PROTECTING MINORITY VOTERS: OUR WORK IS NOT DONE
CHAPTER 1
Background: The Voting Rights Act of 1965

This Report’s assessment of recent voting discrimination in the United States begins with an overview of the Voting Rights Act of 1965 (VRA), including the statute’s origins, provisions, and impact on minority electoral opportunity up until the time period examined in this report (the years 1995 to the present). This chapter also provides an overview of the Supreme Court’s momentous decision in *Shelby County v. Holder* in June 2013, and that decision’s negation of the VRA’s preclearance requirement and possibly other VRA requirements as well.

As Chief Justice Warren observed in his seminal opinion in *South Carolina v. Katzenbach* upholding the VRA’s constitutionality a few months after it was enacted,

> [t]he Voting Rights Act of 1965 reflects Congress’ firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant… [Other] remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur.

For over three decades, Congress, the Executive Branch, and the federal courts joined together in a historic effort to vigorously enforce the VRA and give life to the 15th Amendment’s guarantee that the right to vote shall not be denied or abridged on account of race or color. This consensus began to erode, however, in the time period under review in this Report. Then, in *Shelby County*, the Supreme Court essentially stopped the use of the Section 5 preclearance requirement (and also perhaps the federal observer program) by ruling unconstitutional the VRA provisions which identified the parts of the country where Section 5 (and the observer program) applied. Other VRA remedies remain in effect and continue to be enforced.

I. THE PRELUDE TO THE 1965 ACT: ALMOST A CENTURY OF AFRICAN-AMERICAN DISENFRANCHISEMENT

The VRA was enacted against the backdrop of this country’s shameful and almost century-long disenfranchisement of millions of its African-American citizens. That history of pervasive discrimination was not the inevitable result of the social and economic conditions that
preceded the Civil War and the end of slavery but, instead, represented a substantial backsliding from the initial progress in voting rights that followed after the Civil War.

In 1868 and 1870, the country ratified the 14th and 15th Amendments to the Constitution guaranteeing to all citizens equal protection of the law, and prohibiting any denial or abridgment of the right to vote on account of race or color. Both Amendments included enforcement clauses giving Congress specific power to implement these guarantees through appropriate legislation. While the Amendments did not promise voting rights for all citizens—women were not enfranchised until the ratification of the 19th Amendment in 1920, and the status of Native Americans living on reservations was not addressed—the 14th and 15th Amendments appeared to herald the end of racial discrimination in voting.

Indeed, during the Reconstruction era former slaves registered, voted, and were elected to political office in significant numbers. These gains in black political empowerment were the direct result of the federal government’s enforcement of the 14th and 15th Amendments through legislation and the presence of federal troops in the former Confederate States. But in 1876 the Supreme Court narrowly interpreted these Amendments to invalidate congressional civil rights legislation, and that was immediately followed by the Hayes-Tilden Compromise of 1877, which ended Reconstruction. This ushered in a long era during which all three branches of the federal government took a “hands-off” approach to racial discrimination generally and racial discrimination in voting in particular. By 1900, nearly all of the Reconstruction-era gains in voting rights had been reversed, and the resulting Jim Crow era persisted until the second half of the 20th Century. The concerted effort to effectively nullify the 15th Amendment was carried out in a variety of ways, including racially-inspired and racially-enforced restrictions on voter registration and voting, election methods that sought to dilute any residual voting power of African Americans, and fraud and violence directed against African-American voters.

After World War II, the Jim Crow regime began to crumble in the face of civil rights protests, a Supreme Court and lower federal courts that rejected racial discrimination, tentative action by the federal Executive Branch, and a national consciousness that at least raised questions about Jim Crow. Congress enacted its first voting rights laws since the 19th Century in 1957, 1960, and 1964, and lawsuits were filed against numerous voting registrars in the South by the newly created Civil Rights Division of the U.S. Department of Justice (DOJ). Still, these efforts were only able to dent the structure of oppression. As of March 1965, less than one-third of all African Americans living in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia were registered to vote, whereas about three-fourths of the white population of those States was registered.
Marchers walk toward the Edmund Pettus Bridge during the Selma to Montgomery March for Voting Rights of 1965.

Finally, after the 1964 Freedom Summer in Mississippi saw both valiant efforts to register African Americans to vote and retaliatory violence including the murders of three civil rights workers, and after the brutal March 7, 1965 attack on protesters peacefully marching across the Edmund Pettus Bridge in Selma, Alabama, President Johnson stood before Congress on March 15, 1965 to urge the adoption of a new voting rights bill. Johnson declared that “There is no issue of States rights or national rights. There is only the struggle for human rights,” and “we shall overcome.” Congress responded, and less than five months later, President Johnson signed the Voting Rights Act of 1965 into law on August 6.

II. THE 1965 VOTING RIGHTS ACT

The VRA’s first order of business was to knock down the registration laws and stop the actions by local registrars that were preventing African Americans from registering and voting. The VRA sought to do this in several ways. First, Section 4 of the Act laid out a formula for identifying areas where voting discrimination was most prevalent and temporarily prohibited the use of voting “tests or devices” in those areas. These “tests or devices” included any requirement that voters “(1) demonstrate the ability to read, write, understand, or interpret any matter; (2) demonstrate any educational achievement or his knowledge of any particular subject; (3) possess good moral character; or (4) prove his qualifications by the voucher of
registered voters or members of any other class.” Second, Section 6 of the Act gave the U.S. Attorney General the authority to bypass local election officials by dispatching federal registrars (known as “examiners”) to register qualified voters in these same areas designated by Section 4. Third, Section 8 gave the Attorney General the authority to send federal observers into polling places in the Section 4 areas to monitor and document the conduct of elections and to deter misconduct by election officials and intimidation by private citizens.

Congress understood, however, that once minority voters became able to vote, the risk was substantial that states and localities where discrimination had been most prevalent would enact or seek to administer new techniques for minimizing or canceling out minority electoral participation. Thus, Congress included Section 5 in the VRA. Section 5 requires that all new voting practices and procedures in areas identified by Section 4 undergo federal review before implementation. This review—called “preclearance”—was designed to ensure that new practices and procedures did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color.

The VRA also included, in Section 2, a nationwide general prohibition on voting discrimination. In Section 4(e), Congress took a first step toward addressing potential discrimination in English-only elections, establishing a remedy for Puerto Rican citizens educated in schools where the predominant language was not English. And in Section 11, Congress prohibited voter intimidation.

The constitutionality of the VRA was immediately challenged by several of the states covered by Section 4 and thus subject to the Act’s special remedies regarding voter registration, election monitoring, and preclearance. Their lawsuit was filed directly in the Supreme Court, and on March 7, 1966, exactly one year after the events of Bloody Sunday on the Edmund Pettus Bridge, the Court decisively upheld all the challenged provisions in *South Carolina v. Katzenbach*. Discussing the VRAs specially targeted provisions, the Court captured the essence of the new legal framework Congress had established for addressing racial discrimination in voting:

> Congress… found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.
III. REAUTHORIZATION AND EXPANSION OF THE VRA’S REMEDIES AFTER 1965

Part of Congress’ original structuring of the targeted “test or device,” preclearance, examiner, and observer remedies was the inclusion of a sunset provision which would have effectively terminated these remedies in 1970 by allowing the Section 4 coverage to expire.\(^{19}\) In that year, however, Congress reauthorized Section 4 coverage for another five years, and then reauthorized coverage for an additional seven years in 1975, 25 years in 1982, and 25 years again in 2006 (terminated then in 2013 by the Shelby County decision).\(^{20}\)

The congressional debates in 1970, 1975, 1982, and 2006 over reauthorizing the Section 4 coverage formula focused mostly on whether to continue requiring Section 5 preclearance for voting changes. This is because the other most significant remedy applied to the Section 4 areas – the prohibition on voting “tests or devices” – was expanded by Congress into a nationwide five-year suspension in 1970\(^{21}\) and a permanent, nationwide ban in 1975.\(^{22}\)

As part of the debate over each post-1965 reauthorization of Section 4 coverage and thus Section 5, Congress examined the recent record of voting discrimination in the covered areas to assess whether there was a current need for the preclearance requirement. As a result of each review, Congress found that there was a significant and ongoing pattern of voting discrimination in these areas, and that, accordingly, there continued to be a significant risk that the electoral gains that had been achieved in these areas would be rolled back without federal oversight.\(^{23}\)

In 1975, Congress also received extensive information indicating that in certain parts of the country, the use of English-only elections was having a substantial and discriminatory impact on language minority citizens – Hispanic Americans, Asian Americans, American Indians, and Alaska Natives.\(^{24}\) Congress also received information indicating that in a subset of these areas, the impact of English-only elections and other discriminatory practices was comparable to the voting “tests or devices” that had prevented African Americans from effectively participating in the electoral process.\(^{25}\) Accordingly, as part of the 1975 reauthorization legislation, Congress extended Section 4 coverage – and thus the Section 5 preclearance requirement – to particular states and localities that were conducting English-only elections. Congress also prohibited English-only elections in these newly-designated Section 4 areas for as long as Section 4 coverage continued.\(^{26}\) In addition, the 1975 legislation added Section 203 to the VRA, which requires bilingual election assistance in other areas around the country. These areas are identified by a separate coverage formula laid out in Section 203.\(^{27}\) Finally, the 1975 legislation amended Section 2 and Section 5 of the VRA to include a prohibition on discrimination against language minority citizens.\(^{28}\)
The 1982 reauthorization legislation also included an expansion of the VRA, in the form of an amendment to Section 2 adding a results test to that section’s general prohibition on racial and language minority discrimination in voting. The amendment was adopted to respond to a 1980 Supreme Court decision, Mobile v. Bolden, in which the Court made it significantly more difficult for minority plaintiffs to successfully challenge at-large and multi-member election plans under the 14th Amendment. Congress based the new results test on the standard that courts had relied upon prior to Mobile for resolving claims against at-large and multi-member elections.

After the Supreme Court’s initial decision in March 1966 upholding the constitutionality of the VRA, the Supreme Court continued to reject constitutional challenges to the Act. Later in 1966, the Court upheld the constitutionality of the bilingual provisions of Section 4(e), and following the 1970 reauthorization, the Court summarily rejected a renewed challenge to Section 5. Following the 1975 reauthorization, the Supreme Court issued a third decision in favor of Section 5 in 1980, rejecting claims that Section 5 violated principles of federalism, that Congress lacked the authority to reauthorize Section 5, and that Congress could not include in Section 5 a prohibition on voting changes that have a discriminatory effect. The Supreme Court’s last decision upholding the constitutionality of Section 5 was in 1999, following the 1982 reauthorization. In that case, the Court again rejected the assertion that Section 5 violated federalism principles.

Most recently, in 2005 and 2006, Congress conducted a series of 20 hearings and heard testimony from 90 witnesses in deciding whether to reauthorize Sections 5 and 203. The evidence received included the 2006 Report of the National Commission on the Voting Rights Act, which summarized and detailed numerous findings of voting discrimination within the jurisdictions covered by Section 4 between 1982 and 2005. By margins of 390-33 in the House of Representatives and 98-0 in the Senate, Congress voted to extend Section 4 coverage, and thus Section 5, for an additional 25 years, and to extend Section 203 for an additional 25 years as well. President George W. Bush signed the 2006 reauthorization into law on July 27, 2006.

As in 1982, the 2006 legislation included amendments to respond to recent Supreme Court decisions that Congress believed had undermined voting rights enforcement. Those decisions, in 2000 in Reno v. Bossier Parish School Board and in 2003 in Georgia v. Ashcroft, had significantly restricted the scope of Section 5’s prohibition on voting changes with either a discriminatory purpose or a discriminatory effect.

The 1970, 1975, and 1982 reauthorizations also extended the application of the federal examiner and observer provisions in areas covered by Section 4. In 2006, Congress again extended the observer authority, but repealed the examiner provisions since they had not been used for several years and were no longer needed.
IV. THE VRA’S MAJOR PROVISIONS

Section 2

Section 2 of the VRA is a permanent nationwide prohibition against voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group. Section 2 is violated both by practices and procedures that have a discriminatory purpose and those that have a discriminatory result. Section 2 is enforced through lawsuits filed in local federal courts (i.e., the court where the defendant jurisdiction is located).

The Section 2 results standard provides that a violation exists if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election... are not equally open to participation by... citizens protected by [Section 2] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

A detailed explanation of this broad standard was set forth in the 1982 Senate Judiciary Committee report for the legislation. The Senate Report identified a variety of factors that may be considered in undertaking a “totality of the circumstances” analysis, and in practice courts have relied upon these factors in applying Section 2.

While Section 2 applies to all voting practices and procedures, it has most frequently been applied in “vote dilution” challenges to at-large election systems and redistricting plans. There have been numerous court decisions finding that at-large systems and redistricting plans violate Section 2, and there have been hundreds of Section 2 settlements requiring counties, cities, and school districts to abandon at-large voting and adopt district-based methods of election. Successful Section 2 vote dilution claims like these must meet three “preconditions” first identified by the Supreme Court in Thornburg v. Gingles: (1) the minority population must be sufficiently numerous to comprise a majority of the eligible population in a reasonably-drawn single member district, (2) the minority voting population must be politically cohesive, and (3) minority voters’ candidates of choice must generally be defeated as the result of white bloc voting. Once these preconditions are satisfied, plaintiffs must then establish a violation under the full “totality of the circumstances” analysis.

Section 5

Section 5 required certain states and political subdivisions of other states to obtain federal preclearance whenever they would “enact or seek to administer any [new] voting...qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”
Section 5 applied broadly to any change affecting voting, even one that might seem minor or unobjectionable on its face.\textsuperscript{49} Voting changes subject to Section 5 were not permitted to be implemented unless and until preclearance was obtained.\textsuperscript{50}

Jurisdictions were required to seek preclearance either by filing suit in the U.S. District Court for the District of Columbia (requesting a declaratory judgment) or by making an administrative submission to the U.S. Attorney General.\textsuperscript{51} Whichever forum was chosen, it was the jurisdiction that had the burden of proof, not minority citizens or the Justice Department.\textsuperscript{52} The jurisdiction was required to demonstrate that each voting change “neither ha[d] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority status]....”\textsuperscript{53}

The Section 5 “effect” standard, distinct from the Section 2 “results” standard discussed above, prohibited backsliding. More specifically, Section 5 barred the implementation of any voting change “that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”\textsuperscript{54} Thus, effect was evaluated by comparing minority electoral opportunity under the new practice to minority electoral opportunity under the pre-existing practice. A discriminatory effect existed if the new practice would make that opportunity worse.

As noted earlier, the states and localities subject to Section 5 were identified by a series of provisions contained in Section 4 of the Act. The Section 4 coverage formula, first enacted in 1965 and then amended in 1970 and 1975, operated as follows: jurisdictions were covered if (1) they employed a “test or device” for registration or voting at the time of the 1964, 1968, or 1972 presidential election, and (2) less than 50 percent of the jurisdiction’s eligible voters registered or voted in the same election.\textsuperscript{55} For the coverage determinations based upon the 1964 and 1968 elections, the VRA defined the term “test or device” as those practices (such as literacy tests) which, as described above, the VRA temporarily and then later permanently banned. For coverage determinations based upon the 1972 election, the meaning of “test or device” was expanded to also include the use of English-only election procedures where a language-minority citizen group constituted more than five percent of the citizen voting age population of the jurisdiction.\textsuperscript{56}

As also discussed earlier, Section 4 coverage – and thus Section 5 – was further subject to recurring sunset provisions. Congress reauthorized and extended coverage in 1970, 1975, 1982, and 2006 after finding on each occasion that a high level of voting discrimination had continued in the Section 4 areas.

Thus, Section 5 remained in effect until \textit{Shelby County} based upon a combination of evaluations by Congress. First, Congress relied upon the evaluations built into the coverage formula, which looked at electoral conditions existing in 1964, 1968, and 1972 to identify
those areas of the country that had a history of persistent voting discrimination. Second, Congress relied upon four separate evaluations that updated Congress’ assessments of whether a pattern of voting discrimination was continuing in the jurisdictions with a history of voting discrimination.

From the outset, Section 4 permitted individual jurisdictions to sue to remove themselves from coverage (to “bail out” of coverage). Over the years, a number of jurisdictions took advantage of this exit ramp.

As a result, at the time Shelby County was decided, there were nine States subject to Section 5 in their entirety – Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In addition, portions of six other States were covered – California (three counties), Florida (five counties), Michigan (two townships), New York (three counties in New York City), North Carolina (40 of the State’s 100 counties), and South Dakota (two counties).

**Language assistance requirements**

In 1975, Congress enacted two complementary provisions, Section 4(f)(4) and Section 203, requiring certain jurisdictions around the country to provide voting materials in one or more languages in addition to English. These sections incorporated identical substantive requirements for language assistance. They differed in terms of the processes used to identify the covered jurisdictions. These provisions, like Section 2, are enforced through litigation filed by the Justice Department or minority individuals.

Section 4(f)(4) applied to those jurisdictions covered by the 1975 amendment to the Section 4 coverage formula. Given that the Supreme Court found the coverage formula unconstitutional in the Shelby County case, it is unclear whether there continue to be jurisdictions to which Section 4(f)(4) applies. The Supreme Court did not discuss Section 4(f)(4) in the Shelby County decision and thus did not specifically rule upon that section’s continuing viability.

Section 203 relies on a different coverage formula, which takes into account the number or percentage of voting age citizens in a state or political subdivision who are members of a single language minority group and who have limited proficiency in English, and whether the illiteracy rate of the jurisdiction’s language minority group is higher than the national illiteracy rate. Section 203 also includes a sunset proviso; it was reauthorized in 1982, 1992, and once again in 2006. The relevant coverage data are drawn from data collected by the U.S. Census Bureau, and thus the jurisdictions subject to Section 203 change somewhat over time. New determinations were originally made at ten-year intervals; since 2006 they are to be made at five-year intervals. Each Section 203 coverage determination is accompanied by a specification of the specific language or languages for which the jurisdiction is required to provide language assistance in the voting process.
According to the most recent determinations issued in 2011, the States of California, Florida, and Texas are fully covered under Section 203 (for Spanish), and individual counties are also separately covered in those States. Individual counties and townships are covered in 22 other States. Local jurisdictions are predominantly covered for Spanish, but many are covered for other languages including a variety of Asian, Native American, and Alaska Native languages. Sections 4(f)(4) and 203 apply to all stages of the election process, i.e., to “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.” The sections require that both written election materials and oral assistance be provided in the language of the covered language minority group.

The substantive requirements of Sections 4(f) and 203 are further described in the Attorney General’s Guidelines on Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups. The Guidelines specify that covered jurisdictions “should take all reasonable steps” to provide language assistance “in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities…” The Guidelines further explain that “[c]ompliance… is best measured by results[,]” and that the requisite results are most likely to be achieved by covered areas working in close cooperation with local community organizations. The Guidelines also endorse the targeting of language assistance to those language minority citizens in need, so that language assistance is not necessarily required to be provided to all eligible voters in the jurisdiction.

Section 4(e) of the VRA, enacted in 1965, requires jurisdictions to provide language assistance to United States citizens who were “educated in American-flag schools in which the predominant classroom language was other than English.” This section primarily affects citizens who attended primary school in Puerto Rico. There is no particular geographic coverage provision attached to this section. Section 4(e) also is enforced through litigation.
Federal observers

Since 1965, the Attorney General has been authorized by Section 8 of the VRA to send federal observers into polling places located in jurisdictions covered under Section 4, provided that the Attorney General certifies a particular county or parish for observers. As with Section 4(f)(4), the Shelby County ruling against the Section 4 coverage formula raises the question of whether there continue to be jurisdictions that are subject to the Section 8 authority, even though Shelby County did not discuss Section 8. DOJ apparently has concluded that the Section 8 observer authority no longer is enforceable after Shelby County.

Coverage of additional areas for preclearance and federal observers

The 1965 Act also includes provisions allowing courts to designate a jurisdiction not covered by Section 4 for similar coverage for a specified time period. Under Section 3(a), a court may designate a jurisdiction for federal observers (and, before the 2006 amendments, for federal examiners as well). Under Section 3(c), a court may designate a jurisdiction for preclearance of all or a subset of its voting changes. These “bail in” provisions continue in effect after Shelby County.

Permanent prohibition of certain tests and devices for voting

Section 201 of the VRA is a permanent nationwide ban on the use of specified “tests or devices” as prerequisites to registration or voting.

Other VRA provisions

Section 208 of the VRA, enacted in 1982, provides that any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be assisted by a person of the voter’s choice, other than the voter’s employer or agent of the employer or officer or agent of the voter’s union.

Section 11(a) of the VRA prevents election officials from refusing to count legitimate votes.

Section 11(b) of the VRA prohibits intimidation, threats, or coercion in the voting process and applies to private persons as well as persons acting under color of law (that is, governmental officials).
CHAPTER 1

V. THE TWO FORMS OF VOTING DISCRIMINATION: LIMITATIONS ON BALLOT ACCESS AND VOTE DILUTION

Voting discrimination generally may be characterized as occurring in one of two forms, restrictions on ballot access and election methods or structures that dilute minority voting strength.77

Ballot access restrictions

Voting practices that limit or restrict access to registration or voting may discriminate on the basis of race or language minority status (depending upon the particular practice involved and/or the circumstances in which the practice is being implemented). Practices that may be of concern include: registration limitations or the improper purging of registration rolls; a lack of bilingual assistance or ineffective bilingual assistance; limitations on early in-person voting or absentee voting; a photo ID requirement for in-person voting; the elimination of polling places or polling place changes; voter intimidation; and restrictions on candidate qualifications or on candidate qualification procedures.

Minority vote dilution

Voting practices that may dilute minority voting strength are those election methods or structures which, in the context of racially polarized voting, tend to minimize or cancel out the ability of minority voters to elect their preferred candidates to office. Such practices may include: at-large election systems; multi-member election districts; redistricting plans that unnecessarily fragment minority areas or pack minority voters into a limited number of districts; and annexations of white residential areas that either fence out minority residential areas or reduce a city’s minority population percentage in the context of at-large voting.

Discriminatory ballot-access restrictions are sometimes referred to as “first generation” discrimination and vote dilution as “second generation” discrimination. This reflects the fact that, historically, restrictions on ballot access were often the initial method chosen to deny or abridge the right to vote, and vote dilution was undertaken only after minority voters gained access to the ballot at least to some extent.78 However, in reality, both types of discrimination may occur concurrently, and instances of “first generation” discrimination may follow after “second generation” discrimination. Nor is it accurate to view “second generation” discrimination as something that occurred only after the VRA was adopted, or to view “first generation” discrimination as something that existed only in the past.

For example, there is a long history of “second generation” voting discrimination in Alabama that predates the VRA. In 1911, although the State had almost completely disenfranchised its African-American citizens, the City of Mobile, Alabama changed to an at-large method of
electing its city government “to reinforce the 1901 [State] Constitution as a buttress against the possibility of black office holding.” Later in the 1950s, although African-American registration remained depressed, the Alabama Legislature redrew the boundaries of the City of Tuskegee to remove 99 percent of the city’s African-American population. The author of that legislation also sponsored legislation that banned the technique of single-shot voting in at-large elections for county commissioners across Alabama, out of a concern that those African Americans who were registered to vote might use this technique to elect individuals to office.

On the other hand, “first generation” discrimination clearly remains a present-day concern. For example, as discussed in detail in Chapter 6, several States recently have enacted photo ID laws that, because of their particular provisions, discriminate against minority voters.

VI. IMPACT OF THE VRA ON MINORITY ELECTORAL OPPORTUNITY, 1965 TO 1995

The impact of the VRA on our Nation’s political processes has been profound. The opportunity of minority citizens to register, vote, and elect candidates of choice dramatically improved from 1965 to 1995, most notably in the South and Southwest, but throughout the country as well.

The initial focus of the VRA in 1965 on removing barriers to voter registration by African Americans had the desired result to a substantial degree. Within about six years of the enactment of the VRA, the combined African-American registration rate in the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia climbed to about 57 percent, almost 30 points higher than that rate had been in March 1965. Still, the African-American registration rate in 1971-72 remained a substantial eleven points below the white registration rate in those States. Through continued enforcement efforts, the African-American registration rates further improved thereafter, such that by the time of the 2006 reauthorization the African-American rates were comparable to the white registration rates in most of the South, with a few exceptions.

However, the efforts that began in the mid-1970s to address discrimination against language minority citizens have not yielded the same results. As shown on the graph on the following page, substantial disparities between registration rates for language minority citizens and whites are continuing.
As Congress anticipated in 1965, the enactment of the VRA was followed by a series of new discriminatory measures in the specially covered areas. For example, in 1965 Mississippi repealed provisions allowing illiterate voters to receive assistance in voting, and in 1966 adopted a state law to enable county boards of supervisors to switch from district to at-large elections. DOJ interposed Section 5 objections to both changes. Other examples included Georgia’s adoption of restrictions on assistance to illiterate voters, to which the DOJ objected in 1968, and South Carolina’s adoption of a discriminatory redistricting plan for its state senate, to which the DOJ objected in 1972.

By 1975, a pattern of conduct by Section 4 jurisdictions was apparent. As the House Judiciary Committee observed in its 1975 report supporting Section 5’s reauthorization, the recent objections entered by the Attorney General… to Section 5 submissions clearly bespeak the continuing need for [the Section 5] preclearance mechanism. As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength. Such other measures may include switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans.

This did not mean, however, that ballot access discrimination had ended, as Section 5 objections were also interposed to many such changes.

In the years after 1975, this pattern continued. During the remainder of the 1970s, and then in the 1980s, 1990s, and into the 2000s, a majority of the objected-to voting changes involved discriminatory election methods, redistrictings, and annexations. Objections to changes affecting ballot access were also interposed. Congress reiterated its particular
concern about “second generation” discrimination that would undo the “first generation” progress when it reauthorized Section 5 in 1982 and again in 2006.

A positive pattern also emerged in the 1970s and continued with increasing force in the 1980s and 1990s: a substantial number of cities, counties, and school districts – particularly in the areas subject to Section 5 – changed from at-large to district election systems. The initial impetus was a Supreme Court decision in 1973, *White v. Regester*, overturning multi-member districts for the Texas Legislature on the ground that they diluted African-American and Latino voting strength in violation of the 14th Amendment. Other successful dilution suits based on the 14th Amendment followed. In 1980, however, the Supreme Court did a sharp U-turn in its *Mobile v. Bolden* decision, substantially re-interpreting the constitutional cause of action and making it much more difficult for plaintiffs to prevail. As explained above, Congress then amended Section 2 in 1982 to revive the pre-*Mobile* standard by creating the new Section 2 results test. Thereafter, hundreds of Section 2 suits were filed leading to decisions and settlements in which at-large systems were abandoned, and many other localities abandoned at-large systems in anticipation that they might be sued. Section 5 objections to dilutive annexations also led to the adoption of district election methods.

Finally, lawsuits also were brought under Section 2 challenging discriminatory redistricting plans, particularly (although not exclusively) in the areas not subject to Section 5. For example, in 1990 the Ninth Circuit Court of Appeals upheld a district court ruling invalidating the redistricting plan for the Los Angeles County Board of Supervisors because it discriminated against Latino voters. This led to the election of the first Latino to the Board in over a century.

**VII. SUPREME COURT’S LIMITS ON SECTION 5, CONGRESS’ RESPONSE, AND THE SUPREME COURT’S DECISION IN *SHELBY COUNTY V. HOLDER***

After 1995, the Supreme Court issued three decisions substantially curtailing the scope of the Section 5’s nondiscrimination requirements. Then, in 2013, the Court issued its decision in *Shelby County v. Holder*, which effectively nullified the preclearance requirement.

- In 1997, the Supreme Court ruled in *Reno v. Bossier Parish School Board* that, a finding that a voting change had a discriminatory result under Section 2 of the VRA could not be used to object to a voting change under Section 5 of the VRA.
• In 2000, the case returned to the Supreme Court, and the Court held in *Bossier Parish II* that Section 5 is generally not violated where a jurisdiction adopts a voting change with a discriminatory intent if the change would not make minority voters worse off compared to what existed before.\(^{100}\) The Bossier Parish school district intentionally drew its post-1990 redistricting plan to avoid creating even one majority African American single-member district, but this discriminatory intent did not violate Section 5, according to the Court, because the old plan did not include any majority African American districts either and thus the new plan was not retrogressive or intended to be retrogressive.\(^{101}\) The Court’s ruling was particularly troublesome because it meant that DOJ and the federal court in Washington D.C. would now be required to preclear intentionally discriminatory practices, contrary to their prior practice\(^{102}\) and inconsistent with prior decisions by the Supreme Court.\(^{103}\)

• In 2003, in *Georgia v. Ashcroft*, the Supreme Court substantially re-interpreted the Section 5 retrogression standard as applied to redistricting plans. The Court held that redistricting reviews were required to take into account minority “influence districts” in addition to considering those districts where minority voters would have the opportunity to elect their preferred candidates.\(^{104}\) This was highly problematic since it is unclear what constitutes a minority “influence district” and, whatever the term means, it is questionable whether such districts, in the context of racially polarized voting, in fact offer much if any real opportunity to minority voters to influence elections.\(^{105}\)

As noted, as part of the 2006 reauthorization of Section 5, Congress amended Section 5 in response to *Bossier Parish II* and *Ashcroft*. The amendments essentially returned the statute to the discrimination standards that pre-dated the Supreme Court decisions.\(^{106}\)

*Shelby County v. Holder* was filed in the U.S. District Court for the District of Columbia by Shelby County, Alabama on April 27, 2010. The federal judge hearing the case conducted a thorough review of the record before Congress and concluded that the 2006 reauthorization was constitutional.\(^{107}\) On appeal, the U.S. Court of Appeals for the District of Columbia Circuit conducted its own review of the record and agreed with district court ruling, with one judge dissenting.\(^{108}\)

The Supreme Court then took the case and, on June 25, 2013, reversed the judgment of the district court and held that the Section 4 formula that determined which states or jurisdictions had to seek federal review for their voting changes is unconstitutional.\(^{109}\) The Court did not address the constitutionality of the preclearance remedy. As a result, today, no jurisdiction is subject to the Section 5 preclearance requirement. As noted above, the Section 4(f)(4) prohibition on English-only elections and the Section 8 authority for federal observers also apply only to Section 4 jurisdictions, and although neither provision was at issue in or mentioned in *Shelby County*, DOJ does not appear to be enforcing either provision.
In the 5-4 decision, Chief Justice Roberts concluded that the Section 4 coverage provisions were not properly based on “current needs” because the Section 4 coverage formula was based on electoral conditions in 1964, 1968, and 1972. The Chief Justice thereby ignored the fact that Section 5’s reauthorization in 2006, like the reauthorizations that preceded it, was premised on Congress’ evaluation of current needs, and that Congress had concluded in 2006 that a pattern of voting discrimination was continuing in the areas identified by the Section 4 coverage formula. Chief Justice Roberts conceded that “voting discrimination still exists; no one doubts that[,]” but did not conduct any detailed review of the massive record Congress had gathered in 2005 and 2006, based on which Congress made a direct and specific legislative finding of the current need for Section 5.

Justice Ginsburg authored the dissenting opinion for herself and for Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg began her opinion with the following overview of the 2006 reauthorization and its constitutional validity:

Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.

And, as Justice Ginsburg stated later in her opinion, “[t]hrowing out preclearance when it has worked as and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

The consequence of Shelby County is that all the previously covered states and localities are now able to implement voting changes without advance federal review to determine whether the new practices are discriminatory. As was true before 1965, the burden is now back on the DOJ and minority citizens to identify and obtain court judgments against discriminatory voting practices in the jurisdictions with the worst histories of voting discrimination.