputation for being fair regardless of the race of the litigants before him and for being courteous to African-American attorneys. As a result, in his initial (failed) run for governor in 1958, he was endorsed by the NAACP. It is said that he attributed his loss to the perception that he was "liberal" relative to his opponent on race issues (although he put it in much cruder terms). It is further said that he vowed not to let that perception stand in the way of his election again. See https://en.wikipedia.org/wiki/George_Wallace.

[16] The group need not be large. American political parties are coalitions (although the coalitions are constantly changing and re-organizing themselves). Even a small group, especially if it is well-organized and cohesive, can be the difference between victory and defeat, and hence courting such a group can be well worth a politician's or a party's time

[17] Indeed, in a nation like ours, where government has its fingers in all sorts of pies, the franchise can be important not just to protect rights, but also to protect patronage. Members of a disfranchised group are less likely to get government jobs or contracts. Government projects—from parks to roads to utilities—are less likely to be located or improved upon in the areas where those members will benefit from them.

[18] It is interesting to compare African-American disfranchisement with the era prior to the enfranchisement of women Unlike African Americans at the time, women as a class could not be described as "insular." Most women lived in families that included both men and women. The argument against women's suffrage was frequently that husbands, fathers and sons could be trusted to look after the interests of women outside the home, while women looked after the interests of their menfolk inside the home. Yet it is hard to avoid noticing that legislation that purported to protect working women from strenuous work or long hours was often advocated by men-only unions whose members were in competition with women for jobs and that women themselves were in no position to vote. See Muller v. Oregon, 208 U.S. 412 (1908). Of course, Progressive women often supported such legislation too. But those lobbying for such legislation were seldom working women; more often, they were members of the upper-middle class. See Suzanne LaFollette, Concerning Women (1926). Whether women are well served by protectionist legislation has been a major theme in feminist literature of the 20th century. My point here is simply that the heyday of such legislation was during a period that women were unable to vote in many parts of the country.

[19] These laws were at least as destructive as the Jim Crow laws. But they get considerably less attention today. *See, e g*, Williams v. Fears, 179 U.S. 270 (1900)(upholding an 1898 prohibitive tax on labor recruiters in Georgia); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781 (1998).

See also Benno Schmidt, Jr., *Peonage* in The Oxford Companion to the Supreme Court of the United States 729 (Kermit Hall, et al., eds. 2005). In order to abolish peonage, the laws that made peonage possible had to be

The right to cast a ballot must therefore be guarded with great care. That will come as a surprise to no one. Unfortunately, it doesn't answer any of the hard questions: For example, *what constitutes great care in this context?* Along with the right to the ballot is the right to have one's ballot count, which requires the exclusion of those who are not entitled to a ballot.[20] Policies that are intended to facilitate the right to cast a ballot—like early voting and requirements that election officials take the voter's word for his or her identity—can increase the likelihood of voter fraud. We know there have been problems in North Carolina—the state that received the most attention in this report. One election had to be run again in order to ensure its integrity.[21]

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dismantled one by one—a task that involved multiple trips to the Supreme Court by both the United States and private litigants. See Pollock v. Williams, 322 U.S. 4 (1944)(and cases cited therein).

[20] Opponents of voter ID laws frequently argue that cases of voter impersonation (the kind of fraud most obviously prevented by such laws) are very rare. While it is impossible to say for sure, I strongly suspect they are right. But even the fiercest critics of voter ID laws, like Justin Levitt, agree that some cases occur. See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, Washington Post (August 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.e42a723f0d09.

On the other hand, otherwise qualified voters lacking in an ID are also uncommon. And those who cannot acquire one without unreasonable inconvenience are very rare indeed. Efforts to estimate the numbers of those without IDs by comparing voting rolls with driver's license and other ID lists are prone to over-estimation. Voting rolls are often heavy with individuals who have recently died, moved out of the jurisdiction, or become incapacitated. Driver's license lists are more up to date. The best solution for the cases of no ID that do exist may be for political activists in those jurisdictions that choose to have voter ID laws to assist them in securing an ID.

Moreover, opponents of voter ID laws should take into consideration the fact that voter ID laws help combat other kinds of voter fraud too. Consider the example of a felon in a jurisdiction where felons are not permitted to vote. He may be perfectly aware that he is not entitled to vote, but may be willing to chance it anyway, thinking that if he is caught after the fact he will simply deny that he was the person who showed up at the polling station. This is a lot riskier in a jurisdiction that requires the presentation of an ID. Prosecuting authorities are unlikely to believe the "It wasn't I" defense. The point holds true for other kinds of individuals (*e g*, non-citizens) who manage to register but are not entitled to vote.

Unlike the case of voter impersonation, cases of felons voting in jurisdictions where they are not entitled to vote appear not to be rare at all. See Byron York, *When 1,099 Felons Vote in Race Won by 312 Ballots*, Washington Examiner (August 6, 2012) (referring to the 2008 Senate race in Minnesota), https://www.washingtonexaminer.com/york-when-1-099-felons-vote-in-race-won-by-312-ballots. *See also* John Fund & Hans von Spakovsky, Who's Counting (2012) (detailing various kinds of voter fraud and other kinds of election irregularities across the country).

[21] See Mark Binker, *New Election Ordered in Pembroke*, WRAL (December 20, 2013), https://www.wral.com/new-election-ordered-in-pembroke/13237755/.

Commissioner Narasaki writes in her Statement that "once an election has been held—fairly or not—the result cannot be undone." I agree that running an election again is a rarely-invoked remedy (in part because the margin of victory for the winning candidate is rarely so small as to leave the proper outcome in doubt). But, as in the Pembroke case, it does happen. Bell v. Southwell, 376 F.2d 659 (1967), is an especially well-known example.

[21] *See, e g*, Tyler O'Neil, *Hillary Clinton Says Supreme Court Nominee Brett Kavanaugh Will Bring Back Slavery*, PJ Media (July 13, 2018)("'I used to worry that they [the Republicans] wanted to turn the clock back to the 1950s. Now I worry they want to turn it back to the 1850s.'"); *Biden Tells African-American Audience GOP Ticket Would Put Them "Back in Chains,"* CBS News (August 14, 2012), https://www.cbsnews.com/news/biden-tells-african-american-audience-gop-ticket-would-put-them-back-in-chains/.

On the other hand, requirements that voters present an ID can exclude the occasional voter who does not have an ID and cannot get one except at great inconvenience. How do we reconcile those two competing considerations? It isn't always easy, and intemperate statements about the motives of members of the opposing party don't make it any easier. [22] As Thomas Sowell is fond of saying, "There are no solutions. There are only trade-offs."[23] For what it's worth, large majorities of

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I should also mention in this context Commissioner Yaki's ill-considered statement about the Federalist Society for Law and Public Policy. The Federalist Society is an organization of conservative, libertarian and classically liberal lawyers, law students and law professors. It has about 65,000 members, including many of the nation's most distinguished jurists. It also happens to include both Commissioner Kirsanow and me as well as most center-right attorneys of my acquaintance. Not only do its members not fit the description Commissioner Yaki gives them, the organization has been described in quite positive terms by individuals usually viewed as left of center. For example:

"For over a decade, I have been privileged to be involved in Federalist Society events, and it's a really interesting thing that they have seen fit to invite me even though I generally don't think like them on a lot of things, and the quality of the speakers and the free-for-all discussion is unparalleled, so it's really been a privilege."—Neal Katyal, Acting Solicitor General (Obama Administration).

"I think one thing your organization has definitely done is to contribute to free speech, free debate, and most importantly, public understanding of, awareness of, and appreciation of the Constitution So that's a marvelous contribution, and … in a way I must say I'm jealous at how the Federalist Society has thrived in law schools."—Nadine Strossen, Professor of Law, New York Law School & Former President, American Civil Liberties Union.

"[T]he Federalist Society has brought to campus the commitment to real, honest, vigorous, and open discussion. It is a result of the works of the Federalist Society to create a wonderful environment for discussing social, political, legal and constitutional issues."—Paul Brest, Professor of Law & Former Dean, Stanford Law School.

The Federalist Society's programs are not held in secret; even Commissioner Yaki is welcome It is one of the most open organizations I have ever known. And it strives to include speakers from across the ideological spectrum in its panel discussions. I can recall only one occasion when a panel on which I was a speaker was not balanced (only because the liberal speaker failed to show up). Although, as a speaker, I had already given my own view on the topic (which was a more conservative view), I spontaneously got up and gave the liberal point of view too, just to make sure that the Federalist Society maintained its tradition of presenting the many sides of each issue.

By contrast, I once witnessed an official of the supposedly "mainstream" Association of American Law Schools aggressively bar a conservative staff member of this Commission from attending one of its programs. The official who did so made it clear she believed that the staff member was somehow there to spy on the speakers (every last one of whom was so far to the left that the average American would need a telescope to see them). In fact, the staff member, who had traveled from Washington to New York for the event, was there to scout out left-of-center speakers to invite to the Commission's September 15, 2010 national conference. Like the Federalist Society, but unlike the AALS, the Commission's Chairman at the time, Gerald Reynolds, although a conservative himself, strongly preferred for the conference to include speakers with an array of viewpoints.

The AALS is also famous for having brought in over 20 speakers to discuss the then-recent passage of California's Proposition 209 (which prohibited discrimination or preferential treatment on the basis of race, sex, or ethnicity in public employment, public contracting and public education). Every last one of the speakers opposed the initiative, not a single supporter was invited to speak, despite the fact that several law professors who had worked on the campaign, including me (the campaign's statewide co-chair), were present at the meeting). See also Charles Fried, *"Diversity" From Left to Far Left*, Washington Post (January 3, 2000)(comparing the AALS's lack of viewpoint diversity in panel presentations to the Federalist Society's strong viewpoint diversity). Something has happened to organizations that are supposedly mainstream in the last 25 years. And it isn't good.

[23] Fox News Interview of Thomas Sowell, https://www.youtube.com/watch?v=3_EtJWmja-4&feature=youtu.be. The extent to which the various Statements of my Commission colleagues fail to address these tradeoffs is disheartening. The soaring rhetoric they employ makes it all sound so easy: If only nice people were in charge of

Americans think that both voter ID requirements *and* early voting are reasonable methods of conducting elections.[24]

It's not just first-order questions that are difficult: Exactly who should have the power to protect the right to cast a ballot? Who should decide which trade-offs to make?[25] If too much power is

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the nation, everything would be fine. Alas, it's not that easy. I like soaring rhetoric as much as the next person … well almost as much. But sooner or later one must get down the job of conducting fair and free elections, which requires reconciling oneself to the imperfect world we live in.

William Blackstone famously said, "it is better that ten guilty persons escape than that one innocent suffer." He is did not say that is better for 100,000 guilty persons go free rather than one innocent suffer imprisonment, and I would venture to say he would not have been willing to put such a large thumb on the side of innocence. What is the right tradeoff between the inclusion of eligible voters and the exclusion of fraudulent votes? I don't know the answer to that question. But at least I acknowledge that it's a real question.

My colleagues are apparently of the view that serious election fraud is fairly rare in this country. And I am inclined to believe they are right about that. May it ever be so. But as Americans we are lucky in this respect. Fraudulent elections in other parts of the globe are the rule rather than the exception. See, e.g., Bernd Beber & Alexander Scacco, *The Devil Is in the Digits: Evidence that Iran's Election Was Rigged*, Washington Post (June 20, 2009); Dany Bahar, *A Fraudulent Election Means Even More Problems for Venezuela*, Brookings Institute Podcast (May 22, 2018); Kim Sengupta, *Zimbabwe Elections: Opposition Politician Arrested Amid Allegations of Voting Fraud: Senior Official in MDC is Seeking Political Asylum, After Claiming Poll Results Were Rigged*, The Independent (August 8, 2017).

Moreover, election fraud was once common here too. See, e.g., John F. Reynolds, *A Symbiotic Relationship: Vote Fraud and Electoral Reform in the Gilded Age*, 17 Soc. Sci. Hist. 227 (1993); Denis Tilden Lynch, "Boss" Tweed: The Story of a Grim Generation (2017); Pamela Colloff, *What Happened to the Ballot Box that Saved Lyndon Johnson's Career?*, Texas Monthly (November 1998); Robert A. Caro, Means of Ascent: The Years of Lyndon Johnson (1990); T. Harry Williams, Huey Long (1969); Mike Royko, Boss: Richard J. Daley of Chicago (1971).

It feels like my colleagues want it both ways. On the one hand, even though the racially-motivated voter exclusion and voter intimidation they fear is now rare, they refer back to a period before some of them were born as proof we must be ever-vigilant. And, yes, we must. But, on the other hand, they scoff at the notion that we must be vigilant about election fraud too, even though that is also part of our history. And like racism, election corruption has never been entirely eradicated.

[24] *See, e.g.*, *Four in Five Americans Support Voter ID, Early Voting*, Gallup Poll (August 22, 2016), https://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx.

[25] The North Carolina ID case may be an example of how partisanship may, whether consciously or unconsciously, affect one's perceptions. The North Carolina legislature is majority Republican and was accused by the plaintiffs in that case (led by the North Carolina NAACP) of targeting racial and ethnic minorities. Okay, maybe. Since I have not carefully read through the record in that case, I am not in a good position to judge.

Here's what I can say: The trial judge (appointed by George W. Bush) found no such intent. The appellate judges (two appointed by Barack Obama and one by William Jefferson Clinton), not only found such an intent, they stated that the statute targeted racial and ethnic minorities "with almost surgical precision." None of that is comforting. The Supreme Court declined to take the case and hence neither agreed not disagreed with the decision of the Court of Appeals. In retrospect, I am glad the Supreme Court denied the petition for certiorari. If it had taken the case and issued one of the 5-4 decisions for which it has become famous, reversing the Court of Appeals, it would have meant that *every* judge involved in the case voted along party lines. The issue isn't worth the appearance of that kind of partisanship.

But here is what I find troubling about the case: While I do not think I or my colleagues have enough information to second-guess the differing results in the case, I do know enough to say the Court of Appeals is engaged in serious hyperbole in saying that the statute targeted minorities "with almost surgical precision." It's a highly quotable turn of phrase, but it happens not to be true. Even the NAACP's own expert witness (whose numbers I believe were

concentrated in the hands of a single authority (whether it is the federal government or a local registrar, an executive officer or a judicial one), abuses are sure to follow.[26] This, I believe, is one of the shortcomings of this report. The assumption lurking behind some of its conclusions is that all would be well if the federal government (in the form of the Voting Section of the Civil Rights Division of the U.S. Department of Justice) were the primary arbiter of what is appropriate and what is not.[27] But is it true? Are state and local authorities really the only ones that act out of partisan or other inappropriate motives? What if it's also the attorneys at the Voting Section of the Civil Rights Division who need to be watched carefully?[28]

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inflated) estimated that African-American voters without IDs number about 6% while white voters without ID number about 2.5%. If that's considered anything close to surgical precision in the Fourth Circuit, I intend to make sure my loved ones never undergo surgery there.

Note that this report quotes the "almost surgical precision" language three times and paraphrases it once and that three of the Commissioners appointed by Democrats quote it in their Commissioners' statements Note also that only Commissioners appointed by Democrats voted to approve this report See *supra* at note 1.

[26] Some have argued that Congress should pass legislation re-establishing preclearance at least for selected jurisdictions they regard as high-risk for efforts to disfranchise minority groups. They argue (not irrationally) that state and local governments, out of partisan motives, may in the future make changes in election procedures that unreasonably interfere with the right to vote, and challenging those changes in court in the traditional manner will sometimes be unwieldy and time consuming. Preclearance would help eliminate that problem Fine That's true. *But what if it is the Department of Justice's Civil Rights Division or other federal institutions that are acting unreasonably out of partisan motives? That is not an irrational fear either* See infra at note 29 (discussing the Civil Rights Division's effort to overrule the voters of Kinston, North Carolina, who had voted by a ratio of 2 to 1 to make their local elections non-partisan). Just as challenging a state or local government's decision in court can be unwieldy and time consuming, so too can challenging an action of the Civil Rights Division.

[27] The various statements of my colleagues also contain a touch of this. For example, Commissioner Narasaki writes, "It is abundantly clear that . . the right to a fair and equal vote ... is under siege in several states and jurisdictions, and given that reality *state sovereignty is not an inviolable right* " (Italics added). In the same vein, Chair Lhamon writes, "Americans need strong and effective *federal* protections to guarantee that ours is a real democracy." (Italics added.) (Note that both of them are long-time inside-the-Beltway denizens) The tragedy here is that my colleagues don't seem to understand that many Americans trust the attorneys in the Voting Section of the Civil Rights Division at the U.S. Department of Justice even less than they trust the politicians and bureaucrats of their own state and locality. And it's not just because the attorneys in the Voting Section are overwhelmingly left of center. See infra at note 28. It is also because those attorneys have proven themselves unwilling to protect Americans from voter fraud and voter intimidation in an even-handed manner. See Statement of Commissioner Gail Heriot in U.S Commission on Civil Rights, Race Neutral Enforcement of the Law?: DOJ and the New Black Panther Party Litigation 125 (2010)(discussing United States v. New Black Panther Party and United States v. Brown, 494 F. Supp 2d 440 (S D. Miss. 2007), aff'd, 561 F.3d 420 (5th Cir. 2009)).

[28] These days I don't think anyone would bother to deny that career employees of the federal bureaucracy—particularly at the higher levels—tend to be disproportionately ideologically left of center. See, e.g., Mike Causey, *Are Feds Democrats or Republicans? Follow the Money Trail!*, Federal News Radio (April 3, 2017), https://federalnewsradio.com/mike-causey-federal-report/2017/04/are-feds-democrats-or-republicans-follow-the-money-trail/. It is also well-established that high-level career employees tend to self-select into agencies whose mission they regard as compatible with their ideological perspective. Consequently, agencies like the National Labor Relations Board have particularly high concentrations of left-of-center career employees while the Department of Defense has particularly high concentrations of right-of-center employees. See Joshua D Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States The Ideology of Agencies, Presidents and Congress*, 56 Am. J. Polit. Sci. 341 (2011).

I believe that, in the end, any search for a single, disinterested institution that can always be trusted to protect us all from the abuses of others will be in vain.[29] Ambition must be made to counteract ambition.[30] There is no other way.

Finally, there is the problem that no Washington insider likes to mention: As a nation, we lavish resources on protecting the right to cast a ballot and making it as convenient as possible. And, in general, that is a good thing. This report itself is an example of that concern. But we need to keep in mind why are we doing this. If the point is to choose our policymakers by democratic means (and surely that is the point), the system isn't working nearly as well as it should.[31] Increasingly, real policy is made not by elected officials, but by bureaucrats who are virtually unaccountable to

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I have no data showing the political or ideological affiliations of *all* attorneys in Voting Section of the Civil Rights Division of the Department of Justice. On the other hand, Hans von Spakovsky has reported that he obtained through the Freedom of Information Act the resumes of the 16 attorneys hired into the Voting Section during the first several years of the Obama Administration. His description of their resumes made it clear that they were decidedly left of center, one and all. Some were well left of center. *See* Hans von Spakovsky, Every Single One: The Politicized Hiring of Eric Holder's Voting Section (August 15, 2011), https://www.heritage.org/civil-society/commentary/every-single-one-the-politicized-hiring-eric-holders-voting-section.
Moreover, research conducted at my direction found that other civil rights agencies (for which we do have figures) show extraordinary one-sidedness in partisan or ideological balance. For example, of the 844 entries going back to 1991 for political donors who listed "EEOC" as their employer on Opensecrets.org , 38 (4.5%) went to Republicans or Republican or conservative affiliated groups. All of the others (95.5%) went to Democrats or Democratic or liberal/progressive affiliated groups. (No one listed "Equal Employment Opportunity Commission" as employer) Similarly, I directed my staff to determine who, from a list of 565 employees of the Office for Civil Rights at the U.S. Department of Education, had made political contributions recorded on Opensecrets.org. Of the 43 donors found, 41 (95.3%) had given to Democrats or Democratic or liberal/progressive affiliated groups, and 2 (4.7%) had given to Republicans or Republican or conservative affiliated groups. There are few, if any, state legislatures as one-sided.
Especially given the von Spakovsky data, it would be surprising if the Voting Section at the Civil Rights Division were significantly different from OCR or the EEOC. See also Ralph R. Smith, *Which Party Receives the Most in Political Contributions from Federal Employees?*, FedSmith.com: For the Informed Fed (May 19, 2016)(finding that $137,603 worth of political contributions are made to Democrats by Department of Justice employees, while $14,939 worth of political contributions are made to Republicans), https://www.fedsmith.com/2016/05/19/which-party-receives-the-most-in-political-contributions-from-federal-employees/.

[29] Partisan and other inappropriate motives, sometimes conscious, but more often unconscious, exist at all levels of government. A case worth examining in this regard involves Kinston, North Carolina. Kinston is a town of less than 25,000 residents in the eastern part of the state. African Americans make up almost two thirds of its population. Voters in Kinston voted by a 2 to 1 margin to have its local elections conducted in a non-partisan manner. There is nothing unusual about this; many local jurisdictions conduct elections without listing on the ballot the party affiliations (if any) of the candidates. It is as common as dust
As common as it is, in 2009, the Obama-Era Civil Rights Division refused to tolerate it. Put differently, it refused to allow the voters of Kinston, very much including the African-American voters, the dignity of deciding how to conduct their own local elections. It insisted the words "DEMOCRAT" or "REPUBLICAN" appear on the ballot for local officials. It is hard not to wonder whether the Civil Rights Division was motivated by a desire to defend the right of African Americans to vote (on everything except whether their elections will be non-partisan) or a desire to benefit the Democratic Party.

[30] Federalist 51.

[31] See generally Philip Hamburger, Is Administrative Law Unlawful? (2015). For a view that the unaccountable career bureaucracy is a good thing, see Eugene Robinson, *God Bless the "Deep State,"* WASH. POST (July 19, 2018).

voters.[32] While concern over the right to cast a ballot and the integrity of that ballot is certainly a good thing, we need to spare a thought for elections' raison d'être too. Are we seeing the level of self-governance to which a free people should be entitled? It is getting increasingly difficult to answer that question positively.[33] And surely those who argue most energetically for federal agencies to supervise elections are often the ones who argue federal agencies to supervise our daily lives.

A FEW THOUGHTS ON SAFEGUARDING THE RIGHT TO CAST A BALLOT (AS WELL AS OTHER RIGHTS)

At the individual level, the right to vote can seem very unimportant. It is rare—to the point of being almost unheard of—for an election to be decided by a single vote. On Election Day, many Americans choose not to exercise their right to vote. Some view themselves as insufficiently informed about the candidates to cast a vote they can be proud of, and it is not uncommon for them to be right about that. Others find it distasteful or simply a waste of their time. They have jobs to do, families to tend to, and other activities that bring purpose to their lives.

But those who worry that this will cause basic voting rights to go undefended may be worrying unnecessarily. Unlike with some other rights, with voting rights, there are well-organized third parties with a strong and direct incentive to prevent abuse. Elected officials and political parties are the most obvious examples.[34] Their jobs depend on elections, and they are not about to let the voting strength of their political coalitions be reduced without a fight. Indeed, if anything, elected officials may be accused of spending a disproportionate amount of their time worrying about voting issues (and hence about their own re-election) to the detriment of issues that affect their constituents' lives in more direct ways.[35]

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[32] This, of course, was a major tenet of the Progressive Movement: Out with elected mayors, in with city managers with "expertise" in administration; out with the election of local officials of many kinds, in with the "short ballot;" out with Presidential appointees to do the work of the executive branch, in with "civil servants"; out with separation of powers, in with delegation of rulemaking and adjudicatory authority to administrative agencies staffed with career bureaucrats, out with "politics," in with "disinterested experts" who theoretically have the best interests of the country in mind.

[33] For the lighter side of this issue, see the BBC's *Yes, Minister* or its sequel *Yes, Prime Minister*. See https://en.wikipedia.org/wiki/Yes_Minister. Yes, I can still laugh at this problem now and then, but it's getting harder as time goes on.

[34] Elected officials and political parties are not the only ones with a motive to defend voting rights. There are many others, probably too many, whose fortunes rise and fall according to who occupies the White House, the governor's mansion, or the mayor's office or which party controls the legislative branch. That can include political appointees, aspiring political appointees, public contractors, aspiring public contractors, lobbyists, lawyers, businesses, unions and many others. All of them have a strong and direct incentive to ensure that members of their political coalition can vote. In addition, there are those whose interest in public policy is intense despite its having little direct effect on their lives or fortunes (though they may be rarer than we would all like to think)

[35] One way in which the interests of elected officials (as well as identity politics organizations) may diverge from their rank-and-file voters can be seen in the area of "vote dilution." In theory, vote dilution can mean very different things. First, it can refer to apportionment such that much larger numbers of voters live in one district than in another This has been prohibited since Reynolds v. Sims, 377 U.S. 533 (1964) and is rarely a genuine issue today.

To be sure, elected officials and political parties also have an incentive to make sure that members of the opposing political coalition *cannot* vote or that supporters of their coalition who are not entitled to vote get to do so anyway.[36] But one important limitation on such abuses is the American two-party system, which I believe is significantly better for this purpose than a multi-party system. There is almost always a large, well-financed coalition willing to push back against threats of disfranchisement (with African-American disfranchisement of the late 19th and early 20th centuries as the major exception). [37] Alas, the same cannot be said for many of our other rights.

Second (and more relevant to the present discussion), it can refer to apportionment such that the members of a particular group are distributed over several districts, rather than concentrated in one or more districts where they can form a majority. A variation on the latter theme can be this: It is also considered vote dilution to concentrate the votes of the minority such their votes are more than sufficient to elect the candidate of their choice (and hence votes are wasted that could have gone towards influencing elections in other districts).

Here is the problem with the second form of vote dilution: For rank-and-file voters in a particular minority group, it is seldom clear whether they will be better off having 10% of the vote in six of ten districts on the city council or 60% of the vote in one of ten districts. The 10% may not be enough of allow the group members to elect the candidate of their dreams, but it will sometimes be enough, through adept coalition building, to defeat the candidates of their nightmares. It is not obvious whether it is better for them to have six city council members (and hence a majority) who at least are not hostile to their interests or one city council member who can voice their position at city council meetings and attempt to drive deals with the other members. It may depend on the issues that come before the council, which are never completely foreseeable. It may also depend on the coalition-building talents of the particular person elected, which are difficult to gauge prior to that person's election. On the other hand (and here's the rub), the elected official or aspiring elected official from that minority group's protected district may flatter himself or herself into believing that the choice is indeed clear.

[36] Commissioner Narasaki makes a similar point when she writes that "people willing to suppress votes to stay in power will always be seeking new ways to accomplish that goal." The point she doesn't make, but which is also valid, is that people willing to engage in election fraud to stay in power will always be seeking new ways to accomplish *that* goal. See United States v Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007), aff'd, 561 F.3d 420 (5th Cir. 2009). Again, we should avoid the temptation to believe that federal authorities are the only good guys and that state authorities cannot possibly be engaged in an effort to thwart local fraudsters when they say that is their intent.

[37] When elected officials from both major parties conspire together for the benefit of elected officials qua elected officials (i e. when they act in a "bipartisan manner"), the protections offered by the two-party system break down. That's when the voters are in real trouble. See Jean Merl, State's *Redrawn Congressional Districts Protect Incumbents*, L.A. Times (February 9, 2002)("In a rare burst of bipartisan cooperation, legislators did their best to make all districts either safely Democratic or safely Republican; thus they sharply curtailed the likelihood of competition this year"). Even so, the danger isn't that individual voters will be "disfranchised" in the strict sense It's something more dangerous, since it may slip the notice of average voters, and even if it does not, punishing both parties is not an easy task.

This may be an example of the old joke: There are two parties in the American political system: The Stupid Party and the Evil Party. Now and then they get together and do something that is both stupid and evil. This is known as "bipartisanship "

In no other area of law and policy is there a greater incentive for elected officials to advocate for special interest legislation. The special interest is, of course, they themselves—the class of incumbent politicians. See, e.g., The Bipartisan Campaign Reform Act of 2002, Pub.L. 107-155, 116 Stat. 81, enacted March 27, 2002, popularly known as the McCain-Feingold Act, (generally making it more difficult for incumbent politicians to be challenged). See also Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)(holding unconstitutional on First Amendment grounds the section of McCain-Feingold that made it illegal for a conservative non-profit to publicly show a film that was critical of Hillary Clinton shortly before the Presidential primaries in which she was a candidate).

One reason that large disfranchisements of existing voters have been extremely rare in history (again with one major exception) is the obvious one: *Voters don't like to be disfranchised.*[38] And as Ralph Waldo Emerson taught us, "When you strike at a king, you must kill him." I have sometimes told the story of the lead-in to Wyoming's entrance into the Union to my law students. Unlike any state at the time, the Wyoming Territory gave women the right to vote. Fearing that Wyoming's example would cause the women of other states to demand the vote, Congress initially balked at Wyoming's application for statehood, telling the Wyoming territorial legislature that it must disfranchise women first. But the Wyoming legislators stood their ground and cabled back to Congressional leaders, "We will remain out of the Union one hundred years rather than come in without the women." Eventually Congress relented.

I have looked at that story in the past as one in which the legislators stuck to their principles—that Wyoming women were equal partners in the settlement of the territory and that it would be morally wrong to deny them their right to participate. And I hope and trust that this was indeed the case for at least a number of the legislators. But, upon reflection, there's another way to look at the situation: Women already had the vote. The first legislator to suggest that he might be willing to disfranchise women had better hope and pray that his colleagues follow suit and that women are indeed disfranchised. Otherwise he will likely be angrily voted out of office at the next opportunity.[39]

Almost no one argues that there is any significant chance that the African-American Disfranchisement will be repeated in the lifetime of anyone around today. The catastrophic circumstances in the South at that time have virtually no chance of recurring. We have plenty of problems to deal with. That isn't one of them.

That doesn't mean that smaller interferences with the right to vote won't happen. There may even be lots of them.[40] Indeed, there will probably be lots of

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[38] Some states during the African-American Disfranchisement Movement considered the idea of continuing to allow African-American men and illiterate white men to vote, but allowing literate women and/or women of property (but not other women) to vote. Among the states to consider this approach were Alabama and Mississippi. See Michael Perman, Struggle for Mastery: Disfranchisement in the South 1888-1908 (2001). It was believed such an approach would cause less resentment than disfranchisement.

[39] It's important to understand just how unusual the disfranchisement of a major group is, not just in American history, but in the history of Western democracy. Political scientist Richard Valelly wrote:

> No major social group in Western history, other than African Americans, ever entered the electorate of an established democracy and then was extruded by nominally democratic means such as constitutional conventions and ballot referenda, forcing that group to start all over again. Disenfranchisements certainly took place in other nations, for example, in France, which experienced several during the nineteenth century. But such events occurred when the type of regime changed, not under formally democratic conditions. In Europe, Latin America, and elsewhere, liberal democracies never sponsored disfranchisement. Once previously excluded social groups came into any established democratic system, they stayed in.

Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement 2 (2004).

[40] There will also be lots of false alarms. Some of the cases mentioned by Chair Lhamon, in my opinion at least, are not quite what they appear to be on the surface. For example, she originally stated that "[i]n New York just three

years ago baseless racially identifiable citizenship challenges prevented Americans from voting" (in response to my statement, she has since changed "prevented" to "impeded") and cites to the New York State Attorney General's press release. But looking at a press release alone is not always the best way to understand what is baseless. In this case, accounts in the media present a different side of things: In Deerpark, New York, a town of a little under 8000, Town Supervisor Gary Spears filed a challenge to voter registrations by 30 persons with Chinese names. Spears said that the fact that all 30 individuals wrote down the same address raised red flags for him. It turns out that all of them are students at a small college, Fei Tian College, which is affiliated with the Falun Gong movement. While the residence is listed as a three-bedroom, single-family home in the town tax records, it is apparently functioning as a dormitory at this small college. Some of the registrants also apparently showed up on Facebook as having addresses in California. Only two registrations were cancelled. But as I understand the matter from news media accounts, they were added back to Deerpark's voting rolls before any election had passed, meaning that nobody was ever actually denied the right to vote. See, e.g., Holly Kellum, Voting Registration of 30 Deerpark Citizens Cleared, The Epoch Times (October 14, 2015), https://www.theepochtimes.com/voting-registration-of-30-deerpark-citizens-cleared_1877222.html; Chris Fuchs, Chinese-American Students File Lawsuit Alleging Voter Intimidation, NBC News (October 27, 2015), https://www.nbcnews.com/news/asian-america/chinese-american-students-file-lawsuit-alleging-voter-intimidation-n452166. All in all, this seems to be a case of a reasonable challenge that turned out to be unfounded. No harm was done. It is one of life's everyday misunderstandings blown out of proportion by our current polarized political culture.

Chair Lhamon also states that "[i]n North Carolina we heard testimony about a voter over 90 years of age who had to make eleven trips to different state agencies and institutions to try and obtain the correct paperwork because her voter registration card did not match the name on her license."

That may sound terrible, but the real story turns out to be not so terrible. According to the transcript, the voter in question was then-92-year-old Rosanell Eaton, who was also one of the named plaintiffs in the North Carolina NAACP v. McCrory litigation. Mrs. Eaton was a heroine of the Civil Rights Movement. As a young woman in 1939, she was among the first African Americans to register in her county. To do so, she had to recite the preamble to the Constitution as proof of her literacy. She went on to be an assistant poll worker for 40 years and was responsible for registering more than 4000 people to vote.

It is telling that to challenge North Carolina's voter ID law, the North Carolina NAACP had to use a plaintiff who actually did have an ID, in this case a driver's license. The problem was simply a name discrepancy. Her driver's license said "Rosanell Eaton" while her voter registration said "Rosanell Johnson Eaton," which she apparently assumed would be a problem. Mrs. Eaton sued well before the North Carolina voter ID law had gone into effect (and hence before the procedures had been worked out). But in any event, it was clear right from the beginning that, she easily could have voted by absentee ballot even without an ID. Alternatively, if she preferred to vote in person, the procedure for reconciling one's voter registration to one's driver's license (as opposed to the other way around) was easy and would have taken only five minutes. Even the procedure for reconciling one's driver's license to one's voter registration is much easier than the eleven trips she and her daughter apparently took. See Sterling Beard, *The Left's Faux Martyr*, National Review Online (August 19, 2013), https://www.nationalreview.com/2013/08/lefts-faux-martyr-sterling-beard/.

Finally, Chair Lhamon points to a Georgia legislator whom she describes as having "openly stated that he does not want early voting because of the type of people—voters of color—who will use it." I agree with Chair Lhamon that parts of the statement of the legislator in question were problematic. But he appears to be motivated by purely partisan concerns, not race. He believed that early voting opportunities are disproportionately being located within easy distance of African-American mega-churches (whose members disproportionately vote Democratic) and wrongly believed this to be a violation of "the accepted principle of separation of church and state." That's silly. His main grievance appears to be that early voting opportunities within easy distance of large numbers of Republican voters were rarer (and hence election officials were not acting in a non-partisan manner). If he is right on that, he has a legitimate point. See Fran Millar, Interim DeKalb CEO Honeymoon Over, http://www.thecrier.net/our_columnists/article_a5bd6f90-37c0-11e4-a3e0-0019bb2963f4.html.

them.[41] But I take some solace in the fact that, as a nation, we are better prepared to deal with voting rights issues than we are with issues arising out of a number of our

[41] Commissioner Adegbile points out that "successful" §2 cases (as defined in the staff-generated part of this report) have quadrupled in the years since *Shelby County* when compared to the same number of years immediately preceding that case. Part of this may be just timing. The census is always taken at the beginning of the decade. The work of redistricting takes place about two years later, so litigation over re-districting tends to be decided in 2013-2014 or so. But I suspect that he is right that the number of §2 challenges has grown or at least that it will grow. That should be expected. The upshot of *Shelby County* was that, unless Congress legislates further, the old preclearance system would be replaced by §2 litigation as the dominant method for dealing with these issues in all states instead of just in non-covered jurisdictions. That is not troubling in itself.

The important question is whether §2 litigation is somehow less effective at dealing with violations of the law than was the preclearance method in those jurisdictions where preclearance was previously required. Looking at the twenty-three §2 cases classified in this report as "successful," I am not yet convinced that it is Eleven out of the total took place in jurisdictions that weren't covered in the first place, so the change in procedure wrought by *Shelby County* did not affect them. (Note that this lends some credence to the Supreme Court's conclusion that Congress's use of a 1975-vintage formula for determining which jurisdictions are high-risk for violations of the law was unfairly out of date Moreover, it is evidence that §2 litigation has been sufficient to control abuses. If it hadn't been, there would have been massive pressure to extend preclearance nationwide.)

The fear of those who would like to see preclearance restored was that in the formerly covered jurisdictions, §2 lawsuits would be too cumbersome a method for derailing proposals that violate the law. Those proposals would therefore be implemented before a court had an opportunity to make a decision and act But that doesn't seem to have happened. According to the chart on pages 275-77, of the 12 cases in covered jurisdictions, five resulted in preliminary injunctions (a standard tool for preventing likely violations that threaten to cause irreparable harm before they can be fully litigated).

I took a look at the remaining seven (i.e. the ones in which, according to the chart, no preliminary injunction had issued) to see if they involved a proposal that would have failed preclearance, but instead got implemented before the court had a chance to decide what to do. These cases are a jumble, and I do not claim to be an expert on their sometimes-complicated histories In some cases it's not even possible, based on the information available to me, to confirm whether the chart is right that no preliminary injunction was granted Nevertheless, it is not certain that any are examples of what *Shelby County* critics feared—cases where proposals that *would have been derailed by preclearance* instead got implemented before a court had time to make a decision and act (although Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S D. Tex. 2017), might be such a case). I discuss some of them infra at note 42.

other rights.[42] Voting issues seldom slip by unnoticed.[43]

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[42] Post-Shelby County cases in which the lack of the former preclearance procedures likely led to the implementation of an illegal voting procedure are at worst rare. According to the Report's chart on pages 221-4, there are seven "successful" §2 cases from formerly preclearance jurisdictions where no preliminary injunction issued. But that doesn't necessarily mean an illegal voting procedure was implemented that would have been prevented by a preclearance process. For example, in Benavidez v. Irving School District, No. 3:2013cv00087 (N.D. Tex. 2014), a continuing duty to preclear would not have yielded a different result. How do I know that? Because it was precleared. The plaintiff brought the case in spite of that and apparently won. And in Terrebonne Parish NAACP v. Jindal, 3:14-CV-00069-JJB-EWD (M.D. La. August 17, 2017), a preclearance process would not have changed things, since defendants had not changed election procedures in a way that would have triggered that process. Instead, plaintiffs were arguing that the defendants should change procedures that had been in place a long time.

Of the cases I was able to examine, Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017), may come the closest to being what preclearance supporters fear, see *supra* at note 41. No preliminary injunction appears to have issued there, so the City of Pasadena's re-districting plan for its city council went into effect for the 2015 election before being permanently enjoined for future elections by the court in 2016. But it appears that no preliminary injunction was requested, and nothing I found in the record explains why.

One thing we do know is that there were facts in dispute in *Patino* (since summary judgment was denied and a trial on the merits occurred). It is therefore possible that a preliminary injunction was not asked for, because the plaintiffs knew that until they had taken discovery and proven their case at a full trial, the balance of equities would be viewed by the court as not weighing in their favor.

The leads to the question whether it is a good thing or a bad thing that sometimes temporary restraining orders and/or preliminary injunctions won't issue in cases where the plaintiff is ultimately successful in proving his or her entitlement to a permanent injunction. That in turn becomes a question of the relative importance of the two different kinds of errors that can occur in the context of a particular case. It's not clear that the failure to grant a preliminary injunction that in hindsight *should* have been granted is always a more serious error than the issuance of a preliminary injunction that in hindsight *should not* have been granted. Sometimes standing in the way of a change to election procedures instituted by democratically elected officials on the ground that it is *possible*, but not especially likely, that the change will eventually be shown to be unlawful will be precisely the wrong thing to do If so, the §2 litigation method may be superior to the preclearance method, because the courts are in a somewhat better position to balance the dangers of Type I and Type II errors. With preclearance, the Civil Rights Division ordinarily will either preclear or not preclear. The option of allowing a change to be implemented and then revoking preclearance after it has had the opportunity to consider the matter at greater length does not fit in well with the concept of preclearance. Unlike §2 litigation with its time-honored distinction among temporary restraining orders, preliminary injunctions, and permanent injunctions, the preclearance process is not structured to give the Civil Rights Division three distinct bites at the apple.

Note that in the case of *Patino*, the court ordered that in the future the City of Pasadena will be subject to preclearance. This is an option that courts have with jurisdictions that have violated the law. Under §3, they can be "bailed in" to the preclearance system. *Patino v City of Pasadena*, 230 F. Supp. 3d 667, 729-30 (S.D. Tex. 2017). The defendant in Allen v City of Evergreen, 2014 WL 12607819 (S.D. Ala. 2014), was similarly "bailed in" under §3 It's important to remember that Shelby County did not do away with the preclearance process. If a court designates a jurisdiction under §3, that jurisdiction will be subject to preclearance.

For a discussion of Perez v. Abbott and the special case where the status quo ante is not an option, see infra at note 43.

[43] In cases in which the status quo ante is not an option, §2 litigation may be the superior method of dealing with illegal voting procedures. Perez v. Abbott may be a useful example.

The supposed virtue of the preclearance approach is that it prevents state and local governments from implementing a change in election procedure until that change has been thoroughly considered and approved. If the change doesn't

Consider, for example, *Shelby County v. Holder*. In that case, 48 amici curiae briefs were filed. Amici included by John Nix et al.; the Judicial Education Project; the Justice and Freedom Fund; the Mountain States Legal Foundation; the Southeastern Legal Foundation; the National Black Chamber of Commerce; Arizona; Georgia; South Carolina; South Dakota; the Pacific Legal Foundation; the Landmark Legal Foundation; Hans von Spakovsky, J. Christian Adams, Clint Bolick, Roger Clegg, Charles Cooper, Robert Driscoll, William Bradford Reynolds, Bradley Schlozman, the Abraham Lincoln Institute for Public Policy Research, the Center for Constitutional Jurisprudence, the Cato Institute, the State of Texas, Project 21, Alabama, Merced County, California, Alaska, American Unity Legal Defense Fund, Professor Patricia Broussard, National Bar Association, Rep. John Lewis, Rep. Frank Sensenbrenner, Dick Thornburgh,

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get approved in time for an election, its proponent must default to the status quo ante. (See *supra* at note 42 for my thoughts on whether this is always the best approach.)

One of the problems with this approach is that sometimes the status quo ante is unworkable. So it was with Texas in *Perez v Abbott* (Congressional re-districting case). After the 2010 census, Texas had been allotted four more seats in the U S. House of Representatives. There was no way it could simply default to the re-districting map of the previous decade if its proposal failed preclearance (as it eventually did, just a bit before *Shelby County*).

Here's my understanding of what happened: After the 2010 census, the Texas legislature passed two newly re-districted maps, both of which became the subject of lengthy litigation—one for the U.S. House of Representatives and one for the Texas House of Representatives. Texas opted to submit them for preclearance to the U.S. District Court for the District of Columbia (as the Voting Rights Act permits it to do) rather than to the U.S. Department of Justice. See Carrie Johnson, Could Texas' Redistricting Leave Latinos Behind?, National Public Radio (September 19, 2011)(suggesting that Texas chose to submit its plans to the U.S. District Court for the District of Columbia, because it was leery of the Department of Justice's possible political motives).

But with the primary season fast approaching, no decision on preclearance had been forthcoming, and Texas therefore could not legally implement its plan. Things were starting to look bad.Luckily for Texas voters, parallel §2 litigation had been filed in federal court in Texas. See Complaint in Perez v. Texas, No. 5:11-CV-00360-OLG-JES-XR (W.D. Tex. filed May 9, 2011), and a three-judge panel had been convened. See 28 U. S. C. §2284. With the help of the parties, *that* court (not the U.S.D.C.D.C.) begun to devise (after one false start, see Perry v. Perez, 565 U.S. 388 (2012)) substitute plans. Ultimately, the U.S. District Court for the District of Columbia declined to preclear the original Texas plan. But was the §2 court that saved the day by devising the alternative map, not the preclearance court. That alternative map was implemented in time for the 2012 elections.

It seems to me that having the §2 court design the alternative will usually be a better method of dealing with the cases where the status quo ante is not an option. Nobody should want a court to be deciding how to re-district a state. It is an inherently political decision that, when possible, should be left to politicians, acting within the law But sometimes judicial action may be necessary. I suspect most people would prefer a court to the lawyers in the Voting Section of the Civil Rights Division, especially given the lack of political and/or ideological diversity of the Voting Section (as discussed *supra* at note 28), courts will likely be seen as more legitimate. Spreading the responsibility out to federal courts across the country rather than concentrating that responsibility in just one court—the U.S. District Court for the District of Columbia—makes sense too. There is a season for this type of litigation. It comes once every ten years after the census. It is impossible to predict how many cases will reach litigation, so it is impossible for the U.S. District Court for the District of Columbia to gear up each decade to handle the cases. In addition, if a single federal court is seen as the arbiter of all such cases, judgeships on that court will be especially controversial and the court will be subject to special scrutiny and suspicions of political bias.

The litigation over Texas's Congressional re-districting continued for years after the 2012 elections. Eventually, the Texas legislature adopted (with only a few modifications) the re-districting plans the §2 court had devised. On March 10, 2017, however, the §2 court decided that the legislature's actions were "tainted" by its earlier actions and that further adjustments would therefore be necessary. Perez v. Abbott, No. 5:11-CV-00360-OLG-JES-XR (W.D. Tex. March 10, 2017). That decision was reversed by the Supreme Court in connection with the Texas map of Congressional districts. Perez v. Abbott, ___ U.S. ___ (June 25, 2018). That reversal occurred only one day before the chart in the staff-generated portion of this Report was adopted by the Commission. The reversal was therefore not reflected in that chart.

Brennan Center for Justice, Sen. Majority Leader Harry Reid, Veterans of the Mississippi Civil Rights Movement, Gabriel Chin, the Constitutional Accountability Center, Professor Richard Engstrom, The Leadership Conference on Civil and Human Rights and the Leadership Conference on Civil and Human Rights Education Fund, the Hon. Marcia Fudge, Professor Kareem Crayton et al., Jurisdictions that Have Bailed Out, the National Lawyers Guild, the American Bar Association, National Latino Organizations, Section 5 Litigation Intervenors, the Alabama Black Legislative Caucus and the Alabama Association of Black County Officials, New York, Senator C. Bradley Hutto, Navajo Nation et al., Joaquin Avila, Asian American public interest groups; a group of historians and social scientists; Ellen Katz and the Voting Rights Initiative; the Alaska Federation of Natives and Alaska Natives and Tribes; and the City of New York.

Similarly, in *Crawford v. Marion County Board of Elections*, there were 41 amicus briefs. The individuals and organizations filing include Prof. Richard Hasen, the League of Women Voters of Indiana, the League of Women Voters in Indianapolis, Congressman Keith Ellison, the Electronic Privacy Information Center, the Asian American Legal Defense and Education Fund, Rock the Vote, the National Black Law Students Association, the National Black Graduate Students Association, the Feminist Majority Foundation, the Student Association for Voter Empowerment, Charles Ogletree and a group of historians and scholars; Christopher Elmendorf and Daniel Tokaji; AARP and the National Senior Citizens Law Center; the National Law Center on Homelessness and Poverty; the Lawyers Committee for Civil Rights Under Law; Service Employees International Union; the American Federation of State, County, and Municipal Employees; Common Cause; the Jewish Council for Public Affairs; the National Council for Jewish Women; NAACP Legal Defense and Education Fund; the Cyber Privacy Project; Privacy Journal; Privacy Activism; Liberty Coalition; the U.S. Bill of Rights Foundation; Robbin Stewart; ACORN; Dr. Frederic Schaeffer et al.; Senator Dianne Feinstein; Representative Zoe Lofgren; Representative Robert Brady; the Rutherford Institute; the Asian American Justice Center; the Asian Law Caucus; the Asian American Legal Center of Southern California; the Asian American Institute; R. Michael Alvarez; Lonna Rae Atkenson; Deila Bailey; Thad E. Hall; Andrew D. Martin; National Congress of American Indians; Navajo Nation; Agnes Laughter; Brennan Center for Justice; Demos; Lorraine C. Minnite; Project Vote; People for the American Way Foundation; Pacific Legal Foundation; Karen Handel, then Georgia Secretary of State; Erwin Chemerinsky; Mountain States Legal Foundation; Doris Anne Sadler; Center for Equal Opportunity; Project 21; Senator Mitch McConnell; American Unity Legal Defense; Republican National Committee; Lawyers Democracy Fund; Texas, Alabama, Colorado, Hawaii, Michigan, Nebraska, Puerto Rico, South Dakota; Washington Legal Foundation; Evergreen Freedom Foundation; American Civil Rights Union; and the Conservative Party of New York State.

That is not to say that justice will always be done. It won't be. No nation is ever that lucky in any area of the law. But relative to other rights and other areas of human endeavor, this one at least gets plenty of attention.[44] That's something. Instead, my point is only that I wish elected officials

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[44] At times there seems to be an over-sensitivity in this area, especially in efforts to combat voter intimidation, to go alongside occasional under-sensitivity. A few years ago, billboards with the message "Voter Fraud Is a Felony! Up to 3 ½ yrs & $10,000 fine" led to a hullaballoo in Cleveland. The large corporation that owned and leased the

(and others interested in elections) spent as much time worrying about issues that have affected people's lives more directly.

The voter ID cases are interesting in this regard. The various state laws at issue in those cases get a lot of attention, not just in the courts, but from the press and from various organizations that purport to represent the interests of groups thought to be less likely to have an ID. Yet photo IDs are necessary for lots of activities, not just voting. According to Ashe Schow of the Washington Examiner, they are necessary to open a bank account; to apply for food stamps; to apply for public assistance; to apply for Medicaid or Social Security; to apply for a job; to apply for unemployment benefits; to rent or buy a home; to purchase alcohol, to purchase cigarettes, to drive, buy, or rent a car; to get on an airplane; to get married; to purchase a gun; to adopt a pet; to rent a hotel room; to apply for a hunting license; to apply for a fishing license; to purchase nail polish at CVS, and purchase certain cold medicines.[45] To that list I can add my experience has been (and the GSA web site confirms) that to enter federal buildings one must often present a photo ID.

Given how common photo ID requirements are, one must wonder why all the objections seem to concern voter ID laws. No effort that I am aware of (and certainly nothing like the monumental effort that has been put into combating voter ID legislation) has been put into softening ID laws and policies like those above. Getting a job, renting a home, opening a bank account, and many other things on the list are more important to how an *individual* is able to live his or her life than the ability to vote.[46]

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billboards—Clear Channel Outdoor Holdings, Inc.—came under pressure from local politicians and pressure groups to remove them. Buckling under that pressure, it agreed to do so. As penance, it further agreed to allow their billboards to carry the message, "Voting is a right. Not a Crime!" for free. Patrick O'Donnell, Voter Fraud Billboards that Drew Complaints of Racism and Intimidation Will Come Down, Clear Channel Says, Cleveland Plain Dealer (October 20, 2012), https://www.cleveland.com/metro/index.ssf/2012/10/voter_fraud_billboards_that_dr.html. It is, of course, a fact that voter fraud is criminal. I do not know for certain how common it is, but obviously outcries like the one in Cleveland serve to cause ordinary citizens to conclude it may be more common than they thought. "Why else would local politicians throw such a fit over a billboard that accurately states what the law is?" many will likely wonder.

Is an accurate statement of this kind protected by the First Amendment? It is a question worth considering. The Supreme Court recently issued an opinion finding that a state law designed to protect against voter intimidation went too far toward discouraging free speech. See Minnesota Voters Alliance v. Mansky, ___ U.S. ___ (June 14, 2018)(holding that a Minnesota law prohibiting individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside a polling place is a violation of the First Amendment) What is curious is that some serious allegations of voter intimidation have drawn less attention from officials than the billboard case: Voter intimidation involving two men, standing shoulder-to-shoulder in front of the door to the polling place, wearing paramilitary clothing, hurling racial epithets at white voters and poll workers, with one wielding a night stick, caused far less concern at the Department of Justice almost a decade ago. See Statement of Commissioner Gail Heriot in U.S. Commission on Civil Rights, Race Neutral Enforcement of the Law?: DOJ and the New Black Panther Party Litigation 125 (2010).

[45] Ashe Schow, 24 Things That Require a Photo ID, Washington Examiner (August 14, 2013).

[46] Even the things that look small on paper can turn out to be very important once you know the facts. For example, migraine sufferers whose headaches are triggered by sinus congestion (like me) consider few things as important as obtaining the decongestant pseudoephedrine (in over-the-counter drugs like Sudafed). Yet under federal law, it is apparently available only on presentation of a photo ID.

Once more for emphasis: I am not arguing that the political classes should pay less attention to voting rights issues. Even if I were arguing that, I would be barking at the moon. In our Era of Big Government, so many believe themselves to have a huge stake in the outcome of elections, it seems unlikely that I or anyone else will be able to persuade them not to worry. I am simply hoping that we can duplicate some of the energy that goes into voting rights elsewhere.

The area that is most troubling right now is free expression. The ACLU, once the nation's premier public interest law firm, has quietly backed away from its traditional position favoring robust protections for unpopular speech. Wendy Kaminer, a former ACLU Board Member, recently wrote in the Wall Street Journal:

> [T]raditional free-speech values do not appeal to the ACLU's increasingly partisan progressive constituency—especially after the 2017 white-supremacist rally in Charlottesville. The Virginia ACLU affiliate rightly represented the rally's organizers when the city attempted to deny them a permit to assemble. Responding to intense post-Charlottesville criticism, last year the ACLU reconsidered its obligation to represent white-supremacist protesters.
>
> The 2018 guidelines claim that "the ACLU is committed to defending speech rights without regard to whether the views expressed are consistent with or opposed to the ACLU's core values, priorities and goals." But directly contradicting that assertion, they also cite as a reason to decline taking a free-speech case "the extent to which the speech may assist in advancing the goals of white supremacists *or others whose views are contrary to our values*."[47]

I am less optimistic about the nation's willingness to put effort into safeguarding the right to free expression than I am the right to vote. I hope I am worrying unnecessarily.

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[47] See Wendy Kaminer, The ACLU Retreats from Free Expression: The Organization Declares that Speech It Doesn't Like Can "Inflict Serious Harms" and "Impede Progress," Wall Street Journal (June 20, 2018)(emphasis added).

Mr. JOHNSON of Louisiana. Thank you.

Ms. Whitaker, can you walk us through how a generic case would be brought under Section 2 of the Voting Rights Act, and then what steps that would proceed?

Ms. WHITAKER. Yes, thank you, Ranking Member Johnson, for that question.

Section 2, as I said in my remarks, applies nationwide. It authorizes both the Federal Government and private citizens to challenge discriminatory voting practices. It specifically prohibits any State, as well as political subdivisions, from applying or imposing a voting qualification practice, standard, or procedure that results in the denial or the abridgment of the right to vote based on race, color, or membership in a language minority.

Furthermore, the statute provides that a violation will be established if based on the totality of the circumstances, electoral processes are not equally open to members of a racial or language minority group in that those members of that group do not have equal opportunity to elect—as compared to other members of the electorate to elect representatives of choice.

And as I mentioned, the vast majority of the case law with regard to Section 2 has been determined in the context of redistricting. But in recent years, we have some developing jurisprudence challenging other types of election laws.

Mr. JOHNSON of Louisiana. I have time for one more question for you. Why does the Supreme Court require Congress to create a substantial record of the need for any sort of Federal preclearance process before it upholds a Federal statute that requires States and localities to get permission from the Federal Government before their voting rule changes can go into effect? Why is that so important?

Ms. WHITAKER. Thank you, Ranking Member Johnson.

The key case here for Congress going forward is what the Court said in *Shelby County* v. *Holder* in 2013. In that case, the Court identified the principle of equal sovereignty among the States, and the Court said that to comply with that standard requires a showing that a statute's disparate geographic coverage has to be sufficiently related to the problem it targets.

According to the Court, as I mentioned earlier, it criticized the data, the outdated nature of the data that Congress had relied on in reauthorizing the coverage formula, criticizing it for stemming from the late 1960s and early 1970s.

Mr. JOHNSON of Louisiana. Thank you. I yield back.

Mr. COHEN. I now recognize the ranking member for the—the chairman of the committee for 5 minutes, Mr. Nadler.

Chairman NADLER. Thank you.

Ms. Whitaker, my recollection is that when we held hearings back in 2006, we established a record that of the need for Section 5 of the disparate impact as of that—as of then, not going back to 1994. How did the Court disregard those findings?

Ms. WHITAKER. Thank you, Chairman Nadler.

The Court acknowledged the extensive record that Congress created. However, the Court focused on the fact that the coverage formula had not been substantively updated since Congress had last updated in 1975 and, again, that it focused on those statistics re-

garding literacy tests and low voter turnout and low voter registration rates from the late 1960s and early 1970s.

Chairman NADLER. Thank you.

Ms. Lhamon, first of all, let me ask you a quick question, and then what I wanted to get to. Would you tell us what Footnote 40 referred to and why it was wrong?

Ms. LHAMON. The footnote is part of Commissioner Heriot's statement, and it suggests that there may not be ongoing concerns about race discrimination, among other discrimination, in the States. The facts are what they are.

For example, one of the examples that I highlight in my statement is an example in New York State where 30 Chinese-American students were almost prevented from being able to vote on the basis of national origin because someone challenged their Americanness and challenged their ability to vote.

They ultimately were able to vote, but it was humiliating for them. There was testimony received from one of the students who said it was his first time attempting to vote, and he felt like he wasn't an American because someone suggested that he had no right to vote.

Chairman NADLER. Okay. Now you, Mr. McCrary, you have written that the majority opinion in Shelby inappropriately focused on the evidence of voter participation that approached parity between whites and African Americans. Why is focusing exclusively on that statistic misleading? In other words, what does this statistic fail to capture that is relevant?

Mr. MCCRARY. Are you asking about the data in the record before Congress or about the general focus on participation?

Chairman NADLER. The general focus. You said that inappropriately—you said that the majority opinion inappropriately focused on that data, as opposed to more general data.

Mr. MCCRARY. Well, as I said, a primary focus of the voting changes to which the Federal courts and the Department of Justice objected over the decades was to vote dilution. And to ignore that fact seems to me an important lapse in the Court's consideration of the record.

Chairman NADLER. Okay, thank you.

Ms. Lhamon, I have two questions which I will ask as one question. We know the basic problem before the Voting Rights Act and the basic problem with the Voting Rights Act after Shelby County is that Section 2 is difficult to use. You can lose your voting rights and play a game of whack-a-mole.

Ms. LHAMON. That is right.

Chairman NADLER. We have finally proven after three elections have gone by that this is discriminatory, and they enact something else that becomes the same thing. Two questions.

Number one, why not amend Section 2 to enable a court to give—to enjoin, to temporarily enjoin a practice if there is any evidence that it might be discriminatory while the proceeding goes on so you can't have two elections go by under discriminatory practice and then find it unconstitutional? So you stop the game of whack-a-mole.

And second of all, why not get around all of this and apply Section 5 nationwide?

Ms. LHAMON. Well, taking the questions in order, it is the Commission's very strong recommendation that Congress amend the Voting Rights Act to be more proactive and to find ways to make sure that voters rights are protected ex ante. So your suggestion is consistent with the Commission's recommendation and would be helpful.

It is my own view that that fix would be an important fix, and it is also important to give life to the Section 5 protections, which already were designed to be those kinds of ex ante——

Chairman NADLER. Why not make Section 5 nationwide under congressional power to regulate the Federal elections or any elections as the courts have found that affect Federal elections?

Ms. LHAMON. Chairman, it is—it is very clear from the evidence that we gathered that there is support for a need for that kind of protection nationwide. The United States Supreme Court gave clear guidance to Congress that it needs to have current basis for the kinds of harm, and we found that basis in our investigation of——

Chairman NADLER. The Supreme Court said that we have to have current basis for discriminatory among different—for discriminating among different sovereignties. If we didn't discriminate among any sovereignties, we said everybody is subjected to Section 5, what is the argument against—is that a good idea?

Ms. LHAMON. Well, Congress certainly has the authority to enact the law that it chooses to enact. And it would be—it would be evenhanded in its protection in that sense, consistent also with a different sentence in the 2013 decision from the United States Supreme Court.

It is—it is my view that a belt-and-suspenders approach is appropriate, and there is an absolutely——

Chairman NADLER. What do you mean by a "belt-and-suspenders approach?" I am sorry.

Ms. LHAMON. That it is important to shore up the basis for congressional action and——

Chairman NADLER. So you think that would be a good idea?

Ms. LHAMON. I think it would be a good idea to shore up the basis for congressional action. And there is no question that there is strong evidence across the country of contemporary discrimination with respect to access to voting.

Chairman Nadler. Okay, my time has expired. I yield back.

Thank you.

Mr. COHEN. Thank you, sir.

I now recognize Mr. Jordan from Ohio.

Mr. JORDAN. Thank you, Mr. Chairman.

Ms. Lhamon, do you believe that noncitizens should be able to vote in Federal elections?

Ms. LHAMON. I think that is up to the electorate to decide.

Mr. JORDAN. But I am asking you, as the head of the—the chair of the U.S. Commission on Civil Rights here testifying on the Voting Rights Act, what do you believe?

Ms. LHAMON. Well, Member Jordan, I couldn't answer that as the chair. My personal belief is that I enjoy voting today in a community where noncitizens are able to vote. But that is unrelated to what the Commission would vote on——

Mr. JORDAN. My question is real specific. What do you—do you believe noncitizens should be able to vote in Federal elections?

Ms. LHAMON. It is not a question that I have given a lot of thought to. They are not able to vote now. Congress hasn't given them that authority.

Mr. JORDAN. I understand that. But you said you are in a community where they can vote in local elections. Is that right?

Ms. LHAMON. Yes, I am.

Mr. JORDAN. And you support that?

Ms. LHAMON. I enjoy my right to vote, and I don't question what my fellow voters have decided.

Mr. JORDAN. Mr. Saenz, same question. Do you believe noncitizens should be able to vote in Federal elections?

Mr. SAENZ. No. I don't believe noncitizens should be able to vote in Federal elections. I do believe that in local elections, particularly in school board elections where noncitizens' children may be the most heavily affected by decisions by those who are elected, that it is appropriate to consider providing the vote to noncitizens.

Mr. JORDAN. And why don't you think it is appropriate? I just wonder what you are thinking because it sounds like Ms. Lhamon may think it is appropriate for noncitizens to vote in Federal elections. You were clear and said you don't think that should happen. Why don't you think that should happen?

Mr. SAENZ. Because I think that we should encourage folks to naturalize and become citizens so they have the full scope of rights that are involved in citizenship. Voting is one of them, but not the only one. So I am in favor of streamlining our naturalization process and ensuring that everyone who is eligible has the ability to apply for and receive citizenship, regardless of their financial circumstances, for example.

Mr. JORDAN. Do you think allowing noncitizens to vote in a Federal election would devalue the vote of citizens?

Mr. SAENZ. No, I don't think it would. But I think it would devalue the process of becoming a citizen for those who were not born here.

Mr. JORDAN. Do you think it would dilute and devalue the vote of citizens?

Mr. SAENZ. I don't.

Mr. JORDAN. Well, it seems dislogical that if——

Mr. SAENZ. You and I disagree——

Mr. JORDAN [continuing]. Only citizens—if only citizens are allowed to vote——

Mr. SAENZ. For me to accept——

Mr. JORDAN [continuing]. And noncitizens voted, that would devalue the vote of the citizen.

Mr. SAENZ. I don't see it that way, Mr. Jordan. I think that would depend upon how those noncitizens vote in comparison to citizens. I simply have no information about that. So I can't accept your premise that it devalues someone else's vote that another person voted.

That is a very dangerous proposition. It would suggest, as we allow more and more people to vote that somehow they are devaluing the votes of those who voted previously.

Mr. JORDAN. I am all for more people voting, as long as they are citizens.

Mr. McCrary, do you think—do you believe that noncitizens should be able to participate and vote in Federal elections?

Mr. MCCRARY. No. But I would note from the historical record that restrictions—the restriction of the right to vote to citizens dates from roughly the turn of the 20th century, throughout the 18th and 19th centuries——

Mr. JORDAN. I understand when it happened. I am asking today.

Mr. MCCRARY [continuing]. Noncitizens were freely encouraged to vote. But in the——

Mr. JORDAN. It was a little different country in the 1800s.

Mr. MCCRARY. I am sorry?

Mr. JORDAN. It was a little different country in the 1800s, Mr. McCrary. I know the law. I am just asking you what you believe should be the law today.

Mr. MCCRARY. Representative Jordan, I answered the question to begin with. The answer is no.

Mr. JORDAN. Do you believe it devalues—if noncitizens would vote, do you think that would devalue the vote of the citizens?

Mr. MCCRARY. As an abstract theoretical matter, you are correct that there would be a devaluation.

Mr. JORDAN. Of course.

Mr. MCCRARY. But it is not likely to be a significant and empirical problem.

Mr. JORDAN. Yeah. Okay. So if it would devalue, you think only citizens should be able to vote, and if noncitizens did vote, it would devalue the vote of the citizen. Are you in favor of some kind of identification and proof that the voter has to present when they vote to demonstrate that they are actually a citizen?

Mr. MCCRARY. Only at the registration level, Representative Jordan. When you require extra identification processes for in-person voting, it can serve as a restrictive procedure. It slows down the process. It makes people nervous about all the documents that they have to bring——

Mr. JORDAN. So you are against a photo ID? You are opposed to a photo ID?

Mr. MCCRARY. I am sorry?

Mr. JORDAN. You are opposed to any type of photo ID presented at the polling station when an individual goes to vote?

Mr. MCCRARY. Yes. The record before the courts that have addressed this question is universally that there is no problem with in-person voter fraud in this country. And the use of a photo ID requirement actually has been demonstrated to have a discriminatory effect upon minority voters in every case where it has been addressed.

Mr. JORDAN. Okay. I got 15 seconds. I want to give Ms. Whitaker a chance to answer the same question.

Ms. Whitaker, do you believe noncitizens should be able to participate in Federal elections?

Ms. WHITAKER. Thank you for that question, Congressman Jordan.

CRS does not make policy recommendations, and noncitizen voting is outside of the scope of the testimony that we were asked to

prepare. But we would be happy to research that for you and get back to you.

Mr. JORDAN. Okay. Thank you.

Ms. WHITAKER. Thank you.

Mr. COHEN. Thank you, Mr. Jordan.

Professor Raskin is recognized for 5 minutes.

Mr. RASKIN. Mr. Chairman, thank you very much.

Thanks to all of the witnesses for your great testimony.

Ms. Lhamon, let me ask you. A United States District Court in Texas struck down a draconian voter ID law that Texas had imposed on the people of Texas. But in the meantime, elections took place where there was a U.S. Senator elected, 36 Members of this body were elected, the governor, the lieutenant governor, the attorney general, and what is the remedy for that?

This election took place under conditions where lots of people were deterred from participating. Their right to vote was chilled. What was the remedy under Section 2?

Ms. LHAMON. There is no remedy. There is no way to restore voting rights to people who now live with elected officials.

Mr. RASKIN. Well, isn't that the decisive argument against neutralizing Section 5 of the Voting Rights Act? Section 5 is all about preclearance, making the jurisdictions send the plans in advance to the Department of Justice or to the U.S. District Court in D.C., right?

And if a State is permitted to get away with violating the Voting Rights Act, and elections take place under it, there is no remedy, right?

Ms. LHAMON. That is right.

Mr. RASKIN. Okay. Let me ask this question. Should Section 5 be amended to allow private parties to challenge the findings of the Department of Justice? The Supreme Court held that DOJ couldn't do that—or rather, that States couldn't object. Should States have the power to do that?

Mr. Saenz, what do you think about that?

Mr. SAENZ. I think it is something worth considering simply because it then takes the benefits of Section 5 preclearance in a more efficient and effective way of reaching a timely conclusion and adds the additional element. Right now, under previous preclearance regime, you would have to follow up with a Section 2 case. It would be much more efficient to have a Section 5-related cause of action.

Mr. RASKIN. Okay. And what is your response to Chairman Nadler's question about whether it makes sense at this point just to amend Section 5 to say we are not going to try to figure out which State bears the most guilt at this point under the Supreme Court's unbelievable outburst of judicial activism, where they declared basically an equal protection act between the States which didn't exist.

But in any event, now that is the straitjacket we are laboring under, why not just say all of the States have to preclear voting changes with the DOJ first? What do you think of that?

Mr. SAENZ. I am in favor of a hybrid of both. I think there are certain practices, for example, reverting from district elections to at-large elections that are, on their face, questionable and have been used in the past to restrict voting rights. And those kinds of

changes should be subject to the very effective and efficient preclearance mechanism nationwide.

On the other hand, there are clearly jurisdictions that have an ongoing history of discrimination in voting and attempts to restrict the right to vote with respect to particular minority groups, and those jurisdictions, despite the second-guessing by the Supreme Court Justices of this body's conclusions, those jurisdictions should be subject to preclearance more broadly.

Mr. RASKIN. Well, the Civil Rights Act or the Pregnancy Discrimination Act or other civil rights statutes apply nationally, even though we don't necessarily have a factual predicate to prove that there was a problem in a particular State. Why not just make it nationwide and then avoid another outburst of judicial activism on the part of the Roberts court?

Mr. SAENZ. So my only concern there is subjecting everything to preclearance nationwide would present a bureaucratic snaggle that could prevent getting an efficient and quick response where necessary. So that is why I am in favor of a hybrid particular practice against a nationwide preclearance, specific jurisdictions subject to broader preclearance on all electoral changes.

Mr. RASKIN. Okay, very good. Now my friend Mr. Jordan has left the room, but is there anything in any of the legislative proposals you have seen to overcome the Supreme Court's decision in *Shelby County* v. *Holder* which would give noncitizens the right to vote in Federal elections?

Mr. SAENZ. Not aware of anything ever been suggested——

Mr. RASKIN. Is anyone on the panel aware of anything in any of the suggested proposals that would give noncitizens the right to vote in Federal elections?

Ms. LHAMON. I am not.

Mr. RASKIN. Okay. Well, let me ask this question. Are you in favor, let us start with you, Mr. Saenz, of the Federal Congress striking down local laws across the country that may allow noncitizens to participate in local elections like school board elections?

Mr. SAENZ. No. I think that is a decision that should be made at the local level.

Mr. RASKIN. In other words, if you respect federalism, you would say that has got to be up to the States and localities to figure it out, right?

Mr. SAENZ. Absolutely. This body has control over the Federal elections quite clearly——

Mr. RASKIN. Yes.

Mr. SAENZ [continuing]. And limited control over other elections, but that is a decision should be left at the local level.

Mr. RASKIN. Okay. And one must charitably assume Mr. Jordan's ignorance of the fact that noncitizens could vote in local and State elections for the vast majority of American history, and it was his party, the Republican Party, which was the great champion of that. And Abraham Lincoln actually was accused of winning election in 1860 based on the strength of the noncitizen vote.

So all of that seems to be a great red herring, and I would urge Mr. Jordan to study the history of his own party because this became an issue in the Civil War, and it was the Republican Party which stood up for the right of noncitizens to vote.

I happily yield back, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Raskin.

Mr. Cline is here. I don't think he has a question at the present time, but I want to commend him for being here to listen. That is an admirable and unusual quality for a congressman. [Laughter.]

Mr. COHEN. Ms. Scanlon, you are recognized.

Ms. SCANLON. Thank you very much.

Mr. McCrary, I think you just fielded a question from the gentleman from Ohio about whether it would devalue the vote of citizens to allow noncitizens to vote. I would like to flip that a little bit. Does it devalue citizenship if citizens aren't allowed to vote for representation in Congress?

Mr. MCCRARY. I am sorry. Could you repeat the question? I am not sure I understood it.

Ms. SCANLON. Sure. We had some questions about whether it devalues citizenship if noncitizens are allowed to vote. But I would like to focus for a minute on the fact that citizens of D.C. and Puerto Rico and the territories are actually U.S. citizens, but that citizenship does not allow them to vote in congressional—or have representation, I am sorry, voting representation in Congress. Does that impact the value of their citizenship?

Mr. MCCRARY. The only part of that question on which I have done any serious research is the fact that Puerto Ricans, when they come to the United States, are automatically able to vote because they are citizens, and they immediately assume a role as participants in the electoral process.

Ms. SCANLON. Okay. Thank you.

Just with respect to voting rights, I represent Pennsylvania. So not a Section 5 State, but we do have our own challenges. And I would like to focus for a minute on one that has been particularly prevalent in the districts I represented.

Back in 2010, we had an issue involving Lincoln University, which is an historic black college and university located in a predominantly white township, and our local election officials moved the polling place from the HBCU to a less convenient place, and that impacted the ability of the African-American population close to the university to vote. Is that the kind of thing that the Voting Rights Act was designed to address, Ms. Lhamon?

Ms. LHAMON. It absolutely is, and it is the kind of thing that we see very serious concern about all over the country still today.

Ms. SCANLON. Okay. In fact, just this year, we had an issue involving Haverford University, also in my district, where the university had a substantially younger, more diverse population than the surrounding area, and we had a lot of difficulty getting a polling place there. Can you make any recommendations as to what we could do with the Voting Rights Act to address those issues?

Ms. LHAMON. Yes. It is very important for Congress to ensure that the Voting Rights Act is amended to allow for ex ante resolution of those kinds of issues just to make sure that voters are able to vote in upcoming elections, don't lose their right to vote because of decisions to move a polling place, to close down polling places. It has very, very significant impacts.

We saw, for example, testimony from the Alaska State Advisory Committee about an Alaska Native elder who had to walk 2 miles to be able to get to a voting place that was open.

Ms. SCANLON. Okay. Thank you.

And just with respect to the bill in general, in my prior life, I participated with the Lawyers Committee for Civil Rights, and the National Commission on Voting Rights on building the extensive record about the continuing issues that the Voting Rights Act was designed to address. So I am very, very interested in seeing us amend the Voting Rights Act, reauthorize the Voting Rights Act to continue.

So thank you.

Ms. LHAMON. Thank you.

Mr. COHEN. Mr. Armstrong is here as well. Would you like to question?

Mr. ARMSTRONG. Thank you, Mr. Chairman.

Mr. COHEN. You are recognized for 5 minutes. Mr. Armstrong from North Dakota.

Mr. ARMSTRONG. Talking about preclearance and how we are doing that in theory, there is a theoretical application, and then there is an on-the-ground application, particularly in rural States. North Dakota is unique. It is the only State in the country without voter registration. It is also incredibly rural. We have entirely vote by mail counties and different issues.

So my question, and probably for Ms. Whitaker, is what kind of evidence has the Supreme Court used in the past to require preclearance on voting rules?

Ms. WHITAKER. Thank you, Congressman.

Under Section 5, the preclearance requirement in the Voting Rights Act that was in effect prior to Shelby County, the covered jurisdiction had the burden of proving that the proposed change to the voting law or standard would neither—was neither enacted with a discriminatory intent and that it would not have a discriminatory effect if it were to be imposed or enacted.

Mr. ARMSTRONG. And has Section 3—and particularly, I think I can ask it for both Hispanics and Native Americans. Obviously, in North Dakota, Native Americans are more prevalent than Hispanics, but has it been used to protect voting rights of Native Americans in the past?

Ms. WHITAKER. Section 3(c) has been used—CRS has not independently verified this research, but roughly, according to the legal scholarship in this area, 20 jurisdictions have been bailed in under Section 3(c). I am not in a position to verify specifically whether Native American—a case involving Native Americans was involved, but I would be happy to do so and get back to you.

Mr. ARMSTRONG. Well, and since I have three other people, if any of them are aware of it, I would take that answer as well.

Ms. LHAMON. It has. And also I just want to take the opportunity to mention that the North Dakota State Advisory Committee to the U.S. Commission on Civil Rights issued a statement in October raising very serious concerns on this front about North Dakota Native American voting rights access. It in pertinent part says the North Dakota Advisory Committee is troubled that this restrictive

voter ID law targets Native Americans, the largest minority group in the State, constituting 5.5 percent of the population.

The committee's primary concern is that the law may deny eligible voters access to the ballot, and it goes on from there, raising very significant concern about Native Americans' rights in North Dakota.

Mr. ARMSTRONG. And actually, that was due to a court decision that was—without voter registration, there has been significant voter ID laws and different issues that go on. You will be happy to know that the turnout on the Native American reservations in North Dakota in the 2018 election was the highest it has ever been, presidential or nonpresidential. And so, hopefully——

Ms. LHAMON. I am happy to know that.

Mr. ARMSTRONG [continuing]. Hopefully, we can continue to work that forward as well.

Ms. LHAMON. I am happy to know that, and I also know from the North Dakota State Advisory Committee's work on this issue that it followed very serious organizing among the Native American communities, which puts a set of pressure on those communities that we would hope the Federal law wouldn't require.

Mr. ARMSTRONG. I yield back the rest of my time.

Mr. COHEN. Thank you, Mr. Armstrong.

Ms. Dean, you are recognized for 5 minutes.

Ms. DEAN. Thank you, Mr. Chairman.

I am Madeleine Dean. I come from Pennsylvania, and I think about Pennsylvania, and we are the poster State for some good things surrounding voters rights and some very bad things.

Two weeks ago, I had the pleasure, the extraordinary historic pleasure of traveling with Representative John Lewis to the Edmund Pettus Bridge, to Selma, and as we came back down the bridge, my husband stood at a plaque, you know, a bronze plaque memorializing the Voting Rights Act. And right across from it, right next to it was a canvas that said "Lift our vote, 2020, voting rights under fire." It was a jarring comparison, and it is a reminder of our history, that our history is not so long ago. And as you point out, the history is actually continuing in terms of voter discrimination.

When I was first elected to the Pennsylvania House in 2012—so this is pre-Shelby, but we are also not a Section 5 State—you might remember that the Pennsylvania House in March of 2012 with Governor Corbett signing it, passed a voter ID law. I was a brand-new representative in May, came in in a special election. We spent the next year and a half going to old age homes trying to help people get qualifying identification.

Sitting with women, men, who were 85, 90 years old who said, "I have voted for the last 60 years. I can't believe—I don't have a birth certificate. I don't have this."

So the chaos and confusion which ensued from that piece of legislation until it was overturned as unconstitutional in, I think, January 2 years later was costly to people. So I wanted to ask you in kind of plain language, for those who haven't read Shelby, don't understand what Section 2 does versus Section 5, what is at stake? You have pointed out that voting rights are at stake.

What is at stake, and what should we, this committee, in terms of crafting new legislation to fully, robustly support our voting rights, what should the American people know about what is at stake in terms of voting rights?

Ms. LHAMON. Congresswoman Dean, what is at stake is our very American self-concept. We believe in a country that is based on full participation and responsive government to its citizens. If we can't all vote, if we can't all fully participate, then we are not a true democracy. That is what is at stake.

Ms. DEAN. Thank you.

Mr. SAENZ. It is the right to vote, as you have described it, from the new voter, very eager, just getting out of school, wants to participate in democracy, who may face barriers, untoward barriers to that right to vote. To the longstanding voter who has voted for decades without any problem, but who, because of new attempts to create barriers to voting, may not have the ID that is now required to vote, may not know where the polling place that they voted for decades has moved. May not understand the new requirements to participate in the ballot.

It is the right to vote that every citizen enjoys and should enjoy in a democracy.

Ms. DEAN. Professor.

Mr. MCCRARY. The problem you refer to is one that we encountered routinely in the cases challenging the use of a photo ID requirement for voting, in-person voting. And you illustrate through your anecdote based on your personal experience why the photo ID is so difficult for some American citizens.

Specifically, birth certificates are not universally available. Many people of an older generation were born not in the hospital, but at home or under the care of a midwife. They never got a birth certificate. Moreover, people who have birth certificates but have moved to a different State sometimes have difficulty in getting a copy of their birth certificate if it has been misplaced or lost.

There are all sorts of reasons why a photo ID requirement is a restriction on the voting process for some 10 percent, depending on which State you are in, of the voting age population that is registered.

Ms. DEAN. I appreciate that. And if you remember, this was 2012. So the corrosive underbelly of what spirited that legislation was revealed very openly by then-leader Turzai, now Speaker of the House Turzai, who famously said, "Voter ID, which is going to allow Mitt Romney to win the State of Pennsylvania, done." You saw that over and over again, that that was obviously the spirit of that legislation.

In the litigation, you remember it was stipulated that they could not come up with a single case of voter fraud through false ID or acting as though they were someone else. So the political underpinnings of it.

I guess as we go and move forward to craft legislation, what can we do to not only protect the Section 5 States, but States like mine?

Mr. SAENZ. I think there are two things. First, we should all recognize that Section 5, when it was in effect, did help noncovered jurisdictions, et al., because there was an indication of what the

Department of Justice concluded was problematic, and the non-covered jurisdictions learned from that.

But I also believe that Congress should seriously consider a hybrid coverage formula that would include coverage of certain changes that have a history that is suspect being precleared all across the country.

Ms. DEAN. That is really helpful. Thank you.

Thank you, Mr. Chairman.

Mr. COHEN. Thank you, Ms. Dean.

And Ms. Garcia, I think you are next, from Texas.

Ms. GARCIA. Thank you, Mr. Chairman, and thank you to all the witnesses.

And it has been sort of an interesting period for me listening to you because it brings back a lot of bad memories because, quite frankly, while some say they are the poster child for what happens good in elections, unfortunately, I am from Texas. And as you know, some of the leading cases on the barriers, the bad stuff that happens in this arena do come from Texas. And while we like to brag about a lot of things, obviously, this is not one that I like to brag about.

And I want to start with you, Mr. Saenz, because I know you and I have worked together on a number of cases, and I still remember calling MALDEF about the Pasadena case because we needed your help. Because, frankly, my district and my area is sort of ground zero for some of the litigation that has spurred in Texas, not only the Pasadena case, but you remember the Lake City case, the San Jacinto College case, Pasadena School Board case, the Galveston case. It is all happening there.

And I guess my question is this. It seems to me that all this has done is do what a lot of conservatives always argue we don't want to do is litigate, that we are just giving work to the lawyers, that we are all about litigation. And, but that is all that has resulted, hasn't it?

Because if you look at what is going on now without the Section 5 preclearance requirement, there is no other way to do it. But why should we have to do it? It would be better to do the preclearance in the hybrid form, as you suggest, or going back the way it was because then we would avoid all that. I mean, the costs incurred, how much do you think it has cost us, just ballpark figure, in terms of resources and lawyers and litigation, and not to mention what the litigants have to go through, the petitioners?

Mr. SAENZ. I would—it is hard to estimate, but I would say we are talking in the tens or hundreds of millions of dollars that have been expended on litigation that could have been avoided if we had preclearance in place. Pasadena, Texas, is Exhibit A because that is a case that was precisely created through a change that the mayor knew he could obtain without preclearance but understood had preclearance applied, it would never be approved.

So we could have avoided that litigation had preclearance still been in place, and that litigation was very costly to the City of Pasadena, Texas, and its taxpayers. Because they not only in the end had to pay their own attorneys' fees and expert costs and other costs of defending, they had to pay the plaintiff's fees and costs of litigating the case. So you are doubling the cost of expensive litiga-

tion that could be avoided, which is why I characterize preclearance as one of the most effective alternative dispute resolution mechanisms that this Congress has ever put in place.

Ms. GARCIA. Right. So tell me, the other thing that I have noticed about all of this litigation, that it just seems like the burden is just so much harder to prove the intentional discrimination factor. It really puts such a high burden on the petitioner.

Whereas under Section 5, you could file a complaint, and again, Texas was probably number one in the number of complaints. And you know, what—is there anything that we can do in terms of a change in law to help with the burden of proof, to help with the litigation, to make sure that at least it doesn't take as long?

Mr. SAENZ. The totality of the circumstances test, and that is how the Supreme Court has described it under Section 2, is a wonderfully contextualized test. It enables you to look at all of the different factors occurring in the community. But the flip side of that is that it is very expensive. And if you then have to prove intentional discrimination in order to obtain a bail-in order or requirement that the jurisdiction be subject to preclearance, as we did in Pasadena, Texas, as you have indicated, the cost goes up even more. The burden for the plaintiff goes up even more.

So anything that can be done to identify the prevailing patterns and somehow streamline the ability to get in and change those prevailing patterns, and preclearance is the best mechanism for that. It is available to us if the Congress will respond to the second-guessing by the Supreme Court majority and enact a new coverage formula.

Ms. GARCIA. Thank you.

And now, Ms. Lhamon, something you said caught my ear. You said in the response to one of the questions that there was no question there is discrimination in access to voting. Now is that an official finding of the Commission or is that just your opinion, or if it is true, then why are we having all these debates, if there is no question?

Ms. LHAMON. It is official as a finding of the Commission, and we voted unanimously to support those findings.

Ms. GARCIA. And when was that, ma'am? I am sorry. I don't——

Ms. LHAMON. We issued the report in September 2018.

Ms. GARCIA. Okay.

Ms. LHAMON. And the very comprehensive investigation of the Commission includes documenting places all over the country where people with disabilities are impeded in their ability to vote, where people of color are impeded in their ability to vote, where people with language access challenge are impeded with their ability to vote.

The access to the vote is very much under siege in this country now, and that is the conclusion of the U.S. Commission on Civil Rights.

Ms. GARCIA. You looked at voting, not the registration, not any of the other—just the actual voting, access to the ballot the day of the election?

Ms. LHAMON. Yes, we did. So we took in testimony about people who physically couldn't access their polling place because the polling place wasn't accessible to people with disabilities. We took in

information about people who tried to vote on the day of and were turned away.

For example, the Kansas State Advisory Committee took in testimony from Native American voters who brought a Native American ID and were turned away at the polling place because although State law allows voting with a Native American ID, poll workers at the polling place didn't understand that and so turned a voter away.

Ms. GARCIA. Right.

Ms. LHAMON. There were serious access issues that we documented around the country.

Ms. GARCIA. Well, I suggest you send a copy of the report to the White House.

Thank you.

Mr. COHEN. Thank you, Ms. Garcia.

And Ms. Escobar from El Paso, Texas.

Ms. ESCOBAR. Thank you so much, Chairman. And Chairman, thank you for your references in your opening remarks about Congressman John Lewis. I had the incredible privilege of being with Congressman Lewis and other Members of Congress recently as we marched across the Edmund Pettus Bridge in Selma, Alabama. And at the very top of the bridge, Congressman Lewis recalled to us in painful and excruciating detail the journey that he has been on and the journey that led to Bloody Sunday, all to fight for the vote. All to fight for the vote.

And so that opening was really poignant, and I am very grateful for it. And I am grateful to all of you for being here today and sharing your expertise and the work that you have done in your careers, especially Mr. Saenz, thank you. As a Latina, I am so grateful to you for the work that you have done, the work that MALDEF has done. But thanks to all of you for sharing your time here today.

This past September, the U.S. Commission on Civil Rights released a report analyzing minority voting rights in the United States, following the Shelby County decision. The report found that our home State of Texas has the unfortunate distinction of having "the highest number of recent VRA violations in the Nation."

Further, the report details that Texas implemented one of the strictest voter ID laws in the Nation after Shelby County was decided, the very same law that a Federal court deemed retrogressive just a year earlier. In fact, Governor Greg Abbott, who was Texas attorney general at the time, tweeted 2 hours after the Shelby County decision that the voter ID law would be reenacted.

Mr. Saenz, can you please give us some examples of new voter suppression mechanisms that would have been prevented by preclearance?

Mr. SAENZ. Absolutely. You know in your State, we are currently going through Voting Rights Act litigation. Indeed, yesterday MALDEF lawyers were in court related to the voter purges that have been threatened for almost 100,000 registered voters in the State of Texas. Why? Simply because they are naturalized voters. They are naturalized citizens who then registered to vote, but prior to naturalizing, they submitted to the Motor Vehicles an indication that they were not yet citizens.

But those are nearly 100,000 voters who were threatened with the prospect of being removed from the rolls. And even if no action is ultimately taken, as we believe will be the case, the litigation so far has been successful, that is a discouragement, a deterrence to so many in the State of Texas, naturalized or not from participating in voting. And I think that was the intent behind a huge announcement knowing that the data was faulty by the secretary of state joined by and repeatedly re-enforced by the attorney general.

We also have the example of Pasadena, Texas. You would think after a victory against Pasadena, where the city reverted from districted city council seats to a combination of districted and at-large seats that we would see the end of that. But we currently face an issue in Odessa, Texas, where there is a similar proposal moving forward, this time by residents of the town, not the city council itself, that we have to grapple with.

So there are really weekly, daily challenges to voting. One of your colleagues mentioned polling place relocations and consolidations. And you know in the State of Texas, particularly with the number of counties that you have, that is a major problem with every election. And under Section 5, when those changes had to be precleared, we at least became aware of what consolidations and relocations were being proposed.

Now we don't even have that opportunity to know until the election is approaching where a relocation may prevent Latino and other minority voters from participating at the same level as they have before, and that is just a single measure of what we have lost as a result of the Shelby County decision.

Ms. ESCOBAR. Thank you.

Ms. Lhamon, what can Congress learn from Texas? Are there any characteristics that are risk indicators for voting discrimination?

Ms. LHAMON. Loyola law professor Justin Levitt testified to the U.S. Commission on Civil Rights about Texas that Texas is "unrepentant recidivist with respect to voting rights." And I think that is what this body can learn from Texas, that there is repetition. And over and over again, around the country, in Texas, among other States, in the goal and the attempt to deny some of us our right to vote, that is a history that extends all the way to the present. That includes intentional discrimination as found by Federal courts in Texas.

That lets us know that we cannot turn away and assume that our voting rights will be protected just because we promised. We have to believe and know and act accordingly, expecting that some among us, as Texas has shown it will do, will try to deny the vote to some people.

Ms. ESCOBAR. And it is what Chairman Nadler described as this endless game of whack-a-mole.

Ms. LHAMON. That is right.

Ms. ESCOBAR. That as soon as you feel as though you have advanced just a little bit and done what Congressman Lewis has said or described as open it up, open it up to everyone. Let everyone have the vote. Let them have their right to vote.

That as soon as it is denied, sure enough, before you turn around, we are fighting it again.

Ms. LHAMON. That is exactly right. And my only amendment to that would be that it is not a game to have access to participation in democracy, to be fully recognized as a citizen and a full participant in this country. That is something that is core to who we are, and we ought to protect it with that vigilance.

Ms. ESCOBAR. And in Latino communities especially and communities that are largely immigrant communities, it is intended also to send a message, a very strong message.

Mr. Saenz, you are nodding your head. What do you think that message is?

Mr. SAENZ. It is intended to prevent people from participating. It is intended to prevent people from taking the right that they have and the duty that they have and exercising it. It is intended to send a message of deterrence.

So even if you successfully stop something in the courts, it has already had that effect of sending a message from the highest levels in the State of Texas that your participation is not wanted.

Ms. ESCOBAR. Thank you all very much. I yield.

Mr. COHEN. Thank you very much.

I would just like to ask one question of the panel, and maybe Mr. McCrary, as an historian, or Ms. Lhamon. In the preclearance States that we had I think in '65, Alaska was included, and maybe was there another—Alaska and Arizona were two States outside the South, but the other States went kind of like the Old Confederacy. It was Texas, Alabama, Mississippi, Louisiana, Georgia, South Carolina, and then Virginia.

Has there been more of a history over the years and up to today of laws that discriminated against minorities in Southern States than in other States. Mr. McCrary.

Mr. MCCRARY. Yes, but I thought you were asking me about the bailout provisions that got Alaska and other States out of coverage almost immediately after the 1965 act was adopted. Certainly there is a record that is much greater for covered jurisdictions back in the day before 2013. I actually did a declaration in the Shelby County case in which I looked all of the consent decrees that were settled in Section 2 lawsuits that were reflected in the court records under the Pacer system, and there was a marked disparity in the number of lawsuits brought under Section 2 that were settled by consent decree in the covered jurisdictions.

My recollection is it was two, three times as many as in the rest of the United States, the three-quarters of the population that lived in noncovered jurisdictions. But of course, the record of Section 2 lawsuits in reported cases also reflects a disparity between the covered and noncovered jurisdictions so that the answer was even if you are restricted to reporting decisions, reported decisions, you would find that discrimination in voting is—was greater in the covered States, covered jurisdictions than in noncovered jurisdictions.

Mr. COHEN. And Ms. Lhamon, is that what you found, too?

Ms. LHAMON. Without question, the history that you describe does track to Southern States, but your reference to Alaska is apt in that Alaska is one of the States that we document in the report has repeat violations of voting rights and is well outside the South.

We also took in testimony and information about very serious concerns about States that are not Southern States with very current issues with respect to voting. Just to highlight or lowlight a particularly salient example, very recently in Maine, the then-chair—he is no longer the chair. But the then-chair of the Republican Party complained about dozens and dozens of black people coming into Maine to vote as a way of saying that there must have been fraud in Maine.

This is well outside the South, but obvious racialized charge about voting access issues in the State. So I have been enormously distressed in the Commission's work to investigate the status of voting rights about the repeat concerns in Southern States, but equally distressed about current present concerns well outside the South across the country, denigrating the right to vote.

Mr. COHEN. And I understand and I concur in that concern. But what I was concerned about in *Shelby* v. *Holder* is what the Court was basically saying is that because there are problems in other parts of the country, which there are, most of which are localized, not statewide and more limited, that they threw out the preclearance for the Southern States that have shown a great history going back as far as history goes in our country of discrimination, and they gave them a free pass because of concentrating on a small part.

And as I learned as a child at a donut shop, keep your eye on the donut and not on the hole. [Laughter.]

Mr. COHEN. And that is where they messed up.

Ms. LHAMON. Very sage advice.

Mr. COHEN. I think there are probably some significance that the anthem "Dixie," which was so prevalent and popular in the South says "Old times there are not forgotten," and they are not forgotten with voting rights.

Ms. LHAMON. There are some other lines I like less in that song, but that is a good one.

Mr. COHEN. They are not forgotten with voting rights.

Mr. McCrary, will you tell me about the bailout provision? Because that is news to me.

Mr. MCCRARY. The bailout provision or the bail-in provision?

Mr. COHEN. Whatever you said you thought I was going to ask you. [Laughter.]

Mr. MCCRARY. Oh, bailout. It was a small point that in the initial phases of enforcing the Voting Rights Act, several States were able to bail out of coverage because the formula had picked them up, but there was no evidence on the record that they had a history of racial discrimination affecting voting.

Of course, subsequent to that, there have been lawsuits in several of those States, and in fact, I think at least one State was added back into coverage not too long after the 1970 act was revised. So, but that is a small point I thought you were leading up to that confused me.

But as to the bail-in provision set out in Section 3(c) of the Voting Rights Act, one thing that is important for the committee to remember is that it requires proof of intentional discrimination and a judicial finding about that intentional discrimination. And even where courts have found intentional discrimination, such as in the

North Carolina case to which I referred, the court did not, in fact, impose a Section 3(c) remedy. One way of dealing with the problems the committee has expressed concerns about might be to think about revising the Section 3(c) provision of the Voting Rights Act.

Mr. COHEN. Thank you, sir.

Mr. Saenz, you want to say something?

Mr. SAENZ. Yes, I just wanted to say bailout is critically important, and the Supreme Court majority in Shelby County failed to accord the bailout provision sufficient attention. It means that while history is predictive—so the history in the South is predictive of what is going to happen. We have seen it post Shelby County.

That is where the activity is, is in previously covered jurisdictions. So history is predictive. Recidivism is real in the context of the voting rights violations.

But where a jurisdiction, whether a State or a smaller jurisdiction, can demonstrate that they are not following their history, they are turning their backs on a history of violating voting rights and ensuring that everyone can participate, the bailout mechanism permitted them to seek relief from preclearance in the future.

And I think that is critically important. It means that while history is a very strong predictor, if you can demonstrate you are not following that history, you get the opportunity to no longer be subject.

Mr. COHEN. And which States and at which time did that ever—has that occurred?

Mr. SAENZ. So as Mr. McCrary indicated early on, there were States that bailed out. Later on—Mr. McCrary would know the States.

Mr. COHEN. Which States bailed out?

Mr. MCCRARY. Alaska, I think Arizona. I can't recall any of the other States——

Mr. COHEN. So it left it with the Dixie whatever, the South.

Mr. SAENZ. Now remember, there were also smaller jurisdictions around the country, and some of those smaller jurisdictions bailed out.

Mr. COHEN. Yes, but no States. No States. But no States. So the only States that were left in were those in the South. Is that correct, Mr. McCrary?

Mr. MCCRARY. Yes, until later revisions of the act in which some areas of New York were covered and a few other——

Mr. COHEN. Areas, but not a State.

Mr. MCCRARY. Pardon?

Mr. COHEN. Not a State, only areas?

Mr. MCCRARY. Not a State.

Mr. COHEN. Right. Let me have one last question. And you talked about, Mr. Saenz, about the idea of having a two-pronged test, and one is the old preclearance and the other would be mechanisms. Congressmen have to determine what procedures or processes would fit into that class. Does it not concern you, as it concerns me, that we might not be looking at the hole and not the donut again, and we give the Supreme Court another reason to possibly throw out our law because we haven't done to their satisfaction a sufficient test to define those areas or to limit them to the

ones that are most germane and maybe even throw out Section 5 entirely?

Mr. SAENZ. I think there are strong indications with respect to certain practices that there have been voting rights violations so inherent in some of those practices that a record could be created. Indeed, I think we have got the record for particular practices. It is a limited number. The one example——

Mr. COHEN. What are those practices?

Mr. SAENZ. The one example that I gave was a jurisdiction that chooses to revert from districted to at-large. Ordinarily, that is done to prevent a minority group from controlling the majority of the body, for example. That is what we saw in Pasadena. We are seeing it in Odessa. We are seeing it in many jurisdictions across the country.

Usually it doesn't go that direction back to at-large. Now there could be a reason why that would be precleared. Maybe the jurisdiction is reverting to at-large because it shrunk so much, it is a much, much smaller city than it used to be. But that, I presume, would be precleared.

But I think that there are a small number of practices where a record exists to support subjecting them to preclearance, an efficient and effective way of evaluating their potential for violating voting rights across the country. I don't think it is a huge list of practices. I do think that it is a way of ensuring that we are using this powerful alternative dispute resolution mechanism as effectively as possible.

As I have said in public speeches, when you talk about vote suppressors, you want to target the serial vote suppressors. That is the Deep South. But you also want to target the copy cat vote suppressors who adopt the tactics of those for their own needs.

Mr. COHEN. Thank you, sir. And with that, we will conclude our hearing. I want to thank all the——

Mr. GOHMERT. Mr. Chairman, I would like to ask——

Mr. COHEN. Sure, Mr. Gohmert. I didn't see you there. Mr. Gohmert from Texas is recognized for 5 minutes.

Mr. GOHMERT. Thank you. Thank you.

It is interesting to hear all the talk about discrimination. As I recall when we had the Voting Rights Act reauthorized, it was clear to me it was going to be unconstitutional. I talked to deans from some very liberal law school, constitutional law professors now said this is not going to stand up because you can't keep punishing States for activity 50, 60 years—50 years or so before.

And the amendment I was trying to get passed that a majority voted down said let us apply Section 5 anywhere discrimination is found. But the majority said, no, we want to keep punishing areas that have been found to have violated civil rights 40, 50 years ago. We want to keep punishing them, and we had data that showed that there were areas around the country, not whole States, but there were areas—I think there was an area in Wisconsin, California, in New England—where there was great disparity in the voting records indicating strong indication of racial discrimination.

And yet people that were Members of the House from those States absolutely were adamant you cannot open up Section 5 to

States that are not part of the traditional South because we don't want to be included. There was no way that was going to stand up.

I brought it to the attention of a Republican ranking person at the time, Jim Sensenbrenner. He didn't want to hear it. He didn't want it included. Of course, he was from Wisconsin.

John Conyers, as chairman of the committee, was much more open to talking about it. Said let me talk to our experts. And anyway, he came back and said, yes, they tell me there is a chance it could very well be struck down. But we will go ahead and run that risk. Well, it got struck down.

Mr. McCrary—I am sorry, Ms. Whitaker, in your research, and I know we heard mention of Section 3(c), Section 3, in your research, has Section 3 ever been used by Federal court to require jurisdiction to preclear their voting rule changes?

Ms. WHITAKER. Thank you, Congressman Gohmert.

Yes, our research has indicated there have been instances where the bail-in provision in Section 3(c) of the Voting Rights Act has been used to subject a jurisdiction to a type of preclearance.

Mr. GOHMERT. And I notice at the Democratic National Conventions where voting is so important, you know, last was it going to be Bernie Sanders, was it going to be Hillary Clinton? There were complaints, you know, of cheating to keep Bernie Sanders from being the candidate, all these kind of issues.

But I noticed around, and we have photographs around the convention site. There were huge barriers, fences, and I know going back to at least 2008 when candidate Senator Obama won, that no one was allowed in the convention without proper identification. And because that was so strict at these prior Democratic National Conventions requiring photo ID, proper identification, Ms. Whitaker, in your research, have you found any lawsuits against the Democratic National Convention for requiring such stringent voting ID requirements and photo ID requirements to get in to be able to vote at the convention?

Ms. WHITAKER. Thank you, Congressman.

We have not conducted that research, but if you would like us to, we would be pleased to do so.

Mr. GOHMERT. Yes, I would love that because I have not been able to find any lawsuits, and it is just interesting why that would not be discriminatory to get into the national—Democratic National Convention. I know when I tried to get into the Department of Justice when Eric Holder was the AG, incredibly rigorous, and I would have thought, as a Member of Congress, that was a right.

But in any event, we talk about discrimination in voting, and it shouldn't be allowed. Whatever needs to be done should be done to prevent any type of discrimination. On the other hand, we also should be just as adamant about preventing dilution of the vote.

I heard mention, gee, we ought to give everybody a chance to vote, just let everybody vote. Well, that is a huge dilution of the people that are United States citizens who are the people that are supposed to be able to vote. And at some point, unless we totally lose the group mind of this country, at some point, some court—hopefully, the highest court—will recognize the damage that is done when votes are diluted by people that are not allowed to vote, that vote more than once, that get on buses and go to different

areas, and that where in college towns, college students are told use your college ID to get to vote here, and then don't use your driver's license. That way, you can use your driver's license back where you live when you are not in college.

Those are forms of dilution of the vote, and I am hoping that what solution we come to will deal with all types of vote dilution and discrimination so that the vote will come back to mean what it should mean, being one person, one vote. And being one person should be allowed to vote, but let us make sure there is not more than one person voting on the same.

Mr. COHEN. Thank you, Mr. Gohmert.

Mr. GOHMERT. Thank you. I yield back.

Mr. COHEN. I think we have come to the conclusion of our hearing. I do want to recognize once more Ms. Johnnie Turner, and I think it is particular—there are many Deltas here. But Ms. Turner was the head of the NAACP in Memphis for years. She was a State representative. Her husband was a State representative. And she has a long history of fighting for voting rights and civil rights, and it is appropriate that you are here today. And you should be recognized for your work and your husband's work.

Thank you.

[Applause.]

Mr. COHEN. And that concludes our hearing. All Members will have 5 days to submit questions.

[The information follows:]

Mr. COHEN. I thank all of our witnesses for appearing today.

Five legislative days to submit additional questions for witnesses.

The hearing is adjourned.

[Whereupon, at 12:12 p.m., the subcommittee was adjourned.]

APPENDIX

Testimony of Dr. Peyton McCrary

George Washington University Law School, Washington, D.C.

Before the

United States Commission on Civil Rights

February 2, 2018

Let me thank the Commission on Civil Rights for inviting me to participate in this briefing on the current challenges facing voting rights enforcement in the United States. My remarks today reflect my training as a historian who has worked on voting rights litigation for 37 years, first as a testifying expert in the 1980s when I was a history professor in Alabama, beginning with *Bolden v. City of Mobile*[1] on remand from the Supreme Court in 1981, and then for a quarter century as a social scientist in the Civil Rights Division of the Department of Justice.[2] At the Department my principal responsibility was, in my view, to see that voting rights cases were built on reliable social science evidence. This included identifying potential scholarly experts who could assist the courts in addressing key factual questions at issue in each case, and working with both experts and attorneys to ensure that we provided the best possible empirical answers to those questions. When opponents of the Voting Rights Act challenged the constitutionality of both Section 2 and Section 5, I helped attorneys marshal the

[1] *Bolden v. City of Mobile*, 540 F. Supp. 1050 (S.D. Ala. 1982). At that time the federal courts were still deciding vote dilution cases under the Fourteenth Amendment. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court had ruled that plaintiffs would have to prove that an election practice was adopted or maintained for a racially discriminatory purpose. The African American plaintiffs prevailed under the new intent standard on remand from the Supreme Court under the intent standard.
[2] I joined the staff of the Civil Rights Division in August 1990 and retired from government service in December 2016.

legislative history of these provisions and the history of their implementation. After retiring from government service in December 2016, I continue to address the history of the Act in my scholarly writing and have begun to serve again as a testifying expert for private plaintiffs in new voting rights cases.

The focus of today's briefing is, as I understand it, to take stock of how the Department of Justice and the private voting rights bar have confronted the profound change in voting rights law wrought by the Supreme Court's 2013 decision in *Shelby County v. Holder*.[3] As participants in this briefing are well aware, the *Shelby County* decision effectively eliminated the preclearance requirement set forth in Section 5 of the Voting Rights Act. Since that decision in June 2013, states previously covered by Section 5 – Texas and North Carolina – have put in place laws that federal courts subsequently found to be racially discriminatory in both intent and effect. I want to share with you the kind of evidence which the Department and private plaintiffs put before the courts in these cases, primarily by expert testimony from social scientists. By understanding the difficulties faced in assembling this evidence you will better appreciate the challenges required to confront future attacks on minority voting rights.

North Carolina State Conference NAACP v. McCrory

The most dramatic change in election law affecting minority voters in recent years has been the adoption of laws that burden – designedly or otherwise – the ability of minority voters to vote in person. The most comprehensive of these changes is a law adopted by North Carolina shortly after the *Shelby County* decision.[4] The Republican

[3] 133 S. Ct. 2612 (2013).
[4] H.B. 589, 2013 N.C. Sess. Laws 381 (enacted as SL 2013-381).

Party had won control of the legislature in 2010 and the governorship in 2012. In 2013 the Republican leadership sought to reverse a tide of electoral reform enacted by Democratic legislatures over the preceding decade – which Democrats had justified as a way of expanding political participation by minority voters. These Democratic reforms included provisions expanding early voting, enabling prospective voters to register and cast their ballots on the same day during the early voting period, and on election day to vote regular ballots at precincts other than the precinct in which they resided. All these procedures had facilitated an extraordinary increase in minority registration and voting, which was further stimulated in presidential elections by the historic candidacy of Barack Obama, the first African American ever elected to the presidency.[5]

Following the *Shelby* County decision, the Republican legislature now adopted a law that, among other things, decreased the period for early voting and eliminated same-day registration and voting, as well as out-of-precinct voting. The proposed law also included a very restrictive photo identification requirement for in-person voting – only a small number of approved documents which many poor and minority voters did not possess would satisfy this photo id requirement.[6] Several public interest groups representing African American voters immediately challenged the new law, shortly thereafter joined by the Department of Justice.[7]

Assessing the racial effect of practices that deny or abridge the right to vote – such as the changes at issue in the North Carolina case – requires different types of

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[5] *NAACP v. McCrory*, 831 F. 3d 204, 214-15 (2016). In fact, black voter registration and turnout was by 2008 at virtual parity with white participation rates.
[6] *Id.*, at 214-16.
[7] *Id.*, at 218.

quantitative analysis than used in vote dilution cases such as challenges to redistricting plans or at-large elections. Political scientists analyzing election administration have in recent years adopted sophisticated methods of linking individual records in large databases. The most direct evidence of the burden of the new photo id requirement on minority voters is obtained by matching the individual records from the state's voter registration database with individual records itemizing whether persons possess one of the documents with photos required by the new law – such as a state driver's license – and to determine the race of persons lacking any required photo id. In the North Carolina case three federal photo id documents would also satisfy the requirements of the new law. For this reason, it was necessary to coordinate data matching from state agency records with databases maintained by the federal agencies, a time-consuming and complicated process – even for the Department of Justice, which as a federal agency had a better chance of securing quick cooperation from other federal agencies – and virtually impossible for private plaintiffs. In each instance the matching process involved databases with millions of individual records.[8]

Data from the state board of elections made it possible also to determine the race of persons utilizing early voting, same-day registration, and out-of-precinct voting. The Department of Justice put on the testimony of political scientist Charles Stewart, whose analysis showed that there was a significant racial disparity in possession of one

[8] "Declaration of Charles Stewart III," April 11, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Surrebuttal Declaration of Charles Stewart III," May 2, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Supplemental Declaration of Charles Stewart III," June 28, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Charles Stewart III, Amended" February 18, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Charles Stewart III, Amended" December 10, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.).

of the photo ids required by the new law, and that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting.[9] In short, Stewart's analysis showed that implementation of the new law would clearly have a racially discriminatory effect on the state's in-person voting.

The testimony of other social scientists, as well as Dr. Stewart, established that African Americans in North Carolina continued to have higher rates of poverty than whites and lower levels of education than whites. Such racial disparities in socio-economic status usually depress voter participation rates and – more relevant to this case – make it more likely that minority voters will lack a required photo id or be able to secure a replacement.[10] Because African American households in North Carolina had less access to automobiles than white households, they had less incentive to possess a driver's license – and getting to the Department of Motor Vehicles (DMV) to obtain a photo id was more difficult. In metropolitan areas bus transportation was readily available but an expert geographer's analysis demonstrated that, on average, getting from predominantly black neighborhoods to the closest DMV office by bus consumed far longer transportation time than driving a car. It is also likely that fewer minority voters have the documents – such as birth certificates – needed to obtain a driver's license.[11] For these reasons acquiring a photo id from this state agency – usually the easiest

[9] "Declaration of Charles Stewart III, Amended" February 18, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Charles Stewart III, Amended" December 10, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.).
[10] See, e.g., "Declaration of Allan J. Lichtman," February 12, 2015, North Carolina State Conference NAACP v. McCrory," C.A. No. 1:13-CV-00658 (M.D.N.C.).
[11] Declaration of Gerald R. Webster," February 12, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.).

place to secure one of the required photo ids – was clearly more burdensome for African American than whites.

Two historians, Stephen F. Lawson and Allan J. Lichtman, independently presented detailed evidence documenting the racially discriminatory purpose of these changes. Both relied on legislative history documents, communications between the technical staff of the state board of elections and legislators, as well as studies reporting quantitative data about early voting, same-day registration, and out-of-precinct voting. Lawson and Lichtman also used newspaper coverage of the legislative process – source material historians routinely consult in their research on decision-making. They examined the historical background of the decision, such as the fact that the changes were designed to reverse the effects of prior electoral reforms that had contributed to the rise of minority registration and voting. The sequence of events leading to passage of the law was telling, especially the fact that a far less restrictive bill was replaced by a much more burdensome version once the Supreme Court eliminated preclearance review in *Shelby County*. It seemed clear to knowledgeable observers that the bill that passed would never have secured federal preclearance, either administratively by the Department of Justice or by a three-judge court in the District of Columbia, before *Shelby County* – and thus its provisions would never have been enforced.[12]

Lichtman and Lawson also took account of the evidence that African Americans overwhelmingly supported Democratic candidates, both white and black – and a substantial majority of whites were solidly Republican in their candidate preferences.

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[12] "Declaration of Steven F. Lawson," April 11, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Allan J. Lichtman," February 12, 2015, North Carolina State Conference NAACP v. McCrory," C.A. No. 1:13-CV-00658 (M.D.N.C.).

This well-known pattern made clear that the best way to increase the electoral advantage of Republican candidates was to diminish the voting strength of African Americans. In the view of Lawson and Lichtman – and their view was consistent with the case law on the intent question – knowledge of such a pattern was key to support for the final bill and revealed not just a partisan goal but also a racially discriminatory purpose.[13]

The Fourth Circuit Court of Appeals ruled on July 29, 2016, that the North Carolina omnibus election law – H.B. 589 – was adopted with a racially discriminatory purpose, had a racially discriminatory effect, and thus violated Section 2 of the Voting Rights Act and the Fourteenth Amendment.[14] Republican legislators requested and received from the State Board of Elections racial data on each of the provisions challenged in this lawsuit and thus knew that the changes they made would "target with almost surgical precision" the African American voters who utilized early voting, same-day registration, and out-of-precinct voting at significantly higher rates than whites.[15]

This victory for plaintiffs came at a high cost. Based on my experience in processing expert witness invoice for a quarter century, my best guess is that expert witness costs alone in this case were likely well into six figures for both the Department of Justice and most groups of private plaintiffs. Even when plaintiffs win a case, furthermore, they face years of waiting to recoup all these expenses. Had Section 5

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[13] "Declaration of Steven F. Lawson," April 11, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Allan J. Lichtman," February 12, 2015, North Carolina State Conference NAACP v. McCrory," C.A. No. 1:13-CV-00658 (M.D.N.C.).
[14] *State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).
[15] *Id.*, at 214.

review still been in place, these provisions in H.B. 589 likely would never have been implemented.

The Texas Cases

In 2011 Texas adopted a very restrictive photo identification requirement for voting – not unlike the photo id requirement in the North Carolina H.B. 589 – after four years of partisan battles in the legislature. A federal court denied preclearance to the Texas photo id requirement (SB 14) in 2012.[16] Immediately after the Supreme Court decision in *Shelby County v. Holder*, however, the state began to enforce the new law. Private plaintiffs, followed by the Department of Justice, then filed Section 2 lawsuits in the Southern District of Texas, charging that SB 14 was adopted with a discriminatory purpose and would have a racially discriminatory effect on the ability of minority voters to cast their ballots in person.[17]

As in the North Carolina case, the United States put on testimony utilizing database matching of individual records in state and federal databases as the most accurate way of measuring the degree to which voters lacked any of the photo id documents required by the state. Political scientist Stephen Ansolabehere's careful analysis demonstrated that over 600,000 Texas registered voters lacked any of the photo ids specified by SB 14. There was a marked racial disparity between African American and white registered voters – and between Hispanic and Anglo registered voters – on Professor Ansolabehere's "no-match" list.[18] Another political scientist

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[16] *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).
[17] *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).
[18] Declaration of Stephen D. Ansolabehere, September 16, 2013, Veasey v. Perry, C.A. NO. 2:13-cv-193 (S.D. Tex.). The findings regarding racial disparities in photo id possession are found at pp. 35-41. The

testifying for private plaintiffs, Matt Barreto, conducted a public opinion survey of Texas registered voters and reported similar findings.[19] That SB 14 would leave well over a half million registered voters without a required photo id and thus potentially unable to vote in person – out of over 13 million registered voters – is a staggering effect. Most importantly, the trial court found that "SB 14 disproportionately impacts both African Americans and Hispanics in Texas."[20]

Anthropologist Jane Henrici testified, based on her years of research among poor residents of Texas cities, that many found it difficult to obtain – and sometimes to retain over the years – documents containing photo identification.[21] Historian Vernon Burton testified about the pattern of racial disparity in socio-economic characteristics over the years, and the continued use of racial appeals in Texas elections.[22] Political scientist Barry Burden presented evidence about the degree of racially polarized voting in Texas, and veteran voting rights lawyer George Korbel pointed out that the state had conceded in recent litigation that voting patterns in Texas were racially polarized.[23]

In discussing the degree to which SB 14 was adopted with a racially discriminatory intent, historian Allan Lichtman recounted the four years of struggle by the Republican majority to pass a photo id bill, culminating in 2011 with the most restrictive bill yet considered, SB 14.[24] Judge Nelva Gonzalez Ramos examined as well

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trial court found that Ansolabehere's findings were buttressed by the testimony of statistician Yair Ghitza, and by a similar database matching analysis conducted by political scientist Michael Herron, an expert for private plaintiffs in the case. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659-62. (S.D. Tex. 2014).

[19] *Id.*, at 662-63.

[20] *Id.*, at 663.

[21] *Id.*, at 664-65.

[22] *Id.*, at 633-36, 638, 654.

[23] *Id.*, at 637-38.

[24] *Id.*, at 654, 658-59; "Declaration of Allan J. Lichtman," June 27, 2014, Veasey v. Perry, C.A. NO. 2:13-cv-193 (S.D. Tex.).

a large quantity of documentation regarding the legislative history of each of the photo id bills between 2007 and 2011, and cited courtroom testimony from legislators on both sides of the issue. Judge Ramos noted that the primary rationale for adopting a photo id requirement offered by its proponents was to prevent in-person voter fraud, but that the state was unable to present evidence of such fraud.[25] After reviewing the evidence the court concluded that SB 14 was motivated "*because of* and not merely *in spite of* the voter id law's detrimental effects on the African American and Hispanic electorate," and thus violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[26]

As with the fate of its photo id requirement for voting, Texas also failed to secure federal court preclearance of its redistricting plans for congressional and state legislative districts following the 2010 Census.[27] In the Section 5 trial the fact that Texas wanted a quick decision so that its proposed districts could be used in the 2012 elections gave the defendant United States a distinct advantage not ordinarily enjoyed by plaintiffs in Section 2 lawsuits. Due to the state's desire to secure quick approval of its redistricting plans for use in the forthcoming 2012 elections, the court ordered the state to provide the defendant United States copies of emails among legislators and staff persons involved in drawing redistricting plans. The court found that these emails, along with other documents detailing the plan-drawing process, made clear that Texas designed each of its redistricting plans to dilute the voting strength of both African

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[25] *Veasey v. Perry*, 71 F. Supp. 3d 627, 645-59 (S.D. Tex. 2014).
[26] *Id.*, at 703 (following an analysis at 639-40).
[27] See the decision of the three-judge court in the District of Columbia, *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012).

American and Latino citizens – and that these plans had the intended discriminatory effect.[28]

The expert testifying about the intent of the redistricting plans for the United States was political scientist Theodore Arrington. Evidence from emails and from legislative history documents indicated that in devising new districts Texas used arbitrary demographic thresholds – 50 percent Hispanic citizen voting age population and 40 percent African American voting age population – to claim that such districts would provide minority voters an equal opportunity to elect their preferred candidates, while knowing that actual data from past elections showed that some of the proposed districts would likely elect Anglo Republican candidates instead.[29] Political scientist Lisa Handley, also testifying for the United States, analyzed voting behavior in past elections and demonstrated that the predictions of the state's plan drawers were largely correct; as a result of racially polarized voting and higher Anglo turnout, the key districts the state's plan drawers expected to benefit candidates preferred by Anglo voters would in fact usually result in the defeat of minority-preferred candidates.[30]

Shortly after the Supreme Court decided *Shelby County v. Holder* in June 2013, it vacated the decision denying preclearance of the Texas redistricting plans. The Department of Justice then intervened in the private Section 2 challenges to these plans filed by private plaintiffs in Texas two years earlier, and the court in that case agreed to incorporate the evidence from the Section 5 case into the record before it. Based on

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[28] *Id.*
[29] Declaration of Theodore Arrington, *Texas v. United States*, No. 1:11-cv-01303 (D.D.C., October 25, 2011).
[30] Declarations of Lisa R. Handley, *Texas v. United States*, No. 1:11-cv-01303 (D.D.C., October 19, 2011). Dr. Handley filed separate reports for congressional and state house plans.

this voluminous record the three-judge court ultimately found in 2017 – as had the Section 5 court in the District of Columbia in 2012 – that the Texas redistricting plans for congressional and state house districts were intentionally discriminatory and would effectively dilute the voting strength of both Latino and African American voters.[31] The case is still pending in the courts – five years after the decision by the Section 5 court denying preclearance in 2012. These lengthy proceedings, unusually complex to be sure, illustrate that litigating a Section 2 case takes far more time than assessing voting changes under Section 5.

As with the North Carolina lawsuit, the two Texas cases required the Department of Justice and private plaintiffs to spend hundreds of thousands of dollars in expert witness fees, along with the other expenditures routinely needed to take a case to trial. All statewide cases brought under Section 2 of the Voting Rights Act require similar resources. Typically, a local case enlists only a single trial team – occasionally two, if there is an intervening party – and fewer expert witnesses, thus costing less to litigate. Even so, such cases often take at least two or three years from start to finish. The first case in which I testified, *Bolden v. City of Mobile*,[32] was in the courts for seven years.[33]

Many of the Section 5 objections by the Department of Justice when the preclearance requirement was still in effect, were to voting changes at the local level, often involving such matters as changing polling places from a location in a

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[31] *Perez v. Abbott*, 250 F. Supp. 3d 123 (W.D. Tex. 2017), re: state house redistricting, and 253 F. Supp. 3d 864 (W.D. Tex. 2017), re: Texas congressional plan. The state senate redistricting plan had been settled by this time: *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015).
[32] *Bolden v. City of Mobile*, 540 F. Supp. 1050 (S.D. Ala. 1982).
[33] See Peyton McCrary, "History in the Courts: The Significance of *City of Mobile v. Bolden*," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., Howard University Press, 1984), 47-65.

predominantly minority neighborhood across a busy highway to a predominantly white neighborhood, or de-annexing African American neighborhoods so that minority voters can no longer vote in city elections.[34] In my experience it is unusual for local minority communities to find the resources to litigate such voting changes. For this reason, the inability to address discriminatory local changes represents the greatest single burden created by the elimination of Section 5 preclearance.

[34] Peyton McCrary, "How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005, *South Carolina Law Review*, 57 (Summer 2006), 785-825.

Response to Questions from Subcommittee Ranking Member Mike Johnson by Peyton McCrary

1. Did you initially refuse to participate in that case?
2. Were you ever threatened with any form of discipline by anyone at the Department of Justice regarding your involvement or lack of involvement in that case?

Response to Question 1:

To put this question in context, the Department of Justice uses the term "investigation" to refer to work on a matter preceding the filing of a lawsuit. I did not refuse to work on the initial investigation that preceded the filing of U.S. v. Ike Brown (the case regarding Noxubee County, Mississippi, which your question addresses). I did, in fact, work on the lawsuit once it was filed.

I discussed this question in sworn testimony during an investigation conducted by the Office of the Inspector General, reported in *A Review of the Operations of the Voting Section of the Civil Rights Division* (March 2013), at p. 39 (Note 28). There the Inspector General's report quotes the allegation by Christopher Coates that a Voting Section social scientist "flatly refused to participate in the investigation" of Noxubee County. The report notes that: "The social scientist told the OIG that he told Coates he did not want to participate in the investigation phase of the matter because he had other things he was working on at the time." The report adds: "Coates agreed with this account of the conversation but told us that [in his view] the social scientist had other reasons because this was the first time in their 20-year history of working together that the social scientist declined to work with Coates."

I have a clear recollection of my conversation with my old friend Chris Coates about the Noxubee County investigation. I specifically recall telling him that since coming to work in the Voting Section in 1990: "I have never refused to work on an investigation, and I am not doing so now." In his testimony to the United States Commission on Civil Rights Chris claimed that I had told him that "the Department should not investigate cases with White victims." I am confident that I never said that. In fact, I had in my files an earlier memo by veteran Department attorney David Marblestone – which I gave to the investigator interviewing me – explaining that in his legislative history research there was no indication that the Congress had ever intended that the Voting Rights Act should not apply where white citizens were a racial minority, as was true in Noxubee County.

At the time of this initial conversation, I was working evenings and weekends on my own time – in addition to my assignments in the Voting Section – on a co-authored law review article later made part of the record before Congress in the 2006 act reauthorizing Section 5 of the Voting Rights Act. Peyton McCrary, Christopher Seaman, and Richard Valelley, "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," *Michigan Journal of Race & Law*, 11 (No. 2, Spring 2006), 275-323. See the pre-publication version of this article in *Voting Rights Act: Section 5 Preclearance and Standards: Hearing Before the Subcomm. On the Constitution of the H. Comm. On the Judiciary*, 109th Cong. 96-181 (2005) (Serial No. 109-69).

Once the Department filed the Section 2 case in Noxubee County, I readily agreed to help the trial team headed by Chris Coates. As the inspector general's report explained in the same footnote (at p.38): "we found that the social scientist later participated in the litigation of the Noxubee case by hiring and managing the government's expert witness during the trial, and that in 2006 Coates signed a performance assessment of the social scientist rating him as 'outstanding' in all categories and describing, among other things, his assistance in working with the Section's expert witness in the Noxubee case." The report adds in the same footnote that: "Coates did not acknowledge the social scientist's work on the Noxubee case in his testimony to the Commission."

Response to Question 2:

In my 26 years as a social science analyst in the Voting Section, I was never threatened with any form of discipline regarding any of my work – including the case involving Noxubee County, Mississippi. In 2011 I was honored by the Civil Rights Division of the Department of Justice with the Maceo W. Hubbard Award "for sustained commitment to the furtherance of civil rights, in the tradition of Maceo W. Hubbard."

Peyton McCrary, "The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," Michigan Journal of Race & Law, Vol. 11:275: https://docs.house.gov/meetings/JU/JU10/20190312/109049/HHRG-116-JU10-20190312-SD004.pdf

"An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report," U.S. Commission on Civil Rights: https://docs.house.gov/meetings/JU/JU10/20190312/109049/HHRG-116-JU10-20190312-SD002.pdf

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Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on
"History and Enforcement of the Voting Rights Act of 1965"
March 12, 2019 – 10:00 am – 2141 Rayburn

- I thank the Chairman of this subcommittee, Congressman Steve Cohen, for convening this hearing and for his leadership and important work facilitating this very critical opportunity to look at the machinations to what gives strength to many of the views we express in our daily acts of patriotism – "one person, one vote" – "government of, by, and for the people."

- Currently, only 68 percent of eligible voters are registered in Texas and state restrictions on third party registration, such as the Volunteer Deputy Registrar program, exacerbate the systemic disenfranchisement of minority communities.

- These type of programs are often aimed at minority and underserved communities that, for many, many other reasons (like demonization by the president, for example) or mistrust of law enforcement are afraid to live as openly as otherwise required.

- With the elimination of preclearance, we are on our way to being back to square one for rehabilitating the Voting Rights Act.

- So the lesson we learn here is that maintaining our rights requires vigilance.

- But taking a look at that requires regular maintenance and service.

- More than half a century after the passage of the *Voting Rights Act of 1965*, we are still discussing voter suppression – something which should be a relic of the past, yet continues to undercut racial minorities, immigrants, women, and young people.

- The *Voting Rights Act of 1965* was a watershed moment for the Civil Rights Movement – it liberated communities of color from legal restrictions barring them from their essential right to civic engagement and political representation.

- But uncaged by Supreme Court's infamous 2013 *Shelby County v. Holder* ruling which struck down Section 4 of the Voting Rights Act, 14 states, including my state of Texas, took extreme measures to enforce new voting restrictions before the 2016 presidential election.

- For example, in Harris County, we had a system where voters were getting purged from the rolls, effectively requiring people to keep active their registrations.

- Following the U.S. Supreme Court's Decision in *Shelby County v. Holder* in 2013, hundreds of polling locations closed in Texas—significantly more in number and percentage than any other state.

- In addition, the Texas Election Code only requires a 72-hour notice of polling location changes.

- These are just a few examples of the erosion of equal access to voting.

- It is imperative that our electorate actually reflects the priorities and diversity of our communities.

- That is why I am proud that we held a hearing on HR 1, the For The People Act, legislation from Congressman Sarbanes of which I am proud to be an original cosponsor – we examined all the onerous ways our democracy has been burdened by the lack of preclearance.

- We heard from the head of the NAACP Legal Defense Fund, we heard from The Leadership Conference in Civil and Human Rights.

- We are actively exploring all the ways in which we can strengthen our democracy.

- I strongly support H.R. 1 because of its numerous and salutary reforms in the area of voting rights and protection, specifically the provisions that:

    1. Prohibit "voter caging";

    2. Restore the voting franchise in federal elections to the formerly incarcerated persons;

    3. Prohibits deceptive practices and voter intimidation;

    4. Reaffirms Congress's commitment to restore the Voting Rights Act; and

    5. Include measure to combat congressional gerrymandering.

- Throughout my tenure in Congress, I have cosponsored dozens of bills, amendments, and resolutions seeking to improve voters' rights at all stages and levels of the election process.

- This includes legislation aimed at:

- Increasing voter outreach and turnout;
- Ensuring both early and same-day registration;
- Standardizing physical and language accessibility at polling places;
- Expanding early voting periods;
- Decreasing voter wait times;
- Guaranteeing absentee ballots, especially for displaced citizens;
- Modernizing voting technologies and strengthening our voter record systems;
- Establishing the federal Election Day as a national holiday; and
- Condemning and criminalizing deceptive practices, voter intimidation, and other suppression tactics;

- Along with many of my colleagues in the CBC, I was an original cosponsor of H.R. 9, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, which became public law on July 27, 2006.
- I also authored H.R. 745 in the 110th Congress, which added the legendary Barbara Jordan to the list of civil rights trailblazers

whose names honor the Voting Rights Act Reauthorization and Amendments Act.

- This bill strengthened the original Voting Rights Act by replacing federal voting examiners with federal voting observers – a significant distinction that made it easier to safeguard against racially biased voter suppression tactics.

- In the 114th Congress, I introduced H.R. 75, the Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2015, which would prohibit states whose congressional districts have been redistricted after a decennial census from redrawing their district lines until the next census.

- Prejudiced redistricting, or gerrymandering as it is more commonly known, has been used for decades to weaken the voting power of African Americans, Latino Americans, and other minorities since the Civil Rights Era.

- After the Shelby County Supreme Court ruling, which lifted all preclearances for states with histories of discrimination seeking to change their voting laws or practices, redistricting became a favorite tool for Republicans who connived to unfairly win 2 or 3 more seats for their party in the House of Representatives.

- In the 110th Congress, I was the original sponsor of H.R. 6778, the Ex-Offenders Voting Rights Act of 2008, which declared that the right of a U.S. citizen to vote in a federal election could not be denied because an individual had been previously convicted of a criminal offense.

- The Ex-Offenders Voting Rights Act sought to reverse discriminatory voter restrictions that disproportionately affect the African American voting population, which continues to be targeted

by mass incarceration, police profiling, and a wholly biased criminal justice system.

- In light of my dedicated commitment to the issue, I look forward to discussing the history of the Voting Rights Act of 1965 with the witnesses and my colleagues here today.

- Thank you.

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