The Future of the Voting Rights Act

David L. Epstein, Richard H. Pildes,
Rodolfo O. de la Garza,
Sharyn O'Halloran, Editors

Russell Sage Foundation ♦ New York

Chapter 15

Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics

Bernard Grofman and Thomas Brunell

The renewal of section 5 of the Voting Rights Act (VRA) in 2007 will depend on both politics and the state of the law, and even more upon the peculiar interaction between the two.

Looking at the renewal issue in 2003, when the first draft of this chapter was written, it appeared that the two most important factors affecting renewal were who was going to be elected president in 2004 and the closely related question of who would be on the Supreme Court when the VRA came time for renewal. To these questions we now know the answers. Yet the general predilections of the next Supreme Court were always in little doubt, regardless of which particular bodies come to inhabit those robes. And there were reasons to think that the VRA is such an icon it was unlikely to be attacked even by a Republican president, especially one courting the Latino vote.

Moreover, whether renewal was to be decided by a Congress controlled by the Democrats or one controlled by the Republicans, mattered a lot less than one might think because there is no simple link between likelihood of renewal and Democratic strength. There are critical differences between the parties in their views about section 5 (and about voting rights—and civil rights, in general), but there are also big differences within the parties. Both parties will be divided about the renewal. But majorities in each will likely favor renewal of section 5 in some form. In the political realm, the devil will be in the details.

Most House members from the Republican Party see race conscious line-drawing as just another form of affirmative action quota, and thus something to which they are, in principle, unalterably opposed. And most states rights oriented Republicans see the preclearance denial authority of section 5 given to the Department of Justice (or to the federal bench in the District of Columbia) to be an undue imposition on

local responsibility for conducting elections, and are likely to view the pre-1965 history of racism in covered jurisdictions as having happened too long ago to be relevant today (the Bull Connor is Dead argument). However, for many Republicans, principle must bow to pragmatism. With respect to voting rights, the Republicans have long been divided between a pragmatic wing that sees section 5 and section 2 as having dramatically benefited Republicans by leading to the packing of Democrats of all races into the heavily minority districts, and a "principled" wing that continues to see color-conscious districting as anathema regardless.[1]

The pragmatists relish the way in which the creation of majority-minority districts has "bleached" the remaining districts and thus bled them of loyal Democrats so as make it easier for Republican candidates to win in them. In addition to the direct benefits of reducing the number of districts that Democrats might win, the more Machiavellian elements of the pragmatist wing of the Republican Party also believe that section 5 as it has been implemented helped lead to white flight from the Democratic Party in the South by reinforcing the notion that the Democrats are the party of minorities. As white Democratic representation falls, and minority Democratic representation rises, the prominence of minority members as spokespersons for the Democratic Party in the South increases.[2] Whether Machiavellian or not, pragmatist Republicans believe it very likely that, for the immediate future, the Voting Rights Act could serve a major factor in keeping Republicans the majority party in the U.S. House. Moreover, Republican pragmatists are keenly attuned to the negative political consequences of being seen as antiminority, especially anti-Hispanic, at a time when the party is trying to make inroads at the margins among minority groups by emphasizing faith-based concerns.

Democrats are also somewhat divided about section 5, but the dramatic reduction in the number of white southern Democrats in Congress makes the preponderant view among Democrats easier to suss out. We can think of Democrats as being divided into roughly three groups. Minority Democrats (correctly) see the Voting Rights Act as the single most important factor in their ultimate electoral success. Without the majority-minority districts created by section 2 litigation (or to avoid section 2 litigation), the number of black elected officials (and elected Hispanic officials) would have remained minuscule. Section 5 is seen as a key to protecting those gains.[3]

Tables 15.1 and 15.2 chart the relationship between black population and black electoral success in the various rounds of congressional redistricting beginning in the 1960s, including the post-2000 round of redistricting.[4] The basic patterns in 2002 are very similar to past results. The key difference is a few House districts in the South that are not majority-minority, but where minority voting strength is large enough to control the Democratic primary in the absence of a white Democratic incumbent, are now electing minorities to office due to low but relatively reliable levels of cross-racial voting support by the remaining white Democrats. But even such districts are, in character, very heavily minority.

That minority Democrats are likely to favor the renewal of section 5 will come as no surprise. White Democrats from areas with relatively few minorities can also be expected to support section 5 renewal, both on principle and because they have lit-

TABLE 15.1 / Electing an African American to Congress: South Only, 1962 to 2002

	Percentage Black in District									
Year	0 to 10%	11 to 20%	21 to 30%	31 to 40%	41 to 45%	46 to 50%	51 to 55%	56 to 60%	61 to 70%	More than 71%
1962 to 1964	0(35)	0(40)	0(52)	0(46)	0(9)	0(10)	—	0(2)	—	—
1966 to 1970	0(63)	0(57)	0(75)	0(60)	0(24)	0(9)	0(3)	—	—	—
1972 to 1980	0(104)	0(151)	0(99)	0(110)	20(30)	0(5)	—	—	—	—
1982 to 1990	0(130)	0(174)	0(101)	0(95)	25(20)	100(1)	100(1)	25(8)	40(5)	—
1992 to 2000	0(235)	2.9(140)	0(105)	0(15)	0(5)	—	85.0(20)	76.0(25)	77.1(35)	—
2002	0(45)	0(29)	0(21)	0(9)	40.0(5)	100(2)	100(3)	100(5)	100(3)	—

Source: Authors' compilations.
Note: Entries are the percentage of districts won by a Black candidate with the total number of districts in that category in parentheses. Ten state south: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.

TABLE 15.2 / Electing a Democrat: Non-South Only, 1962 to 2002

	Percentage Black in District									
Year	0 to 10%	11 to 20%	21 to 30%	31 to 40%	41 to 45%	46 to 50%	51 to 55%	56 to 60%	61 to 70%	More than 71%
1962 to 1964	0.2(552)	0(65)	0(24)	0(12)	0(3)	12.5(8)	50.0(2)	100(2)	50.0(4)	100(2)
1966 to 1970	0.7(812)	1.0(102)	5.6(54)	0(18)	—	—	66.7(9)	0	33.3(6)	100(3)
1972 to 1980	1.0(1,301)	0.5(188)	6.8(59)	12.5(24)	0(5)	0(5)	52.9(17)	44.4(9)	75.0(20)	100(15)
1982 to 1990	1.5(1,285)	0(210)	27.5(40)	26.3(19)	0(6)	60.0(15)	72.7(11)	66.7(9)	100(10)	74.3(35)
1992 to 2000	0.6(1,247)	2.1(193)	13.3(30)	30.0(20)	50.0(20)	100(5)	50.0(10)	75.0(20)	100(35)	100(15)
2002	0.8(237)	2.6(99)	16.7(12)	22.2(9)	—	100(1)	100(1)	100(5)	88.9(9)	—

Source: Authors' compilations.
Note: Entries are the percentage of districts won by a Black candidate with the total number of districts in that category in parentheses. Some of these proportions may be misleading because the complement of black includes groups other than non-Hispanic whites, such as Hispanics and Asian-Americans, who may be present in some districts in substantial numbers.

tle to lose. On the other hand, white Democrats from the South commonly blame the VRA (and the majority-minority districts it helped create) for the fate of the Democratic Party in the South. Some still nourish hopes that, if it were possible to return to the old era of using blacks like sandbags to shore up the reelection chances of white Democrats, but not so many blacks that white incumbents' reelection chances were imperiled, then the Democratic South could rise again. For these Democrats, though it might be political suicide to actually oppose section 5 renewal (because this might anger their black—or Hispanic—constituents), there's no reason for them to be enthusiastic about it, or to do anything more than sit on their hands if there really were a prospect of its nonrenewal.

Georgia v. Ashcroft, (539 U. S. 461; 123 S. Ct. 2498) however, has thrown a joker in the deck by potentially radically redefining what section 5 means.[5] Which politicians of which party will be in favor of renewing section 5 in 2006 (or 2007) may depend critically on what section 5 is taken to imply for redistricting—and that decision is at present entirely in the hands of the courts. The majority holding in Georgia v. Ashcroft allows jurisdictions to opt for satisfying the nonretrogression test either in the traditional way, by showing that they have maintained the same number of majority-minority districts (or at least maintained the same number of districts which can be expected to elect minority candidates of choice), or (now) by showing that the plan maintains or improves overall minority influence in the legislature. Here, the level of "minority influence" is to be judged via a vague and almost incoherent "totality of the circumstances" test.

If it is perceived that section 5 translates into the right to spread blacks and Hispanics across districts, with the aim of maximizing the number of Democrats elected as the best way to maximize minority influence—one possible interpretation of some of Justice O'Connor's rather confusing language in Georgia v. Ashcroft—then Republican resistance to renewal of section 5 might be fierce. On the other hand, were that same interpretation to prevail, then white southern Democrats (however few might still be remaining in Congress), who view the Voting Rights Act as the straw that broke the party's back, that is, ended its dominance in the South, may come to believe that section 5 ain't so bad after all. Thus, the effective weakening of section 5 by the Georgia v. Ashcroft decision may make it much easier for all wings of the Democratic party to be enthusiastic about renewing the provision. Still, the party can expect to be somewhat divided about whether or not to push for statutory language that would reverse the Supreme Court's Georgia v. Ashcroft interpretation of the present language of section 5 and return us to a Beer v. United States (425 U.S. 130) interpretation of section 5 in which reduction in the number of districts (potentially) controlled by minority voters would be the sole litmus test for retrogression.[6] Indeed, one can imagine the Republicans being more enthusiastic about such a "glorious restoration" of the Beer standard than some Democrats.[7] On the other hand, even the new version of the section 5 test is, in practice, likely to leave in place many heavily minority districts that are also very heavily Democratic, and thus continue to benefit Republicans.[8] But the role of the Supreme Court may not be limited to interpreting the meaning of any new statutory language of section 5. Congress can vote for renewal, but, far more important is what will happen to the renewal when

its constitutionality is tested, as it surely will be, in the Supreme Court.[9] Based on signs and portents so far, we are quite sanguine about the likelihood that some version of section 5 will be reenacted. But we are far less so about what will happen when we get to the Supreme Court. We see the struggle for renewal of section 5 of the Voting Rights Act as what in political science is called a two-level game (compare Tsebelis 1990). On the one hand, the renewal must pass the Congress. On the other, it must be held constitutional by the Supreme Court.[10]

It is more than likely that some versions of section 5 that might pass in Congress might not pass constitutional muster. There is tension between the Court's historic emphasis on the importance of the right to vote, and its past willingness to allow Congress to use its Civil War amendments' authority to enforce voting rights and the newer states-rights federalism jurisprudence that has looked askance at federal intrusions into domains once reserved to the states (Hasen 2004). Indeed, one can imagine some Republicans in Congress pushing for positions that might seem to be desirable from the standpoint of minority voting rights protections, but that would lead to near certain rejection by the Supreme Court. Thus, voting rights advocates must walk a tightrope between advocating the strongest section 5 that might get through Congress without making it so strong that it would fail in the Supreme Court.[11]

We share the view of many voting rights scholars that whether or not the Supreme Court will accept the need for continuing direct federal oversight of state election process as a constitutional exercise of Congress's enforcement powers under the Civil War amendments will almost certainly critically depend upon the strength of the evidentiary record brought to Congress. That record must provide evidence that patterns of exclusion and discrimination are still present in any jurisdictions which section 5 would propose to cover. It must also buttress the claim that majority-minority districts, or at least districts in which minorities can be elected due to reliable white-Anglo cross-over support, are still needed to allow a full expression of minority preferences to be represented in the political system (see, for example, Pitts 2005b). In addition to the critical need for jurisdiction-specific and relatively contemporary evidence about continuing racism and discrimination, especially as it affects voting,[12] we believe that four other essentially empirical issues must be addressed: evidence about continuing patterns of racially polarized voting, evidence about the extent to which white representatives from districts with substantial black or Hispanic populations are attentive to the concerns of their minority constituents, evidence about the extent to which black (or Hispanic) representatives from districts with substantial or majority black or Hispanic populations are attentive to the concerns of their minority constituents (that is, to Anglo whites), and evidence about the unique representative role vis-à-vis minority interests played by minority representatives.

These issues are not so much directly implicated in the renewal as they are issues that need to be addressed to make it less likely that the Supreme Court majority will continue to mischaracterize the racial structuring of political competition and representation in the United States when it comes time for the Court to decide on the constitutionality of section 5 renewal. With respect to the first issue, it is clear that

some members of the Court are under the belief that the levels of racially polarized voting have been substantially decreasing, even in the deep South, so that blacks and whites (or Hispanics and Anglos) can now form cross-racial (and cross-ethnic) political coalitions that vitiate the need for majority-minority districts, and thus render section 5 (at least in its traditional form) unnecessary. With respect to the second issue, the U.S. Supreme Court majority in Georgia v. Ashcroft seems to be asserting that minorities can be expected to achieve political influence (presumably influence roughly proportional to their numbers) in any districts in which they comprise a substantial proportion of the voters, regardless of who is elected from that district. With respect to the third issue, there is an asymmetry that needs to be addressed in how the Court has viewed majority-minority districts. If a district is drawn so as to be, say, 55 percent white by fragmenting black voters across multiple districts, why is that unproblematic, while drawing a district that is 55 percent black is a signal of racial apartheid? With respect to the fourth issue, as with the third, the Court needs to be better acquainted with recent social science scholarship on the role played by minority representatives with respect to issues of concern both to minorities and to other elements of their constituency.[13]

If the views of the Supreme Court majority about these four issues go empirically unchallenged, we believe that it is much less likely that section 5 would be seen by a majority of the members of the Court as still needed. But if the Court majority believes that section 5 is no longer needed, it is hard for us to imagine that it will continue to find constitutionally legitimate the extraordinarily broad application of Congress's voting rights enforcement authority found in section 5. We believe strongly that the views on racial bloc voting levels, minority influence potential, and the behavior of representatives from majority-minority districts that we have attributed to the Court majority are far too simplistic, and indeed are more wrong than right.

With respect to racially polarized voting in the South, we need to understand prospects for minority victory as involving an interaction between levels of racially polarized voting and levels of minority voting strength. Yes, there is evidence of dramatic gains in minority representation, but these gains can be charged largely to compositional effects (how the districts are drawn) and in the South, quite counterintuitively, to changes in party identification (whites leaving the Democratic party), rather than to changes in the willingness of white voters to support minority candidates of their own party (Grofman, Handley, and Lublin 2001). Even in districts where voting patterns are racially polarized, minority candidates of choice can win—as long as the minority population proportion is high enough (Brace et al. 1988; Grofman, Handley, and Lublin 2001). Thus, evidence that minorities win does not necessarily refute the notion that voting is polarized.

In fact, in the South, there is little evidence that racial bloc voting is on the decline except in situations where minority incumbents are elected from heavily minority districts running for reelection. To the extent that there are real changes in the behavior of southern white voters with respect to support of minority candidates they are such as to make it harder, on balance, for black and Hispanic candidates to win general elections, because there are now more white Republicans—even though

a decreased white proportion of the southern Democratic electorate has made it easier, ceteris paribus, for minority candidates to win nomination in Democratic primaries in many parts of the South (Grofman, Handley, and Lublin 2001). Also, especially outside the South, unless we take into account the combined black and Latino populations in a district, we almost certainly will misstate the nature of white cross-over support for minority candidates of a given race-ethnicity, and we will misestimate the true nature of the relationship between, say, black population proportion and the likelihood of minority electoral success.[14]

With respect to the issue of minority influence, a key point to understand is that minority influence is not simply a matter of numbers, at least, absent districts in which minority voters are in the clear majority. The empirical evidence is clear that the factual claim espoused by Justice O'Connor that the greater the black, or other minority, voting strength in a district, the more will the representative of that district respond positively to the concerns of minority voters is fundamentally wrong. Party matters! Democrats and Republican elected officials respond quite differently to the percentages of blacks or other minorities in their district. In particular, in the South, for districts of any given level of black population, there is overwhelming evidence from both the behavior of representatives in the U.S. House from the South and from the behavior of legislators in various southern legislatures, that Republican representatives elected from such districts will behave quite differently from Democrats (see, for example, Overby and Cosgrove 1996; Whitby 1997; Canon 1999; Mendelberg 2001).[15] Here, Richard Fenno's (1978) seminal distinction between geographic constituency (the set of voters in the district) and electoral constituency (the set of voters who voted for a given candidate) is critical. In particular, when Republicans win in districts where there are large numbers of minorities, but without much support from the minority community, they are not electorally beholden to the minority community and are thus much less likely to give weight to minority preferences than they are to those of the overwhelmingly white voters who elected them.

With respect to the third topic, the nature of white influence on black and Hispanic elected officials, we see good evidence that black or Hispanic elected officials are at least as likely to be sensitive to the views of their white constituents as white representatives are to be sensitive to the views of minorities within the district (see, for example, Fenno 2003).[16]

Finally, with respect to the last issue, we also find that minority officials are likely to serve coethnic constituents in a fashion that is distinctive from the representative role played by white representatives elected from districts with substantial minority populations. In particular, and in contrast to Carol Swain (1993), as perhaps the best study of this topic, Kerry Haynie reports that

> there is, indeed, a connection between the presence of African Americans in [southern] legislatures and the substantive representation of black interests. The data and analyses here show that black legislators are the primary advocates for black interests. For example, African American representatives, all else being equal, are significantly more likely than nonblack legislators to introduce bills that prohibit racial discrimina-

> tion in employment and housing, and laws that advance the educational and social welfare interests of black citizens. Moreover, these analyses indicate that for the substantive representation of African American interests, a legislator's race matters above and beyond the effects of constituency characteristics and political party membership. In other words, black faces in legislatures *do* matter for black interest representation. (2001, 354–56; see also Fenno 2003)

There is one other empirical issue, about the political impact of section 5, that we would like to briefly discuss. Republicans and Democrats seem largely in agreement that redistrictings shaped by section 5 and section 2 are the principal cause of the dethronement of the Democrats in the South—at least at the congressional level. We view that as at best a half-truth, and, at worst, pretty close to nonsense. The shadow of the Civil War lasted a very long time, making the South a Democratic bastion and preventing meaningful political competition except in a handful of southern cities and former Republican strongholds. But no single event, not even a civil war, can shape politics forever.

Around four score and seven years or so later, speeded up by federal actions such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the racist politics and political institutions of the post-Reconstruction era South (for example, segregated schools and water fountains and back of the bus seating combined with overwhelming barriers to African American voting such as literacy tests, poll taxes, and ongoing voter intimidation) began to erode. Once that started to happen, the South's conservatism began to manifest itself in support for Republicans—first at the presidential level, then for statewide election such as U.S. senator and governor, then within House districts, then increasingly for state legislative elections, and now even for local office.[17] Redistricting plans in the 1990s and 2000 (for the U.S. House of Representatives and state legislature) drawn without majority-minority districts to "optimally" distribute blacks to shore up the reelection chances of white Democrats might indeed have slowed the pace of Republican growth (for a discussion of the 1990s, see Grofman and Handley 1998). It is our view, however, that they could not have prevented it.[18]

In any case, what's done is done. For example, as whites have fled the Democratic party in recent redistricting decades, the average proportion black within U.S. House districts in the South needed to push the probability of Democratic victory over 50 percent has gone up. Now levels of white support for Democratic congressional candidates in the South are so low that the only present southern House districts where the chances of Democratic victory are over 50 percent are those drawn with at least a 40 percent black population (see table 15.3). Barring new realignment trends, or the elimination of all or virtually all majority-minority seats in the South and the drawing of plans aimed largely to maximize Democratic strength—one of which we wouldn't want and the other of which we couldn't get, the Republicans will continue to control the majority of southern House districts for the immediately foreseeable future.[19]

In the remainder of this chapter we consider various questions about the scope and content of a new section 5, such as the nature of the section 5 trigger to determine which jurisdictions are to be covered. We also look at the arguments for pressing for

TABLE 15.3 / Electing a Democrat: South Only, 1962 to 2002

	Percentage Black in District									
Year	0 to 10%	11 to 20%	21 to 30%	31 to 40%	41 to 45%	46 to 50%	51 to 55%	56 to 60%	61 to 70%	More than 71%
1962 to 1964	82.9(35)	82.5(40)	96.2(52)	89.1(46)	88.9(9)	100(10)	—	100(2)	—	—
1966 to 1970	69.8(63)	66.7(57)	85.3(75)	75.0(60)	100(24)	100(9)	100(3)	—	—	—
1972 to 1980	65.4(104)	66.9(151)	79.0(99)	76.3(110)	76.7(30)	100(5)	—	—	—	—
1982 to 1990	56.2(130)	60.9(174)	78.2(101)	68.4(95)	100(20)	100(1)	100(1)	87.5(8)	100(5)	—
1992 to 2000	27.2(235)	57.1(140)	40.0(105)	80.0(15)	80.0(5)	—	100(20)	88.0(25)	91.4(35)	—
2002	24.4(45)	34.5(29)	38.1(21)	44.4(9)	80.0(5)	100(2)	100(3)	100(5)	100(3)	—

Source: Authors' compilations.

Note: Entries are the percentage of districts won by the Democratic candidate with the total number of districts in that category in parentheses. Ten state south: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.

renewal of a section 5 whose scope and administration is essentially the same as at present, as opposed to agreeing to a scaled-back version. The key issue here is whether the section might usefully be confined to redistricting (and perhaps annexation), rather than including all possible electoral law changes. Another important question is whether the section 5 language should be rewritten so as to make it clear that Congress wants the courts to enforce the legal interpretation of section 5 that prevailed before Georgia v. Ashcroft.[20] But before we turn to those questions, one further complexity needs to be addressed

In thinking about the importance of renewing section 5 we believe that it is important to see section 5 as paired in an important way with section 2. The expected long run legal interpretation of the section 2 standard has ramifications for the importance of renewing section 5. [21] Although Georgia v. Ashcroft's immediate dramatic impact is on the interpretation of section 5, in the long run, it may prove even more important because of its spillover effects on the interpretation of section 2 of the VRA. Without too much overstatement, as section 2 goes, so goes the importance of section 5. As long as section 2 is in place as a fallback route for those concerned with protecting against minority vote dilution, it is possible to more readily contemplate a world without section 5—especially a world without section 5 as it has been constrained and reinterpreted by the U.S. Supreme Court (compare Pitts 2004) and enforced by a Department of Justice controlled by Bush 43. But if section 2 is rendered toothless by future Supreme Court cases—as it might well be—then there is much greater need to worry about whether we'll have section 5 in any form as a safeguard against the very worst retrogressive outcomes.[22] Additionally, in our view, the prospects for the continued health of section 2 are not good. Justice O'Connor's opinion in Georgia v. Ashcroft has been taken by some lower courts as a wedge to justify weakening section 2, and that wedge may well turn into a battering ram over the course of the decade.

SCOPE AND APPLICABILITY OF THE "NEW" 5 AND 203

Although it might seem straightforward to renew section 5 essentially as is, by simply leaving all present language intact and adding 2004 as a year to be used to determine which additional jurisdictions not already covered are to be covered by either the "registration and turnout in presidential elections" clause or the use of a "voting test or device" clause, we believe that the political and constitutional reality is considerably more complicated. There are many important strategic and tactical issues to be faced by advocates of renewal.

Choosing Triggers for Coverage

In 1975, when the initial political participation trigger for section 5—less than 50 percent of person of voting age being registered or voting in the presidential elec-

tions of 1964 or 1968—was amended, the change was one directional. Specifically, it added jurisdictions that, in the 1972 presidential election, had less than 50 percent of eligible voters registered or voting to the list of jurisdictions already covered. In the 1975 renewal, if a jurisdiction no longer was a voting rights malefactor, it had to prove this by satisfying the "bailout" provisions of the act. The same has been true ever since.

Certainly that simple idea can be applied to renewal today as well, because all we would be doing is checking to see if any jurisdictions should be added to the present list. If, as we would expect, only a few or even no jurisdictions were added, it would not appear to pose any real problem.[23] On the other hand, the fact that jurisdictions whose coverage was triggered in part by inadequate registration or turnout levels in 1964 or 1968 or 1972, might have current registration levels and turnout (at least in presidential elections) that would no longer make them eligible for coverage under either a registration or turnout as a ratio of CVAP test might also seem to be no real problem, either.[24] As noted earlier, to show that they no longer require federal supervision, all a jurisdiction needs do is show itself eligible for bailout. Thus, bailout is the way out for any jurisdiction whose present (and durable) "clean hands" show that continued federal supervision of the jurisdiction's electoral rule changes is no longer needed.

But, we find this renew as is approach problematic for two reasons. First, we are skeptical that the U.S. Supreme Court will find constitutionally acceptable the notion Congress may choose to make the triggering factors for section 5 that applied thirty to forty years ago to automatically continue to apply. Second, and equally important, we are skeptical of the relevance to vote dilution of the turnout and registration trigger factors as they have historically been applied.[25] In our view they answer the wrong questions. In particular, if we are to use registration or turnout figures two elements seem clear to us. One is that the data should include both mid-term and presidential years, given the vast discrepancies in turnout between the two, and not just be restricted to the high turnout presidential years.[26] The other is that the relevant registration and turnout data should specifically be for the covered minorities, not for all voters. Here it simply makes no sense that a jurisdiction can avoid coverage if Anglos and whites have registration and turnout levels high enough to compensate for below 50 percent electoral participation by the minority voters in the jurisdiction, no matter how low that minority participation rate might be.[27]

Deciding on Changes to be Covered

We think that it would be helpful for the civil rights community to recognize that some aspects of section 5 may impose a higher administrative burden on the states than is now justified by their importance as a tool for protecting minorities—at least as long as a strong section 2 provision is in place as a backup. Certainly it is worth considering the possibility of confining the scope of preclearance to redistricting and annexation, rather than including all possible electoral law changes (for example, changes in the location of ballot boxes,

changes in registration hours, and the like). It is not that the latter seemingly minor changes in election practices cannot be used in a discriminatory fashion. They can be and have been. It is rather that requiring preclearance submission to DOJ of these numerous and recurrent changes in rules involves a very large amount of jurisdiction and DOJ paperwork relative to the apparent payoff, and discriminatory practices that arise as a result could be dealt with in other ways. There is always the possibility of a section 2 challenge to such practices—albeit sometimes after the fact—but it would seem to us to make sense to add the strongly deterrent bite that any jurisdiction found violative of section 2 could then be required for a defined time period to submit any and all of its electoral changes for DOJ preclearance. Also, perhaps some type of expedited administrative hearing process could be set up to deal with challenges that must be decided before (or on) election day. By generally limiting section 5 review to practices that were challenged, except for changes that have such powerful potential impact on the minority community that advance review seems compelling, such as redistricting and annexation, the costs imposed on both jurisdictions and DOJ by section 5 enforcement might be reduced. Moreover, for topics related to registration, including changes with great discriminatory potential such as voter purges, it might make sense to deal with these as part of HAVA rather than the VRA, as part of making more uniform the treatment of voting practices throughout the nation.

Evaluating whether new language ought to be added to, in effect, reverse some (most?) of the Supreme Court reinterpretations of section 5 over the past decade plus, we find ourselves torn as to what our recommendation should be about a drive to restore the section 5 retrogression test to the pre-Ashcroft standard represented by Beer. [28] There are strong reasons of principle to argue that the pre-Aschcroft interpretation of section 5 must be restored. The standard that was laid down in that case, on the one hand, robs the provision of its central justification and, on the other hand, is intellectually incoherent. Yet, having said that, we would also note that pragmatic considerations point in the opposite direction, because the need to agree on a draft of new language that is different from the present section 5 language may cause fractures in the coalition behind section 5 renewal, and an insistence on that restoration to the Beer standard may doom any renewal of section 5 in the Supreme Court in that any attempt to suggest that potential electability of minority individuals rather than overall influence of minority voters as a group is the heart of a nonretrogression test risks such a (restored) section 5 being held by a majority of the present members of the Court to be an excessive and improper use of congressional authority under the Civil War amendments.

Still, despite the fact that we have elsewhere (Grofman forthcoming) sought to provide a coherent interpretation of the Georgia v. Ashcroft test by specifying the nature of the relevant social science expert witness testimony,[29] and despite our concern that any attempt to reverse Georgia v. Ashcroft may lead to a Supreme Court backlash against the continuing constitutionality of the Voting Rights Act, we would like to put on the record our reasons for considering Georgia v. Ashcroft not to be a well-thought-out decision.

First, we believe that "minority influence" is an inherently murky concept, and that voting rights standards defined in ways that do not require the precise measurement of minority influence make the task of statutory interpretation for courts much harder.[30] In contrast, the previously used operationalization of the section 5 test, specified in terms of changes in the number of districts in which minorities have a realistic opportunity to elect candidates of choice, offered a relatively straightforward and clearly manageable standard.[31] In reinterpreting Beer, the Court has moved away from a singular focus, on comparing opportunity to elect under the proposed and the benchmark plan, to a much more complex and multifaceted approach about whose operationalization existing case law offers no real guidelines.[32] This is particularly ironic given the Court's decision in Vieth v. Jubilerer (539 U.S. 957), when justices who were in the majority in Georgia v. Ashcroft took the position that, without clear standards, partisan gerrymandering ought to be nonjusticiable.

Although the approach proposed in Grofman (forthcoming) and Grofman and Handley (2006) could go a long way toward resolving many of the ambiguities in operationalizing minority influence in the section 5 context, certain issues are still unresolved. For example, Karlan (2004, 22, 33) has called attention to the fact that the reasoning in Georgia v. Ashcroft seems inconsistent with that in cases such as Presley v. Etowhah County Commission (502 U.S. 491), where the Supreme Court asserted that governance issues did not fall within the scope of section 5. Yet what is partisan control of the legislature about, or how many minorities hold committee chairmanships about, if it is not about governance?[33]

Second, Justice O'Connor's majority opinion in Georgia v. Ashcroft introduces a new and truly strange procedural element into the section 5 review process—what could be called the standard-switching option. The opinion holds that states are apparently free to elect one of two theories of representation. The descriptive theory entails districts in which minorities have the opportunity to elect candidates of choice (many of whom might be expected to be themselves, members of the minority community). The substantive theory[34] involves districts that will elect candidates who are responsive to minority interests.[35] It would appear that it is entirely up to the jurisdiction to decide which theory of representation it wishes to use in its preclearance submission documents to justify its plans.[36]

Third, the standard switching option in Georgia v. Ashcroft is an open invitation to partisan gerrymandering in allowing Democrats and Republicans to seize whichever standard, descriptive or substantive, will best help them to achieve their partisan objectives when they defend plans subject to section 5 preclearance review. In legislatures controlled by Democrats, the Democrats will seek to subtract African Americans, or Democratic-leaning Hispanics, from heavily minority districts, in the name of increasing minority influence—with the real goal being the subjugation of Republican voting strength and the perpetuation of Democratic control.[37] In legislatures controlled by Republicans, the Republicans will seek to add African Americans, or Democratic-leaning Hispanics, even to districts with substantial minority populations, in the name of increasing minority opportunity. Thus, in states controlled by a given party, members of that party

may be aided in pursuing their real goal of achieving dominance over the other party by being able to argue that they are seeking to satisfy section 5.[38]

Fourth, by identifying as elements that need to be taken into account in a section 5 inquiry such matters as the whether the party to which most minority members are affiliated can be expected to retain control of the legislature under one plan but not under another, the majority opinion in Georgia v. Ashcroft forces the voting rights section of the Department of Justice to move away from strict concerns of racial representation to matters that are unavoidably and indubitably partisan. By and large, until quite recently, the staff attorneys of the voting rights section had been insulated from the political concerns that might be important to some of the department's political appointees.[39] But, if electing Democrats may be expected, other things being equal, to increase minority influence—and the majority opinion in Georgia v. Ashcroft comes perilously close to saying just that—it should come as no surprise that, when Republicans control the White House and the Office of the Attorney General, they might want to make sure that section 5 is not interpreted in such a fashion as to prevent Republicans from drawing lines that would reduce the number of Democrats elected. One way to do this is to take control of critical section 5 reviews out of the hands of DOJ's nonpolitical (and, in my experience, sometimes almost inhumanly apolitical) staff attorneys.

There is evidence that this dynamic may already be at work: namely the absence of the chief of the Voting Rights Section's signature on the 2003 letter granting preclearance to the Texas congressional plan.[40] That preclearance rejected the views of staff attorneys as to the presence of a section 5 violation. The removal of DOJ staff attorneys from the preclearance process on a re-redistricting plan drawn by Texas Republicans as a superbly artful gerrymander aimed at adding at least five more Republican members to the U.S. House of Representatives certainly suggests a real politicization of the section 5 preclearance process—an internal power shift away from DOJ's long-term voting rights attorneys toward the political appointees.[41] A spate of recent resignations in the voting rights section only reinforces these fears.

Fifth, the Court takes as given what needs to be proven. Yes, there may be a conflict between maintaining the number of districts where minorities have realistic opportunity to elect candidates of choice and increasing the number of districts where minorities have influence, but I would insist that it is necessary to empirically demonstrate such an incompatibility, not merely to assert it.[42] There may well be plans that improve both descriptive and substantive representation. We believe that many supposedly empirically grounded claims about the fundamental incompatibility of the two goals are exaggerated (see especially Grofman and Brunell 2005).[43] In Hannah Pitkin's typological approach (1967), the categories of descriptive and substantive representation are distinct, but not mutually exclusive.[44] It is quite possible for a plan to advance both descriptive and substantive representation of minorities. For example, to the extent that minority candidates of choice have a "commonality of fate" with minority voters, they may naturally share interests (Mansbridge 1999, 2003; Tate 2003; see also Whitby 1997). Moreover, if minority representatives who are minority candidates of choice are elected from very

heavily minority districts, they almost certainly need to rely on minority votes for their (re)election, and thus need to be responsive to minority concerns, lest they face a successful primary challenge from another minority candidate who alleges that they have neglected this community.[45]

Sixth, we see Georgia v. Ashcroft as offering a solution for an essentially nonexistent problem, because DOJ section 5 preclearance in the 2000 redistricting round was very modest in its ambitions, and consistent with the strictures restricting the scope of DOJ action imposed by the Supreme Court in the 1990s.[46] Yet these differences between DOJ practices about 2001 and DOJ practices about 1991 seem to have escaped the notice of the Supreme Court in Georgia v. Ashcroft.[47] Although our perusal of the evidence is only impressionistic, in comparing the 1990s round and the 2000 round of redistricting, we believe it hard for anyone to dispute that, in 2000, DOJ was exercising much greater caution in deciding on which district merited an objection under section 5 than in the 1990s, and was pursuing a functional rather than simply an arithmetic approach to operationalizing retrogression.[48]

Seventh, and last but far from least, we believe that, fundamentally, the Voting Rights Act was passed to deal with minority exclusion from the ballot box, on the one hand, and from elective office, on the other—not with the lack of minority influence as such (compare Davidson 1992). Thus we find the Court majority stretching history to construe the section 5 language by giving potential primacy to minority political influence in the fashion that it has. In our view, once black enfranchisement had been achieved, the history of voting rights enforcement at the state legislative level and congressional level has largely involved successful lawsuits (and use of preclearance denials) to end the practice of the Democratic party using black (or Hispanic) voters as sandbags to shore up the reelection chances of white Democrats. Although this point can too easily be exaggerated, the Georgia v. Ashcroft opinion does at least raise the specter of a return to that practice.[49]

DECIDING ON THE SECTION 203 TRIGGER

Although even many opponents of section 5 renewal are likely to agree that the section was once needed but to assert that it is no longer, views about section 203 are even more polarized. Opponents of this section reject the justification for requiring ballots in a language other than English. In their view, ought not U.S. citizens at least have the minimal literacy in English necessary to complete a ballot in that language? And, after all, how complex can it be to make the appropriate number of x's by a set of names? Moreover, in a post 9/11 world, not developing competence in English may be seen as an indicator of an unwillingness to accept American values. Also, just as with section 5, opponents of section 203 would emphasize the high administrative costs involved, especially for large jurisdictions.[50]

Just as evidence showing the continued need for section 5 will be critical, we think, if the constitutionality of DOJ preclearance powers is to sustained by the present U.S. Supreme Court, so we believe that compelling evidence showing the

continuing need for section 203 must be part of the evidentiary record in Congress if one is to expect the current Court to see section 203 as a legitimate extension of congressional Civil War powers. We are skeptical that one can count on the continuing vitality of Court precedents seeing access to instruction in one's native language as constitutionally mandated, even as here when the context is the protection of the fundamental right to vote.

Moreover, even if the continuing need for section 203 is accepted, the question of the trigger still needs to be addressed. Is a 5 percent population threshold, along with certain numerical thresholds, a reasonable way to balance concerns about effective exercise of the franchise by those for whom English is not a native language against the costs and administrative burdens placed on local election officials in simultaneously preparing ballots and ballot materials in multiple languages?[51] Here, in looking for justification for section 203, it seems to us that more empirical research is needed on the comprehensibility to nonnative English speakers of the texts of initiatives and referenda, whose dense, complex and esoteric phrasing can—as the present authors will readily attest—challenge the interpretive skills even of a native speaker of English with a Ph.D. in political science.

CONCLUSION

Section 5 renewal should be seen as a two-stage game—Congress and Supreme Court—requiring a number of critical decisions by renewal advocates to steer between Scylla and Charybdis, that is, between renewal language unduly weakened in Congress, and so strong that it will lead to the Supreme Court rejecting DOJ's preclearance authority. In justifying renewal of section 5 and section 203, contemporary and compelling empirical evidence of the continuing need for these provisions will be critical (compare Issacharoff 2004 and Pitts 2005b).

A useful metaphor for Supreme Court review in terms of its fundamental test of "congruence and proportionality" is what we will call the "scales of constitutionality." On one side of the scales, the more the civil rights community gets its way in making the provisions of the act highly inclusive—the more racial or ethnic or linguistic groups that are covered, the greater the range of the electoral activities that must be precleared, the greater the number of jurisdictions covered by section 5, the weaker the thresholds for section 203 coverage, the longer the period of renewal, and (perhaps most important of all) the greater the extent to which Supreme Court decisions about how to interpret section 5 get overturned—the more likely it is that the Supreme Court will just say no. On the other side of the scales—the greater the weight and recency of the evidence that particular groups need to be covered because they still are victims of ongoing discrimination, the greater the evidence that the particular electoral rules that are covered are ones that have been manipulated so as to minimize or cancel out minority voting strength, the more the evidence presented at congressional hearings is specific to the jurisdictions that the new trigger provisions of the act propose to cover, the greater the evidence that the language provisions of the act have been beneficial

not just to recent immigrants but even to those born in the United States whose schooling has not prepared them well for coping with complex ballots and ballot explanations in English only (such as California's often complicated referenda), the shorter the time period for renewal, thus assuring that the act could be reviewed in the light of changing circumstances rather than freezing into place assumptions about racial inequities, and the easier the requirements for allowing jurisdictions (including those within states) to "bail out" from coverage—the more likely it is that the Supreme Court will continue to see section 5 and section 203 as legitimate exercises of congressional powers to implement the Fourteenth and Fifteenth Amendments.

NOTES

1. Once upon a time, in a land far away, there was another principled wing of the Republican party, the Everett Dirksen wing, the one that thought of reconstructionist race politics as its link to the legacy of Lincoln, but that wing of the party is at present close to nonexistent. Nonetheless, its few remnants are likely to be absolutely crucial in negotiating the specific language to go into the renewal of the act.
2. For example, when George W. Bush was elected for the first time in 2000, the proportion of minority southern Democratic members of the House of Representatives was higher than the minority share of the state population in most Deep South states—sometimes much higher. (One example is Georgia, where in 2000 the entire Georgia House Democratic delegation was black. Another is Alabama, Louisiana, and South Carolina, where 50 percent was. Still another is North Carolina, where 40 percent was. Only in Mississippi and Virginia was black share of the state's Democratic congressional delegation in 2000 roughly equal to its minority population share—and of course, even in these states the only black members of Congress are from the Democratic party.)
3. A. Wuffle (personal communication, April 1, 1999, quoted in Grofman 2000) has likened section 2 and section 5 in the 1990s to the two fists of a boxer: section 2, followed by section 5 being like the famous one-two knockout punch—the first to set up the districts, and the second to nail them in place.
4. Table 15.1 parallels earlier analyses that we (and our co-authors) have produced (see especially Davidson and Grofman 1994; Grofman and Handley 1991; Handley, Grofman, and Arden 1998).
5. We see this case as potentially more important for voting rights jurisprudence than Shaw v. Reno, the case widely thought to be the most important voting rights decision of the 1990s.
6. Mark Braden has observed (personal communication, 2003) that the specific group most affected by Georgia v. Ashcroft is likely to be Hispanics. In Congress, and in state legislatures, most of the black majority, or near majority, districts that could have been created are already in place, and blacks are a declining proportion of the total electorate, except in a handful of states. We should therefore not expect to see new black majority seats created because of population growth. For Hispanics, the fastest growing minority in the United States, in covered jurisdictions such as Texas, a nonretrogression test

based on the number of effective minority districts would help freeze into place additional majority Hispanic seats that are a product of the growth in the Hispanic population over the previous decade. On the other hand, the likelihood of Democrats trying to use Hispanics as sandbags to prop up the election or reelection chances of non-Hispanic white Democrats increases under an interpretation of section 5 that includes the notion of minority influence.

7. For proponents of the Voting Rights Act who see the act as a means of integrating the halls of government in some substantial way, the Georgia case can only be seen as setting a dangerous precedent. For partisan Democrats who see the election of more Democrats as critical to representing minority interests, however, the decision is far less troubling, and has even been welcomed. However, the Democratic party is not necessarily the automatic beneficiary of the Georgia v. Ashcroft reinterpretation of section 5. As Mark Braden, a leading Republican voting rights attorney, pointed out (personal communication, June 26, 2003), a good case can be made that Georgia v. Ashcroft should be thought of as a victory for the haves. In covered jurisdictions, those who are in charge of the redistricting process will be less constrained by section 5 than was once the case, and will be better able to pursue a partisan agenda. For example, Republicans are likely to advocate the continuation (or even an increase) in the number of effective minority districts when in control of the redistricting process. In the hands of Democrats, however, redistricting is more likely to lead to the substitution of influence districts for effective districts with the accompanying argument that this is the path to greater overall minority electoral impact.
8. On balance, Republicans in Congress may decide it is the better part of valor to not take on minority civil rights advocates directly, and to let the drafting of proposed language be largely in the hands of the voting rights community, knowing that the ultimate interpretation of any new section 5 language is something that will be fought over in the Supreme Court.
9. Although there is always the potential for presidential veto, it is not something we deem likely. President Bush and congressional Republicans are likely to be working together to shape a common policy vis-à-vis the language used in the renewal.
10. If section 5 is renewed, it will, however, take a while for a court case involving the new language to work its way through the system. For example, after the 1982 changes in section 2 language, the first district court case involving its constitutionality was heard in 1984, and that case was not decided by the Supreme Court until 1986 (Thornburg v. Gingles, 478 U.S. 30). Because we are so late in the decennial cycle, it might seem that a constitutional test of any new section 5 language and triggering mechanisms might be delayed until the next redistricting round, but we doubt that. If nothing else, some re-redistricting in a covered state might serve as an appropriate vehicle for such a test.
11. Having Republicans advocate a stronger version of section 5 than they think can pass Supreme Court scrutiny would be a tactic analogous to what, in the Public Choice literature (Riker 1965) is known as offering a killer amendment—one that is proposed by those who want a bill to fail. The amendment, in appearance, is one highly attractive to the bill's most enthusiastic advocates, but also one that might not be expected to pass. However, some legislators who oppose the bill support the amendment,

allowing it to pass with their support and those of the bill's more extreme supporters. The legislators offering the killer amendment then reverse their position on the vote on final passage of the bill by voting their true preferences. Because the bill has been amended in a way that actually does not command majority support, the amended bill then fails. Here it would be the Supreme Court that is the ultimate "killer."

12. The Court will need convincing that anything even remotely approximating the kinds of discrimination, including exclusion from the franchise, that were found in 1965 (and whose lingering effects persisted into the 1980s)—the historical realities seen as justifying the extraordinary intervention into and control over state electoral processes that the VRA imposed—can be found today.
13. This work shows flaws in the rather negative portrait of black representatives in earlier work such as Carol Swain (1993), and also casts doubt on the notion that white representatives and minority representatives are equally adept and equally motivated to serve minority interests.
14. In California, for example, there are U.S. House districts electing black candidates that do not have a majority of black voters, but do have a clear majority of black and Hispanic voters.
15. For useful reviews of recent literature on race and representation see Seth McKee (2004) and Bernard Grofman (2005).
16. But representatives, regardless of race or ethnicity, will, however, often, ceteris paribus, pay more attention to the voters who have voted for them than those who have not. But voters who are seen as implacable opponents, as well as voters who are seen as "having no where else to go" may well have less influence than their numbers might seem to suggest. This general "them" is explored in more depth in Bernard Grofman (2005)
17. The political science literature refers to this as a "top-down" realignment.
18. In fact, arguably, in many southern states it was the failure of Democrats to properly interpret the handwriting on the wall that led to Democratic losses in excess of what should have occurred as Democrats drew what Bernard Grofman and Thomas Brunell (2005) refer to as "dummymanders," that is, redistricting plans drawn by one party that, at least with hindsight (and arguably with foresight, as well), look exactly like partisan gerrymanders drawn to favor the other party.
19. Indeed, more generally, unlike Ruy Teixeira and some other Democratic polyannas, we do not expect longer-run demographic and social trends to inevitably favor Democrats. In particular, we are skeptical about the feasibility of what A Wuffle (personal communication, April 1, 2004) has called the "waiting for Godez" cure for what ails the Democratic party. Not only would new Hispanic citizens have to have higher probabilities of being registered and voting than we would expect, but there is no good reason to believe that Hispanics will somehow remain invulnerable to the trends that have turned large numbers of other working class and middle class Catholics into Republicans. Thus, when we look beyond the South, we see a closely divided House of Representatives, probably with a Republican majority, as likely to be with us for a while.
20. The parallel would be congressional intent in 1982 to restore the pre Mobile v. Bolden (446 U.S. 55; 100 S. Ct. 1490) standard for determining vote dilution—namely, an

effects test viewed in the totality of the circumstances that did not require direct evidence of intentional discrimination.

21. If the reach of Georgia v. Ashcroft's influence approach extends to section 2, then its impact would be nationwide, not confined to the states covered either in whole or in part by section 5.
22. Recall that we earlier cited a characterization of section 2 and section 5 as they operated in the 1990s as a one-two knockout punch.
23. Indeed, it might even seem highly desirable that the number of covered jurisdictions shrink (or at least not expand greatly), because the presumed justifications for section 5 are unlikely to be as compelling in 2005 as they were in 1965, when Jim Crow was still alive and reasonably well. However, there are countervailing considerations involving voting rights issues for other groups, most notably American Indians, occurring in jurisdictions in the west and southwest that are not presently covered under section 5.
24. Patterns or practices found in 1964 or 1968 or even 1972 seem sufficiently remote from 2007 that, if, say, registration or turnout is to continue be used as a trigger for section 5 coverage, it might seem to make sense to use only more recent data. But if we were to include only jurisdictions whose level of registration and CVAP turnout based on 2004 data fell below the 50 percent threshold, there would be no, or almost no, section 5 coverage at the state level. Using turnout as a proportion of voting age population as the trigger, my initial analysis of state-level turnout data from the 2004 presidential election compiled by Michael McDonald (George Mason University, http://elections.gmu.edu/Voter_Turnout_2004.htm) revealed the fact that only one of the nine states presently covered in whole by section 5 (Texas) would remain covered if low turnout in 2004 was the sole criterion, although two other states not presently covered in whole at present (Arizona and California) would be eligible for statewide coverage. There would be some additional states (for example, Hawaii and Nevada) that would fail a statewide turnout test based on VAP in 2004. But these states would probably not fail if CVAP and not VAP were in the denominator. Moreover, for these states, the applicability of the tests or devices component of the section 5 trigger would need to be demonstrated. However, if citizen voting age population data rather than voting age population data were used to define the trigger, as was the case in the 1975 renewal, then almost certainly none of the states presently covered state-wide would remain with statewide coverage.
25. The U.S. Census Bureau has been charged with the determination of which jurisdictions meet the various turnout and registration trigger provisions that have been used in the past. As Daniel Levitas (personal communication, June 2005) reminds us, when the Census Bureau determined which states fell under the trigger mechanism in the past, they used a complex mix of census micro-sample data and state-specific registration and turnout data produced by various secretaries of state (see for example, June 1976). Scholars who wish to anticipate the Census Bureau determination will need to familiarize themselves with its approach or determine whether—given problems both with the PUMS micro-sample data and state registration and turnout data bases—there are better ways to estimate minority participation rates that might be written into the trigger formulae.

26. Also, we might see the 2004 election as atypically high in voter participation because of media-fed voter perceptions that this election might be the political equivalent of a photo-finish.
27. Indeed, it seems clear to us that, in practice, with any reasonable trigger, the set of jurisdictions we can expect to be covered will be a subset of those now covered. In particular, some states now covered in whole may end up only covered in particular counties.
28. There are other recent cases other than Georgia v. Ashcroft in which the Court has dramatically reduced the scope of Justice's section 5 enforcement powers under the act—most notably Presley v. Etowhah County Commission (502 U.S. 491) and Reno v. Bossier Parish School Board (520 U.S. 471, and 528 U.S. 320). Here, too, the civil rights community might wish to ask Congress to clarify for the Supreme Court the correct interpretation of congressional intent vis-à-vis various specific language in the act. However, none of these cases is, in our view, anywhere as important for the future of voting rights enforcement as Georgia v. Ashcroft.
29. As a social science expert who often testifies in voting rights cases, one of the authors in this volume, Bernard Grofman, has recognized that it is now essential for the D.C. court and for the U.S. Department of Justice to flesh out the relatively sketchy framework for specifying overall minority influence offered in Georgia v. Ashcroft to delineate manageable legal standards for section 5 preclearance decision-making in the light of that Supreme Court decision. To that end he has written an essay offering social science perspectives on operationalizing Justice O'Connor's approach (Grofman forthcoming), and co-authored with Lisa Handley an empirical sequel to that essay in which we apply its three-pronged test of retrogression to data on 2001 plan for the Georgia Senate involving comparison between that plan and the 1997 benchmark plan, on the one hand, and the 2002 consent plan on the other (Grofman and Handley 2006). The two essays described above take the statutory interpretation of section 5 offered by the Supreme Court majority as given. The contribution intended for those papers is to bring social science expertise to bear on ways to empirically operationalize opportunity to elect and influence-based standards in an appropriate fashion that is consistent with Georgia v. Ashcroft. The views expressed below are those of a concerned citizen.
30. Speaking as a citizen, I hope that the concept of influence will not become unduly influential in voting rights jurisprudence. For a similar view about the problematicity of an influence standard, see the discussion in Jason Bordoff's (2003) note dealing with Georgia v. Ashcroft as a leading case of the 2002 Supreme Court term, and see Pamela Karlan (2004). We are particularly worried about "mission creep" between the role of an influence test in section 5 jurisprudence and the role of influence in section 2 jurisprudence.
31. Of course, applying even this standard requires careful empirical analysis (for extended discussion, see Grofman 2005).
32. It is worth remembering in this context that, the Beer court in effect, redefined the effects language of section 5 to restrict it to retrogressive effect (compare Pitts 2005a).
33. Moreover, the way in which the discussion of section 5 is couched in Georgia v. Ashcroft sometimes suggests as much of an interest in legislative intent as in what actually happened (see discussion of this point in Pitts 2005a).

34. Here the Court is borrowing from ideas of the noted political theorist, Hannah Pitkin (1967).
35. A. Wuffle (personal communication to the author, April 1, 2004) has suggested that this standard switching sounds an awful lot like leaving it to the criminal to decide with what crime she or he should be charged, and has imagined the following (tongue-in-cheek) dialogue:

> Criminal. "I could plead not guilty to the rape charge, but, just in case you might convict me of rape, anyway—based on the evidence—I've decided, instead to plead instead not guilty to murder. I know I'll be acquitted on that charge."
> Prosecuting Attorney. "OK, even though you're clearly guilty of rape, since we can't find you guilty of murder, I guess I have no choice under the crime-switching option the Supreme Court gave you but to let you off scot free."

36. Pamela Karlan (2004) has argued there is a potential logical inconsistency here. As long as the number of districts where there is a realistic opportunity to elect is maintained, according to Georgia v. Ashcroft, it would apparently not violate section 5 if a plan eliminated all influence districts and made sure that the party supported by the minority community had no chance to control the legislature. So, in this descriptive representation defense to a retrogression claim is proffered, jurisdictions need not concern themselves with overall minority influence. But if evaluating overall minority influence (effective exercise of the electoral franchise) is the sine qua non of section 5, then it would seen that this litmus test needs to be applied to all plans, and thus we should look both at what happens to realistic opportunity to elect and at overall influence, not at one or the other.
37. Pamela Karlan, in her usual incisive prose, has made the point well by calling attention to the irony of the Supreme Court talking about a jurisdiction being allowed to choose between two different ways to "maximize the electoral success of a minority group" (2004, 31). As she notes, "Georgia hardly had a history of 'choosing' to 'maximize' black voting strength. The very real danger was that Georgia would pick a method of redistricting designed to minimize the electoral success of black voters—as it had undeniably done in the 1970s and 1980s" (31). At best, one might hope that the success would be a "byproduct" of other concerns on the part of the white Georgia Democrats.
38. The only exception will be the rare district that elects a Hispanic Republican. Because such a candidate is unlikely to be the candidate of choice of the Hispanic community (with southern Florida a major exception to this rule), the Republicans will seek to reduce minority population to guard that Hispanic Republican against a loss to a Democratic Hispanic candidate (as occurred in one district in the 2003 re-redistricting in Texas for seats to the U.S. House of Representatives).
39. Yes, there are exceptions, but, in my view, they are relatively few and far between.
40. I am indebted to J. Gerald Hebert, a former attorney with the Voting Rights Section of DOJ for calling this point to my and the media's attention.
41. Of course, the political forces at DOJ taking over the review of the 2003 plan for the Texas delegation's representation in the House of Representatives from the hands of

the line attorneys probably cannot be blamed on the new political content of the section 5 review standard vis-à-vis influence. Given the political importance of the Texas re-redistricting to Republican hopes of maintaining a lock on control of the U.S. House for the foreseeable future, and the apparent willingness of DOJ political appointees to place more weight on achieving with certainty desired outcomes than on the nature of the processes that lead to these outcomes, the same type of "special process" for the section 5 review of the redrawn Texas congressional plan may have been inevitable regardless of how Georgia v. Ashcroft had been decided.

42. I generally share Pamela Karlan's point (2004, 36) that Georgia v. Ashcroft suggests that the Voting Rights Act is becoming a victim of its own success (see also Pildes 2002). Now that black and other minority representatives have been elected in reasonable numbers as a result of the creation of black majority seats, courts seem reluctant to recognize just how difficult this achievement was, and how bitterly resisted by incumbent politicians. They fail to give section 5 and section 2 the credit they in fact deserve, but instead attribute minority electoral gains to the supposed racial goodwill of white politicians and the supposed reduced racial animus of white voters. However, I would also agree with congressional specialist David Rohde (personal communication to the senior author, January 9, 2004) that, as long as African Americans and Hispanics are in leadership roles within the Democratic party, and as long as Republicans find it in their partisan interest to create highly minority districts that pack Democratic voters, descriptive representation of minorities is likely to be preserved at near its present levels almost regardless of the legal climate vis-à-vis voting rights enforcement. On the other hand, I would also concur with the assessment of Republican voting rights attorney, Mark Braden (personal communication, June 26, 2003) that the racial or ethnic group most affected by Georgia v. Ashcroft is likely to be Hispanics. In Congress, and in state legislatures, most of the black majority (or near majority) districts that could have been created are already in place, and blacks are a declining proportion of the total electorate, except in a handful of states, so we should not expect to see new black majority seats created. For Hispanics, the fastest growing minority in the United States, in covered jurisdictions such as Texas, that is not true. A legal climate that discourages the creation of new majority-minority districts will have its greatest impact on Hispanic representation.

43. For somewhat different perspectives, see David Canon (1999), David Lublin (1997), David Lublin and Stephen Voss (2003), Ronald Weber (2000), Voss and Lublin (2001), McKee (2002).

44. Hannah Pitkin (1967) also refers to a third element of representation, which she calls formal representation, which I prefer to call linkage representation—by which is meant the electoral mechanisms that permit voters to designate and control their elected representatives. Formal (or linkage) representation, though distinctive, is in no way incompatible with either descriptive or substantive representation—indeed, quite the contrary. Depending on the characteristics of the constituencies and the preferences of the voters, linkage representation may enhance descriptive representation, and it is likely to be linked to the incentives for substantive representation.

45. In addition to posing an improper dichotomy between descriptive representation and substantive representation, the Court majority to clearly enough distinguish minority

candidates who are also minority candidates of choice from minority candidates who are not candidates of choice of the minority community. Descriptive representation, per se, is certainly not required by the Voting Rights Act. Rather that act protects (among other things) the rights of minority voters to an equal opportunity to elect candidates of choice. However, as I have emphasized in Grofman (forthcoming), and in many of my previous publications, if that right is to be meaningful, it must include the right to elect candidates of choice in situations in which the candidate of choice of the minority community is himself or herself a member of that community.

46. In contrast, even if, like the present authors, one does not believe that the creation of tortuously and bizarrely constructed majority-minority districts in the 1990s redistricting round could be blamed on DOJ enforcement practices (Grofman and Handley 1998; compare Posner 1998); and even if, like the present authors, one does not think that the new constitutional test in Shaw v. Reno was the best way to address the problem of "ugly" districts drawn for race-conscious purposes (Grofman 1997), there can be little dispute that, in the 1990s there clearly was a perceived problem in the way race-conscious districting was being implemented. Moreover, in the early 1990s, Republican attorneys and some civil rights advocates had made implausible assertions about what was required of covered jurisdictions by the Voting Rights Act. Thus federal courts needed to provide some clarification about the scope of section 5. Indeed, though our review of the data is both limited and impressionistic, in looking at congressional and state legislative section 5 preclearance reviews by DOJ in the 2000 round of redistricting, we do not see that DOJ could be accused of overreaching. Hence, when the Court majority unveiled a new section 5 standard in Georgia v. Ashcroft that replaced the Beer standard, they were, in effect, building a new barn when none was needed—the old door had already been locked and all the horses were safe within. In particular, when we look at how DOJ assessed retrogression in the 2001 Georgia senate plan, we see that DOJ raised a preclearance objection to only a handful of the many districts in that plan that had been severely decreased in their African American share of the electorate, and that it failed to object to some Senate districts where the State of Georgia's defense against a retrogression claim under Beer was, in our view, rather weak. (These points are elaborated in the Grofman and Handley review of empirical evidence about Georgia redistricting plans (2006), but the key factual observation is simply that there were more than two dozen districts in the 2001 Georgia senate or house plans where there had been substantial drops in black population and black VAP from the 1997 benchmark, but DOJ objected only to three senate districts.
47. These changes in DOJ review practices for congressional and legislative redistricting across the decades also do not seem to have been much noticed by legal commentators.
48. See, in particular, the comparison in Bernard Grofman and Lisa Handley (forthcoming), of how DOJ handled the Georgia 2001 plans with DOJ's treatment of Georgia's congressional and legislative plans in the 1990s.
49. On the other hand, it would be almost equally ironic if the Voting Rights Act of 1965, passed with proportionally greater Republican than Democratic support, should be interpreted as prohibiting retrogression in the number of districts that elect Democrats—an interpretation that a too-casual reading of Justice O'Connor's opinion in Georgia v. Ashcroft might also seem to support.

50. For example, Mauro E. Mujica, chairman and CEO of U.S. ENGLISH Inc., a group that describes itself as "dedicated to preserving the unifying role of the English language" claims on its Web site that "Los Angeles County spent $3.3 million, 15 percent of the entire election budget, to print election ballots in seven languages and hire multilingual poll workers for the March 2002 primary" (http://www.us-english.org).
51. In a March 7, 2005, press release "Justice Department to Monitor Elections in Arizona, California, and Washington," the Civil Rights Division of the U.S. Department of Justice announced proudly that, in 2004, a record number of 1,463 federal observers and 533 department personnel had been sent to monitor 163 elections in 105 jurisdictions in twenty-nine states. This compares to 640 federal observers and 103 department personnel deployed in 2000. Most of these jurisdictions are likely to be ones where the monitored counties, thus their subordinate jurisdictions, were obligated under section 203 of the VRA to provide voting material in one or more languages other than English. Presumably, this expansion in DOJ monitoring efforts primarily reflects the continuing and expanding multicultural heterogeneity of the U.S. population, as opposed to an increase in attempts to subvert section 203 provisions by covered jurisdictions, or a politically motivated push by a Republican administration for greater visibility within the Hispanic community of actions seen as benefiting Hispanics.

CASE LIST

Beer v. United States, 425 U.S. 130 (1976).
Georgia v. Ashcroft, 195 F. Supp. 2d 25 (2003); 539 U. S. 461 (2003).
Mobile v. Bolden 446 U.S. 55; 100 S. Ct. 1490 (1979).
Presley v. Etowhah County Commission, 502 U.S. 491 (1992).
Reno v. Bossier Parish School Board, I, 520 U.S. 471 (1997).
Reno v. Bossier Parish School Board, II, 528 U.S. 320 (2000).
Shaw v. Reno, 509 U.S. 630 (1993).
Thornburg v. Gingles, 478 U.S. 30 (1986).
Vieth v. Jubilerer, 539 U.S. 957 (2004).

REFERENCES

Bordoff, Jason. 2003. "Note: Georgia v. Ashcroft." *Harvard Law Review* 117 (December): 469–79.

Brace, Kimball, Bernard Grofman, and Lisa Handley. 1987. "Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?" *Journal of Politics* 49:143–56.

Brace, Kimball, Bernard Grofman, Lisa Handley, and Richard Niemi. 1988. "Minority Voting Equality: The 65 Percent Rule in Theory and Practice." *Law and Policy* 10(1):43–62.

Canon, David T. 1999. *Race, Redistricting and Representation: The Unintended Consequences of Black Majority Districts*. Chicago: University of Chicago Press.

Davidson, Chandler. 1992. "The Voting Rights Act: A Brief History." In *Controversies in Minority Voting: The Voting Rights Act in Perspective*, edited by Chandler Davidson and Bernard Grofman. Washington, D.C.: The Brookings Institution.

———. 1994. "The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities." In *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965–1990*, edited by Chandler Davidson and Bernard Grofman. Princeton N.J.: Princeton University Press.

Davidson, Chandler, and Bernard Grofman, eds. 1994. *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*. Princeton N.J.: Princeton University Press.

Fenno, Richard. 1978. *Home Style: House Members in their Districts*. Boston: Little, Brown. (reprinted: Longman 2003).

———. 2003. *Going Home: Black Representatives and Their Constituents*. Chicago: University of Chicago Press.

Grofman, Bernard. 1997. "The Supreme Court, the Voting Rights Act, and Minority Representation." In *Affirmative Action and Representation: Shaw v. Reno and the Future of Voting Rights*, edited by Anthony Peacock. Durham: Carolina Academic Press.

———. 2000. "Remarks at the Panel on Redistricting Issues," Annual Meeting of the National Conference of State Legislatures. Chicago (July 14–17, 2000).

———. 2005. "Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of *Georgia v. Ashcroft*: Part I, Social Science Perspectives." Working Paper. Presented at the Conference on Voting Rights, Yale University Law School. University of California, Irvine Center for the Study of Democracy (April 22–24, 2006).

———. Forthcoming. "Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of *Georgia v. Ashcroft*: Part I, Social Science Perspectives." *Election Law Journal*.

Grofman, Bernard, and Thomas Brunell. 2005. "The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats." In *Redistricting in the New Millennium*, edited by Peter Galderisi. Lexington, Mass.: Lexington Press.

Grofman, Bernard, and Lisa Handley. 1991. "The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures." *Legislative Studies Quarterly* 16(1): 111–27.

———. 1998. "Estimating the Impact of Voting-Rights-Act-Related Districting on Democratic Strength in the U.S. House of Representatives." In *Race and Redistricting in the 1990s*, edited by Bernard Grofman. New York: Agathon Press.

———. 2006. "Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of *Georgia v. Ashcroft*: Part II, Evaluating Retrogression in the 2001 Georgia Senate Plan." Working Paper. University of California, Irvine Center for the Study of Democracy (2006).

Grofman, Bernard, Lisa Handley, and David Lublin. 2001. "Drawing Effective Minority Districts: A Conceptual Framework and some Empirical Evidence." *North Carolina Law Review* 79(5): 1383–430.

Handley, Lisa, Bernard Grofman, and Wayne Arden. 1998. "Electing minority-preferred candidates to legislative office: The relationship between minority percentages in districts and the election of minority-preferred candidates." In *Race and Redistricting in the 1990s*, edited by Bernard Grofman. New York: Agathon Press.

Hasen, Richard. 2004. "Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after *Tennessee v. Lane*." Unpublished manuscript. Loyola Law School, Los Angeles. http://ssrn.com/abstract=561241.

Haynie, Kerry L. 2001. *African-American Legislators in the American States*. New York: Columbia University Press.

Issacharoff, Samuel. 2004. "Is Section 5 of the Voting Rights Act a Victim of its Own Success?" *Columbia Law Review* 104(6): 1710–731.

Karlan, Pamela. 2004. "*Georgia v. Ashcroft* and the Retrogression of Retrogression." *Election Law Journal* 3(1): 21–36.

Lublin, David. 1997. *The Paradox of Representation*. Princeton, N.J.: Princeton University Press.

———. 2003. "The Missing Middle: Why Median-Voter Theory Can't Save Democrats from Singing the Boll-Weevil Blues." *Journal of Politics* 65(1):227–37.

Lublin, David, and D. Stephen Voss. 2003. "The Missing Middle: Why Medium-Voter Theory Can't Save Democrats from Singing the Boll-Weevil Blues." *Journal of Politics* 65(1): 227–37.

Mansbridge, Jayne. 1999. "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes.'" *Journal of Politics* 61(3): 628–57.

———. 2003. "Rethinking Representation." *American Political Science Review* 97 (4): 515–28.

McKee, Seth C. 2002. "Majority Black Districts, Republican Ascendancy, and Party Competition in the South, 1988–2000." *American Review of Politics* 23 (Summer): 123–39.

———. 2004. "The Impact of Congressional Redistricting in the 1990s on Minority Representation, Party Competition, and Legislative Responsiveness." Paper presented at the Annual Meeting of the Southern Political Science Association. New Orleans. (January 2004). http://archive.allacademic.com/publication/getfile.php?file=docs/spsa_proceeding/2004-01-08/16422/spsa_proceeding_16422.pdf&PHPSESSID=af5b851dd39809f6e78690abf29acd14

Mendelberg, Tali. 2001. *The Race Card: Campaign Strategy, Implicit Messages and the Norm of Equality*. Princeton, N.J.: Princeton University Press.

Overby, L. Marvin, and Kenneth M. Cosgrove. 1996. "Unintended Consequences? Racial Representation and the Representation of Minority Interests." *Journal of Politics* 58: 540–50.

Pildes, Richard H. 2002. "Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s." *North Carolina Law Review*, 80: 1517–573.

Pitkin, Hannah Fenichel. 1972 (originally published 1967). *The Concept of Representation*. Berkeley: University of California Press.

Pitts, Michael J. 2005a. "*Georgia v. Ashcroft*: It's the End of Section 5 as We Know It (and I Feel Fine)." *Pepperdine Law Review* 32: 265–314.

———. 2005b. "Let's Not Call the Whole thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act." *Nebraska Law Review* 84: 605–30.

Posner, Mark A. 1998. "Post-1990 Redistricting and the Preclearance Requirement of Section 5 of the Voting Rights Act." In *Race and Redistricting in the 1990s*, edited by Bernard Grofman. New York: Agathon Press.

Riker, William H. 1965. "Arrow's Theorem and Some Examples of the Paradox of Voting." In *Mathematical Applications in Political Science I*, edited by John M. Claunch. Dallas: Southern Methodist University Press.

Swain, Carol. 1993. *Black Faces, Black Interests. The Representation of African-Americans in Congress.* Cambridge: Harvard University Press.

Tate, Katherine. 2003. "Black Opinion on the Legitimacy of Racial Redistricting and Minority-Majority Districts." *American Political Science Review,* 97(1): 45–56.

Tsebelis, George. 1990. *Nested Games: Rational Choice in Comparative Politics.* Berkeley: University of California Press.

U.S. Census Bureau. 1976. "Language Minority, Illiteracy, and Voting Data Used in Making Determinations for the Voting Rights Act Amendments of 1975 (Public Law 94-73), *Current Population Reports: Estimates and Projections,* Series P-25 no. 627, June.

Voss, D. Stephen, and David Lublin. 2001. "Black Incumbents, White Districts: An Appraisal of the 1996 Congressional Election." *American Politics Research* 29(2): 141–82.

Weber, Ronald E. 2000. "Race-based Redistricting: Does It Help or Hinder Legislative Representation." *Political Geography* 19: 213–47.

Whitby, Kenny J. 1997. *The Color of Representation: Congressional Behavior and Black Interests.* Ann Arbor: University of Michigan Press.