

The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?

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I. INTRODUCTION

The late years of the Rehnquist Court ushered in an era of intense debate about the limits of congressional authority under the Fourteenth and Fifteenth Amendments. Congress's July 2006 reauthorization and extension of expiring provisions of the Voting Rights Act ("VRA")¹ represents the latest battleground. The VRA is considered one of the most effective federal civil rights statutes passed by Congress² because it has significantly improved rates of minority voter participation and minority electoral success.³ In particular, the VRA's core feature, the Section 5 preclearance provision,

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¹ See Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (codified as amended at 42 U.S.C.A. §§ 1973b-1973c (West 2003 & Supp. 2007)).

² See, e.g., Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES IN MINORITY VOTING* 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (observing that the VRA is "one of the most effective instruments of social legislation in the modern era of American reform"); J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 53 (1999) (describing the importance of the VRA in enforcing the guarantees of the Fourteenth and Fifteenth Amendments); see also ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (chronicling the role of the VRA in the legal and political history surrounding the struggle for suffrage rights among minority voters).

³ See DAVID A. BOSITIS, *BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY, 2000*, at 5 (2002), available at <http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/BEO-00.pdf> (noting an increase in the number of Black elected officials from 1,469 in 1978 to 9,040 in 2000); National Association of Latino Elected and Appointed Officials Educational Fund, <http://www.naleo.org/membership.htm> (noting an increase in the number of Latino elected officials between 1984 (3,128) and 2004 (4,853)); *Voting Rights Act: the Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16-17 (2005) (statement of Theodore Shaw, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.) (observing that "[t]he VRA and its expiring enforcement provisions have been the primary catalysts for dramatic increases in minority political participation, minority representation in elected bodies at the

has played a critical role in dealing with the difficult and intractable problem of voting discrimination in certain parts of our country.

The Section 5 provision requires certain jurisdictions to obtain federal approval before implementing changes to voting procedures. This preclearance provision applies to states and other areas that have longstanding and particularly egregious histories of voting discrimination, and requires such jurisdictions to obtain pre-approval of their voting changes.⁴ The Section 5 review process requires a showing that voting changes were not adopted with a discriminatory purpose and will not “retrogress” or worsen minority voting strength.⁵ In so doing, Section 5 establishes a floor that covered jurisdictions are required, at a minimum, to maintain.⁶ Congress designed Section 5 to respond to the inadequacy of more tedious and less successful case-by-case approaches to challenging voting discrimination.⁷ This key federal statute helps eliminate barriers to political participation and provides greater levels of access to minority voters. Section 5 has substantially improved the integrity of the political process in parts of the country with particularly long histories of obstructing minority voter participation.

The Supreme Court’s decision in *City of Boerne v. Flores*⁸ articulates a “congruence and proportionality” test that is now widely regarded as the guidepost for determining whether congressional legislation, such as Section 5, enacted pursuant to the Reconstruction Amendments, is proper or exceeds constitutional limits. This Article argues that the recently reauthorized Section 5 provision will withstand constitutional scrutiny in no small part due to the voluminous and extensive legislative record amassed during the 2005-2006 reauthorization process. This record was replete with evidence of vot-

local, state and federal levels, and for the reductions in barriers to access to the political process for African Americans, Latinos, Asian Americans, and Native Americans”).

⁴ 42 U.S.C. § 1973c (2000).

⁵ *Id.* Jurisdictions can obtain preclearance administratively by submitting the change to the Attorney General of the U.S. Department of Justice or judicially by means of a Section 5 declaratory judgment action filed in the U.S. District Court for the District of Columbia; until the voting change is precleared, the change is deemed legally unenforceable. *See* *South Carolina v. United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (noting the District Court for the District of Columbia can enjoin any attempt to implement the change prior to granting of a declaratory judgment of preclearance). Preclearance determinations are final and unreviewable. *See* *Morris v. Gressette*, 432 U.S. 491 (1977). The Section 5 review process is very limited in scope, and preclearance of a change does not shield the change from a future challenge that may be mounted on other grounds.

⁶ 42 U.S.C. § 1973c. Minority voter population loss or the need to comply with the one-person, one-vote requirement may present legitimate reasons to depart from this rule. Likewise, increases in minority voter population may suggest that the jurisdiction could and should create additional majority-minority districts where that population is concentrated. At a bare minimum, covered jurisdictions must maintain status quo levels of minority voting strength to pass muster under Section 5. *Id.*

⁷ *See infra* Section II.B (discussing the inadequacy of the case-by-case approach); *see also* *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (noting that “ingenious” defiance of court orders by the covered jurisdictions prompted Congress to conclude that case-by-case litigation was no longer sufficient).

⁸ 521 U.S. 507, 520 (1997).

ing discrimination and goes above and beyond the burdens that the Supreme Court's more recent federalism precedents place on Congress to justify the exercise of its authority in this context.

This Article observes that the evidence and testimony regarding ongoing voting discrimination served a particularly critical function during the reauthorization process and highlights a number of notable features about this evidence. First, many witnesses gave first-hand accounts of their experiences that illustrated striking similarities between contemporary forms of voting discrimination and the types of discrimination seen in prior reauthorization periods. Second, witnesses also provided numerous examples of the increasingly sophisticated forms of discrimination that have become more prevalent in certain areas. Third, other witnesses helped establish the effectiveness of Section 5 in both deterring and combating voting discrimination while balancing these success stories with the political and social realities of ongoing discrimination.⁹ Litigators, practitioners, and private citizens described the problems of ongoing discrimination in small, under-the-radar jurisdictions and illustrated the continuing need for Section 5 safeguards. This collective body of evidence will prove significant to courts entertaining post-2006 reauthorization challenges to the constitutionality of Section 5.

A number of Supreme Court decisions support my argument that the recently reauthorized Section 5 preclearance provision will withstand scrutiny under the *Boerne* framework. In particular, this Article argues that *South Carolina v. Katzenbach*¹⁰ and *City of Rome v. United States*¹¹ are likely to significantly influence future decisions examining the constitutionality of Section 5. It also compares the breadth and quality of evidence underlying the 2006 reauthorization with the evidence presented to Congress during the 1975 and 1982 reauthorization periods and finds notable similarities.¹² These

⁹ Summarizing his overall impressions of the process leading up to the renewal of the expiring provisions of the VRA, Senator Patrick Leahy (Democrat-VT) observed that "Senators had available to them an extensive record to inform their votes," including a "voluminous Senate Judiciary Committee record," a full record before the House of Representatives, the House Committee Report, the full debate on the House floor and debate surrounding four proposed amendments that were all rejected. 152 CONG. REC. S8372-73 (2006). Senator Leahy also noted that Senate members were provided "some of the extensive evidence received in the Judiciary Committee about the persistence of discriminatory practices in covered jurisdictions that supports reauthorization of this crucial provision." *Id.* For one article written prior to the 2006 reauthorization that highlights the importance of building a thorough congressional record, see Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 180 (2005) (noting that "Congress would be well advised to craft the best evidentiary record possible to support a renewed preclearance provision").

¹⁰ 383 U.S. 301 (1966).

¹¹ 446 U.S. 156 (1980).

¹² Indeed, the House Judiciary Committee issued a report finding that:

[V]oting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory re-districting plans; switching offices from elected to appointed positions; relocating

parallels suggest that the Supreme Court will uphold Section 5 again. Moreover, the 2006 record demonstrates that Congress adopted a particularly deliberative approach during the reauthorization process, suggesting another reason why this congressional judgment should be afforded great deference.

Finally, the Article concludes that important lessons emerge from the evidence of discrimination presented during the 2006 reauthorization. Section 5 fosters a more vibrant and participatory political process in which minority voters are able to leverage their limited political capital to negotiate and bargain with local elected officials.¹³ For elected officials, Section 5 provides a degree of political cover since voting-related changes are subject to review at the federal level before implementation.¹⁴ Although some communities have internalized these values to a greater degree than others, these ancillary benefits of Section 5 enhance the quality of our political process and elevate the significance of Section 5 in our political structure. These benefits of Section 5 provide yet another reason for courts to examine the congressional record with a particularly deferential eye.

II. THE ROLE OF THE LEGISLATIVE RECORD IN CONSTITUTIONAL CHALLENGES TO SECTION 5

A. “Rational”-izing the Boerne Test: Congruence and Proportionality

Some witnesses opposed to reauthorization of Section 5 framed their arguments around old and familiar claims regarding the federalism costs exacted by Section 5. However, these claims have been squarely rejected by the Supreme Court.¹⁵ Indeed, as recently as 1999, the Court recognized that

polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements. The Committee received testimony indicating that these changes were intentionally developed to keep minority voters and candidates from succeeding in the political process.

H.R. REP. NO. 109-478, at 36 (2006).

¹³ See Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 24 (2007) (observing that Section 5 creates a bargaining chip that may play a critical role in the ability of minority representatives “to pull, haul, and trade” within the political process).

¹⁴ See, e.g., *Reauthorizing the Voting Rights Act’s Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 310 (2006) (statement of Donald Wright, General Counsel, North Carolina State Board of Elections) (observing that Section 5 preclearance decisions provide a seal of approval that can help vindicate governmental units from allegations of voting discrimination).

¹⁵ See *Boerne*, 521 U.S. at 518 (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.”); see also *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (noting that the Act “contemplate[s] some intrusion” into areas traditionally reserved to the States); *Katzenbach*, 383 U.S. at 326 (1966) (upholding Section 5 as a valid exercise of Congress’s “full remedial powers to effectuate the constitutional prohibition

the Civil War Amendments contemplate some intrusion into state sovereignty.¹⁶

The most strident VRA opponents,¹⁷ including those who doubt Congress's authority to renew Section 5,¹⁸ argued that the preclearance provision does not satisfy what some commentators consider the Supreme Court's "new federalism" standard.¹⁹ Over the last ten years, the Supreme Court has reviewed the validity of a number of federal statutes enacted by Congress pursuant to its enforcement powers under the Fourteenth Amendment. In assessing the validity of these statutes, the Court has employed an analysis referred to as the Boerne "congruence and proportionality" test.²⁰ The Boerne test entails a three-part inquiry: Its first prong requires the Court to

against racial discrimination in voting"); *id.* at 327 ("Whatever legislation is . . . adapted to carry out the objects the Civil War amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within . . . congressional power.") (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880)).

¹⁶ See *Lopez*, 525 U.S. at 282 (recognizing the "substantial 'federalism costs'" imposed by Section 5 and observing that congressional powers under the Fifteenth Amendment "contemplate some intrusion into areas traditionally reserved to the states") (internal citations omitted). Other VRA opponents level attacks on the Act's coverage formula, 42 U.S.C. § 1973b(b) (2000), arguing that it is outdated and does not permit Section 5 to reach discrimination taking place today in non-covered jurisdictions. Congress designed the coverage formula, based in part on turnout figures from presidential elections in 1964, 1968, and 1972 and on the presence of a prohibited device, such as a literacy test as a proxy for identifying jurisdictions with the longest and most egregious histories of entrenched voting discrimination. Coverage formula critics often neglect to highlight the fact that the coverage formula was reverse-engineered to describe jurisdictions that discriminated and not to describe the discriminatory conduct that Congress sought to remedy. However, the coverage formula has effectively imposed reasonable and logical limits on the scope of Section 5's application. Moreover, for the uncovered jurisdictions that lie beyond the ambit of Section 5, other remedial provisions of the Act can be used to address the discriminatory acts that arise in those areas.

¹⁷ *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (pt. 1): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13-37 (2006) (statement of Roger Clegg, President & General Counsel, Center for Equal Opportunity) (opposing renewal of Section 5); *Voting Rights Act: The Continuing Need for Section 5: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 32-43 (2005) [hereinafter *The Continuing Need for Section 5*]; *Voting Rights Act: Section 5 of the Act — History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 14-17 (2005) [hereinafter *Section 5 of the Act — History, Scope, and Purpose*] (statement of Edward Blum, Visiting Fellow, American Enterprise Institute) (opposing reauthorization bill as excessively race-based and outdated).

¹⁸ See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 214-19 (2006) (statement of Richard Hasen, Loyola School of Law) [hereinafter *An Introduction to the Expiring Provisions of the Voting Rights Act*]; *id.* at 220 (statement of Samuel Issacharoff, New York University Law School); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 198-207 (2006) (statement of Richard Pildes, New York University Law School) [hereinafter *The Continuing Need for Section 5 Pre-Clearance*].

¹⁹ See, e.g., Luis E. Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 130 (2007).

²⁰ *Boerne*, 521 U.S. at 520.

identify the constitutional right or rights that Congress seeks to protect through the legislation in question.²¹ The second prong requires courts to assess whether there is a sufficient history of violations of that right or set of rights.²² This assessment should not occur in a vacuum, but instead the statute “‘must be judged with reference to . . . historical experience.’”²³ Third, courts must also consider whether the contested statute represents an “appropriate” or “congruent and proportional” response to the harm.²⁴ If a court determines that the rights that Congress seeks to protect are subject to heightened scrutiny, then Congress is generally accorded even greater latitude to construct a remedy.²⁵

Here, this Article prescriptively argues that Section 5 should be analyzed under *Boerne* and a number of key precedents that inform the *Boerne* ruling, including *Katzenbach* and *City of Rome*. In *Boerne*, the Court described its three-part inquiry as a restatement of the test employed in *Katzenbach* and *City of Rome* with regard to the Fifteenth Amendment.²⁶ Analyzed under this framework, courts are likely to assume a deferential posture in reviewing the legislative record underlying Section 5. That record provides an adequate basis for Congress to have exercised its authority to renew Section 5. Moreover, the unique role that Section 5 occupies in our political structure and the ancillary benefits that it produces for our political process provide evidence of its effective statutory design and present additional reasons for courts to defer to congressional judgment.

At issue in *Boerne* was Congress’s 1993 enactment of the Religious Freedom Restoration Act (“RFRA”), which the Court found to exceed the scope of congressional powers under the enforcement section of the Fourteenth Amendment.²⁷ Congress enacted RFRA to prohibit government from “substantially burden[ing]” a person’s free exercise of religion except for when the burden employed is “the least restrictive means to further a compelling governmental interest.”²⁸ RFRA’s mandate applied to federal and state governments, including all persons acting under color of law.²⁹ Moreover, its prohibitions extended to all federal and state laws on a retroactive basis.³⁰

The Court applied its three-part inquiry and found a number of problems, including RFRA’s broad structure, which, in the Court’s view, cre-

²¹ See *Tennessee v. Lane*, 541 U.S. 509, 522 (2004); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

²² *Lane*, 541 U.S. at 523.

²³ See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (internal citations omitted).

²⁴ *Lane*, 541 U.S. at 531.

²⁵ See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”).

²⁶ *Boerne*, 521 U.S. at 518.

²⁷ 42 U.S.C. § 2000bb (2000).

²⁸ *Id.* § 2000bb-1.

²⁹ *Id.* § 2000bb-2(1).

³⁰ *Id.* § 2000bb-3(a).

ated a substantive change in constitutional rights by proscribing state conduct that the Fourteenth Amendment itself did not prohibit.³¹ The Court highlighted a number of other problematic RFRA features, including its “sweeping coverage” resulting in “intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”³² The Court also observed that the law was retroactive, had no termination date, applied to all levels of government, extended to all laws, and had no termination mechanism.³³ Finally, and most significantly for purposes of this Article, the Court underscored that the legislative record underlying the enactment of the RFRA lacked examples of unconstitutional discrimination within the last forty years.³⁴ The Court concluded that the RFRA was so “out of proportion to a supposed remedial or preventive object that it [could] not be understood as responsive to, or designed to prevent, unconstitutional behavior.”³⁵

Some commentators view *Boerne* as establishing a new, more stringent test for assessing whether legislation exceeds congressional law-making authority.³⁶ Those who question congressional authority to renew Section 5 appear to adopt a similarly strict reading of *Boerne* with little regard for the post-*Boerne* Supreme Court rulings that tout the VRA as an exemplary model of legislation appropriately enacted pursuant to congressional powers under the Fourteenth and Fifteenth Amendments.³⁷ The Court’s opinion in

³¹ *Boerne*, 521 U.S. at 532.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 530.

³⁵ *Id.* at 509.

³⁶ See Calvin R. Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 50 (2007) (recognizing that “[i]n practice, the Court requires less evidence and permits a looser fit between the remedy and the wrong when the prohibited state behavior is presumed to be unconstitutional”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1 (2004); see also Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1135 (2000); Ellen Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001).

³⁷ For a fairly restrictive reading of *Boerne*, see Luis E. Fuentes-Rohwer, *supra* note 19 at 130 (concluding that if the federalism movement has any traction and the Court musters significant judicial will, Section 5 will be struck down). Interestingly, Fuentes-Rohwer arrives at this conclusion while providing little substantive examination of the record of voting discrimination underlying the 2006 reauthorization. *Id.* For examples of Supreme Court cases using the VRA as exemplary legislation, see *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2667 (2006) (Scalia, J., dissenting in part and concurring in part) (“We long ago upheld the constitutionality of Section 5 as a proper exercise of Congress’s authority under § 2 of the Fifteenth Amendment”); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (noting various rejections to challenges against Section 5 based on the scope of Congress’s enforcement power); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (contrasting Section 5 with Title I of the ADA, which the Court determined to be beyond the scope of congressional enforcement powers under the Fourteenth Amendment while identifying Section 5 of the VRA as “a detailed but limited remedial scheme”); *United States v. Morrison*, 529 U.S. 598, 626 (2000) (distinguishing Section 5 from statute at issue and identifying Section 5 as a proper example of an exercise of congressional power); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (inval-

Boerne contains substantial discussion comparing and contrasting the structural features of RFRA with those of the VRA.³⁸ The *Boerne* Court credited the congressional design of Section 5, observing that its reach remains limited to certain areas of the country in order to reduce the possibility of overbreadth.³⁹ The Court also observed that Section 5 required congressional reauthorization at specified intervals and that jurisdictions could terminate their covered status if they satisfied requirements set forth in the Act's "bailout" provisions.⁴⁰ Although the *Boerne* Court did not require that all Fourteenth Amendment prophylactic legislation contain termination dates and geographic restrictions, the Court observed that these kinds of structural features "tend to ensure Congress' means are proportionate to ends legitimate" ⁴¹

Along with its focus on RFRA's structural deficiencies, the *Boerne* Court also emphasized that the legislative record underlying RFRA's enactment lacked examples of modern laws passed to further religious bigotry.⁴² In particular, the Court observed that the record lacked evidence of religious persecution occurring in the past forty years and concluded that there was insufficient evidence of a widespread pattern of religious discrimination throughout the country.⁴³ The legislative record yielded little evidence of a constitutional harm of the dimension that might warrant the broad remedy that Congress set forth.⁴⁴

In other post-*Boerne* cases in which the Court struck down statutes for going beyond the scope of congressional authority, the Court did so because the evidence in the legislative record — critical to the second prong of the *Boerne* inquiry — was deemed insufficient or inadequate. In *Board of Trustees v. Garrett*, the Court struck down Title I of the Americans with Disabilities Act (ADA), which allowed employees to sue non-consenting states⁴⁵ after finding that the vast majority of examples of disability discrimination

inating the Patent Remedy Act as beyond the proper scope of congressional enforcement powers under the Fourteenth Amendment and using Section 5 of the VRA as an example of legislation properly within its authority); *Lopez v. Monterey*, 525 U.S. 266, 283 (1999) (noting that the Court had previously "upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States").

³⁸ *Boerne*, 521 U.S. at 532-34.

³⁹ *Id.* at 530-31.

⁴⁰ *Id.* at 532.

⁴¹ *Id.* at 533. For a description of those statutes that did not satisfy the *Boerne* standard, see *Garrett*, 531 U.S. 356 (Title I of the Americans with Disabilities Act as applied to states); *Morrison*, 529 U.S. 598 (Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act as applied to the states); *Fla. Prepaid*, 527 U.S. 627 (Patent Remedy Act as applied to the states). For a description of those statutes that have withstood scrutiny post-*Boerne*, see *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding public accommodations provisions of Title II of the Americans with Disabilities Act); *Hibbs*, 538 U.S. 721 (upholding the Family and Medical Leave Act).

⁴² *Boerne*, 521 U.S. at 531-32.

⁴³ *Id.*

⁴⁴ *Id.* at 530-32.

⁴⁵ *Garrett*, 531 U.S. at 368-69.

in the congressional record did not deal with the activities of states.⁴⁶ Moreover, the Court found the ADA's constitutional shortcomings were particularly apparent "when the Act [was] compared to Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations."⁴⁷ In *Kimel v. Florida Board of Regents*, the Court held that the Age Discrimination in Employment Act's abrogation provision was unconstitutional.⁴⁸ In particular, the Court found that Congress "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."⁴⁹ The Court observed that the record consisted "almost entirely of isolated sentences clipped from floor debates and legislative reports."⁵⁰ In *Florida Prepaid v. College Savings Bank*, the Court struck down the Patent Remedy Act, which subjected states to patent infringement suits, because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."⁵¹

In contrast, the post-*Boerne* cases in which the Court has upheld federal statutes passed pursuant to congressional authority under the Fourteenth Amendment, Congress found the record of discrimination to be sufficient to justify prophylactic protection. Moreover, the rights at stake were ones subject to heightened scrutiny. For example, in *Nevada Department of Human Resources v. Hibbs*, the Court upheld the Family and Medical Leave Act ("FMLA") as "narrowly targeted,"⁵² and found sufficient evidence of the "[s]tates' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits."⁵³ In *Tennessee v. Lane*,⁵⁴ the Court upheld Title II of the ADA, observing that "Congress identified important shortcomings in existing laws that rendered them 'inadequate to address the pervasive problems of discrimination that people with disabilities are facing.'"⁵⁵ The Court noted that the congressional record had "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions,"⁵⁶ and it credited the "sheer volume of evidence" demonstrating unconstitutional discrimination in the provision of public services against persons with disabilities.⁵⁷ The legislative record underlying the recent reauthorization of Section 5 ex-

⁴⁶ *Id.* at 369.

⁴⁷ *Id.* at 373.

⁴⁸ 528 U.S. 62, 93 (2000).

⁴⁹ *Id.* at 89.

⁵⁰ *Id.*

⁵¹ 527 U.S. 627, 640 (1999).

⁵² 538 U.S. 721, 738 (2003).

⁵³ *Id.* at 735.

⁵⁴ 541 U.S. 509 (2004).

⁵⁵ *Id.* at 526 U.S. at 18 (citing S. REP. NO. 101-116); see also H.R. REP. NO. 101-485, pt. 2, at 47.

⁵⁶ *Lane*, 541 U.S. at 526.

⁵⁷ *Id.* at 528.

ceeded the breadth and scope of the records underlying the adoption of the FMLA at issue in *Hibbs* and Title II of the ADA at issue in *Lane*.

Section 5 is distinguishable from the statutes that have been struck down post-*Boerne* because it invokes a set of rights subject to the greatest degree of constitutional scrutiny, the right to vote free of racial discrimination.⁵⁸ Even the rights at issue in *Hibbs* and *Lane*, which involved statutes seeking to protect one particular right subject to heightened scrutiny, are not elevated to the level of rights protected under Section 5, the protection of the fundamental right to vote and the prohibition of race discrimination. When Congress seeks to legislate for the protection of rights subject to heightened levels of constitutional scrutiny, congressional power is heightened. That power rises to its apex when Congress sets out to protect some combination of fundamental rights,⁵⁹ suggesting that courts are likely to uphold the constitutionality of the recently renewed Section 5.

Analysis of the record underlying the 2006 reauthorization satisfies a *Boerne* second-prong inquiry into the history of violations. This history reveals an unbroken chain of voting discrimination in the covered jurisdictions, beginning long before the Act's inception and continuing today. Moreover, the record shows that this discrimination is systemic and widespread in the covered jurisdictions, appearing at all levels of government including city, county, and state levels.⁶⁰

By no means does any reading of *Boerne* support the presumption that all exercises of congressional authority under the Fourteenth Amendment

⁵⁸ See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (describing the right to vote as fundamental); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)) (same); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (same).

⁵⁹ See *City of Boerne v. Flores*, 521 U.S. 507, 533 (noting that congressional power is heightened when Congress enacts remedial legislation that addresses problems at the convergence of race and fundamental rights); see also Karlan, *supra* note 13 (discussing *Lane*, *Hibbs*, and *United States v. Georgia*, 126 S. Ct. 877 (2006) and observing that when "Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are generally broader than when it acts to promote equality more generally").

⁶⁰ Interestingly, some commentators questioned whether Congress is required to compile any legislative record at all:

No compiled record can ever fully record what influenced Congress to act, nor can any judicial attempt to impose a record requirement on Congress be justified. Viewed through the prism of textualist jurisprudence, it is difficult to comprehend the Court's heavy weighting of legislative reports and witness and legislator statements that have great potential to mislead and be misused.

W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 161 (2001); see also *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, 94th Cong. 637 (1975) [hereinafter *1975 House Extension of the Voting Rights Act*] (noting that Congress is not necessarily required to seek new evidence in order to justify continued enforcement of the Fifteenth Amendment). There are, of course, practical reasons for creating a legislative record, including ensuring that those charged with carrying out the mandates of the particular legislation are sufficiently sensitized to the law's requirements and objectives.

require the kind of exceptional record developed during the VRA reauthorization. Levying such a requirement would paralyze Congress's ability to expeditiously execute its legislative function and responsibilities. Numerous legislators noted that the VRA reauthorization was atypical in terms of the amount of resources committed to the process, the number of hearings conducted, the number of witnesses presented, and the time dedicated to the issue. Section 5 implicates congressional authority under the Fourteenth and Fifteenth Amendments and touches the most fundamental of all civil rights, the right to vote. Therefore, it is not surprising that Congress committed more time and attention to the reauthorization of Section 5 than other legislation enacted solely pursuant to its Fourteenth Amendment powers. Section 5 withstands scrutiny even under the strictest reading of *Boerne* as it remains a carefully designed statute that has continued utility given the extensive record of ongoing discrimination, the focus of Section II of this Article.

B. From South Carolina v. Katzenbach to Northwest Austin Municipal Utility District Number One v. Gonzales

*Northwest Austin Municipal Utility District Number One (NAMUD) v. Gonzales*⁶¹ was the first constitutional challenge to the recently reauthorized Section 5 provision.⁶² NAMUD, a small, Texas-based utility district filed the case several days after President George W. Bush signed the reauthorized Section 5 provision into law.⁶³ The district's boundaries encompass a middle-class residential subdivision called Canyon Creek — a community with a fairly small number of black and Latino residents.⁶⁴ The Plaintiff's claims include a request that it be permitted to "bailout" under Section 4(a) of the Act, a move that would essentially terminate the district's status as a covered jurisdiction and end its preclearance obligations pursuant to Section 5.⁶⁵ The

⁶¹ No. 1:06-CV-01384 (D.D.C. Aug. 4, 2006) (on file with author).

⁶² See *id.*

⁶³ See Joel Seidman, *Officials Challenge Voting Rights Law*, MSNBC, Sept. 17, 2007, available at <http://www.msnbc.msn.com/id/20823422/>; Press Release, Mexican American Legal Defense and Educational Fund, MALDEF Defends Voting Rights Act Against Constitutional Attack (Oct. 19, 2006), available at <http://www.maldef.org/news/press.cfm?ID=358>.

⁶⁴ The utility district's economic and demographic profile stands in contrast to that of many jurisdictions that have been at the center of Section 5 objections or have been the subject of voting rights litigation. The district, created in the early 1980s, has not been at the heart of any intense racial struggles. In that sense, it appears that the utility district was strategically selected to mount what is certain to be one of the most important challenges to the newly reauthorized Section 5 provision. Regardless of the outcome of the case, which remains pending before a three-judge panel in the D.C. District Court, the losing party will most likely appeal any ruling to the Supreme Court.

⁶⁵ The bailout provision allows certain jurisdictions to seek a declaratory judgment from the District Court for the District of Columbia to remove themselves from Section 5 coverage. Jurisdictions that are eligible for bailout must prove, among other things, that they have faced neither a Section 5 objection nor any court finding of voting discrimination in the preceding ten year period. 42 U.S.C.A. § 1973b(a)(1), (3). The utility district does not fall into any of these categories.

utility district alternatively argued that the district court should strike down the newly extended Section 5 provision as unconstitutional in part because there was insufficient evidence in the congressional record to support the reauthorization of Section 5.⁶⁶

The constitutional claim in *NAMUD* hinges, in part, on the interpretation and application of the *Boerne* congruence and proportionality test.⁶⁷ However, equally important are *South Carolina v. Katzenbach*⁶⁸ and *City of Rome*,⁶⁹ two voting decisions that continue to be central to any assessment of Section 5's constitutionality.

In both *Katzenbach* and *City of Rome*, the Supreme Court upheld prior authorizations of Section 5 as consistent with Congress's Fourteenth and Fifteenth Amendment powers. In particular, the *Katzenbach* Court rejected a challenge mounted by several jurisdictions covered under Section 5, that alleged that the statute exceeded the proper scope of congressional authority. The *Katzenbach* Court deferred to congressional judgment, in part, because the congressional record and deliberative process preceding the Act indicated that Congress carefully studied the need for the VRA. The Court observed that "Congress explored with great care the problem of racial discrimination in voting" and noted that House and Senate Committee hearings were conducted over nine days and gathered testimony from sixty-seven witnesses.⁷⁰ The Court also highlighted that the bill was debated for three days in the House and for nearly twenty-six days in the Senate.⁷¹ Finally, the Court recognized that Section 5 was reauthorized by fairly significant margins with a vote of 328 to 74 in the House and a vote of 79 to 18 in the Senate.⁷²

After assessing the voluminous legislative history underlying the initial reauthorization of the VRA, the *Katzenbach* Court affirmed Congress's judgment regarding the need for the Act's protections. The Court observed that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" and credited Congress's determination that "the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."⁷³ Moreover, the

⁶⁶ During oral argument on summary judgment, Judge David S. Tatel of the D.C. Circuit questioned the utility district's claims that Congress did not receive sufficient evidence of discrimination in the covered jurisdictions to authorize the extension of Section 5 by pointing to the example of Kilmichael, Mississippi. See Transcript of Oral Argument, *NAMUD v. Gonzales* (argued Sept. 17, 2007) (on file with author). For more information regarding the Kilmichael, Mississippi, election cancellation, see *infra* Section III.B.

⁶⁷ *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997).

⁶⁸ 383 U.S. 301 (1966).

⁶⁹ 446 U.S. 156 (1980).

⁷⁰ *Katzenbach*, 383 U.S. at 308-09.

⁷¹ *Id.* at 309.

⁷² *Id.*

⁷³ *Id.*

Court found persuasive the failure of the case-by-case method to end discrimination and the repeated attempts of local jurisdictions to evade anti-discrimination requirements by enacting new and different discriminatory voting procedures.⁷⁴ These observations by the Court in *Katzenbach* are particularly important because they mirror the concerns underlying the evidence presented by numerous witnesses during the 2005-2006 reauthorization process. The Court observed that questions regarding the Act's "constitutional propriety . . . must be judged with reference to the historical experience which it reflects."⁷⁵ This latter point makes clear that the Court will likely be influenced by Congress's prior judgment that Section 5 combats and deters discrimination.

In *City of Rome*, the Supreme Court reviewed a constitutional challenge to Section 5 after Congress's 1975 reauthorization. The challenge brought by officials in Georgia alleged, in part, that Section 5 exceeded Congress's Fifteenth Amendment powers because it reached electoral changes that may only be discriminatory in effect, not in purpose.⁷⁶ The Court determined that Congress's decision to extend the scope of Section 5 to electoral changes that are discriminatory in effect was an appropriate method of promoting the Fifteenth Amendment's purposes, even if it assumed that Section 1 of the Fifteenth Amendment prohibits only intentional discrimination in voting.⁷⁷ The Court held that Congress reasonably concluded that it was appropriate to prohibit changes that had a discriminatory effect, given the risk of purposeful discrimination in jurisdictions with a demonstrable history of intentional discrimination.⁷⁸

The *City of Rome* Court also credited Section 5's statutory design, noting that the preclearance provision was confined to those regions of the country where voting discrimination had been most flagrant.⁷⁹ The Court also credited Congress's approach to studying voting discrimination, finding that as it had noted in *Katzenbach*, "[i]n identifying past evils, Congress obviously may avail itself of information from any probative source."⁸⁰ Further, the Court observed that Section 5 helps to "preserve the 'limited and fragile' achievements of the Act" and to "promote further amelioration of voting discrimination."⁸¹ In addition, the Court rejected the claim that Section 5's preclearance provision had outlived its usefulness and credited "Congress' considered determination" that the statute's protections contin-

⁷⁴ *Id.* at 328.

⁷⁵ *Id.* at 308.

⁷⁶ *City of Rome v. United States*, 446 U.S. 156, 173 (1980).

⁷⁷ *Id.* at 177-78.

⁷⁸ *Id.*

⁷⁹ *Id.* at 174.

⁸⁰ 383 U.S. at 330.

⁸¹ *City of Rome*, 446 U.S. at 182.

ued to be “necessary to counter the perpetuation of 95 years of pervasive voting discrimination.”⁸²

Together, *Katzenbach* and *City of Rome* suggest that the Supreme Court will conclude, as it has in the past, that it is appropriate to give deference to Congress’s “considered” judgment regarding the continuing need for Section 5. These cases illustrate that the Court has always viewed Section 5 as a proper exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments,⁸³ and only a dramatic change of factual circumstances in the covered jurisdictions would warrant a rejection of Congress’s choice to renew and extend the preclearance provision. In all of the pre-*Boerne* cases contesting the constitutionality of Section 5, the Court recognized congressional competency and credited the extensive deliberative process that preceded adoption or extension of Section 5. Indeed, in *Lopez v. Monterey County*, a post-1982 challenge to the constitutionality of Section 5, the Court recognized *Katzenbach* and *City of Rome* as standing precedents that upheld prior authorizations of Section 5.⁸⁴

1. *Post-Boerne Review of the Legislative Record*

The pre-*Boerne* standard is best described as a requirement that Congress act reasonably in designing statutes to carry out the guarantees of the Fourteenth and Fifteenth Amendments. To that end, the Supreme Court emphasized that “Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁸⁵ *Boerne* merely clarified or restated that standard, noting that the Court’s examination of rationality entailed the determination of whether “Congress’s means are proportionate to ends legitimate under § 5 [of the Fourteenth Amendment].”⁸⁶ This Article argues that an examination of Section 5 in this context requires the Court to take a very deferential approach to congressional decision-making to avoid substituting its judgment for that of Congress.⁸⁷

⁸² *Id.*

⁸³ In *Katzenbach v. Morgan*, the Court upheld the Act’s ban on literacy tests against constitutional challenge. 384 U.S. 641 (1966). The Court found that:

[I]t is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York’s English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

Id. at 656.

⁸⁴ *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999).

⁸⁵ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

⁸⁶ *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

⁸⁷ A number of commentators have observed the difficulty that courts encounter when reviewing a matter that is inherently political in nature. See Karlan, *supra* note 13. This difficulty weighs in favor of a high degree of judicial deference to Congress to decide whether Section 5 remains necessary to eliminate discrimination from the political processes of covered jurisdictions. See Karlan, *supra* note 13, at 18-19 (noting that the preclearance regime of Sec-

When Congress seeks to protect a set of rights subject to heightened constitutional scrutiny, a proper application of *Boerne* requires courts to apply a deferential approach to its review of the record.⁸⁸ Courts must be careful not to engage in a level of analysis approaching the untenable position of substituting their own policy choices for that of Congress.⁸⁹ A court using a deferential approach would look for evidence that Congress developed a record that included examples of continuing voting discrimination in the covered jurisdiction, adhered to constitutional limits as it had repeatedly in the past, and acted with some degree of deliberativeness.

Whether the Court conducts a deferential approach to its review or chooses to undertake a more exhaustive examination of the record, Section 5 will survive constitutional scrutiny because Congress went beyond what was necessary to show that voting discrimination persists in the covered jurisdictions and to show that Section 5 is an effective prophylactic measure in dealing with that discrimination. The fact that Congress stands at the apex of its authority when it sets out to protect fundamental rights further supports the idea that courts should defer to congressional judgment in this context.

After extensive debate and hearings presenting significant evidence of ongoing voting discrimination in jurisdictions subject to the Act's special

tion 5 represents a quintessential exercise of political responsibility and observing that because the VRA involves regulation of the political process it raises important issues of political fairness that lie within the expertise of politicians). Other commentators have noted the difficulty that courts encounter when engaging in extensive review of the legislative record as a general matter. See, e.g., A. Christopher Bryant & Timothy J. Simeone, *Remanding To Congress: The Supreme Court's New "On The Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 369-89 (2001) (describing judicial review of the legislative record as a "fundamentally ill advised" exercise); Buzbee & Schapiro, *supra* note 60, at 91 (observing that judicial scrutiny of the legislative record is an "unjustified and unworkable abrogation of legislative authority"); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 86-87 (2001) (expressing criticism of the "Court's emerging vision in which Congress has substantially diminished powers to conduct its internal affairs or to engage in factfinding and lawmaking that the judicial branch will respect"); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1755 (2002) (contending that "eventually the Supreme Court will find the *Garrett* approach untenable").

⁸⁸ See *United States v. Lopez*, 514 U.S. 549, 613-14 (1995) (Souter, J., dissenting) ("If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. . . . [R]eview for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."). See also Buzbee & Schapiro, *supra* note 60, at 160-61 (observing that the Constitution's allocation of authority to legislate pursuant to the Reconstruction Amendments, coupled with the longstanding view that courts' questioning of political judgments must be constrained with judicially manageable standards, weigh against a strict interpretation or application of *Boerne* and its progeny).

⁸⁹ See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451 (2002) (Kennedy, J., concurring in the judgment) ("[C]ourts should not be in the business of second-guessing fact-bound empirical assessments of city planners."); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 583 (1991) (Souter, J., concurring in the judgment) ("At least as to the regulation of expressive conduct, '[w]e decline to void [a statute] essentially on the ground that it is unwise legislation . . .'" (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968))); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (noting that it is not an appropriate function of the Court to appraise the wisdom of a city's policy of regulating its adult theatres).

requirements, Congress deemed it necessary to secure the protections afforded by Section 5. Congress developed a record showing the numerous ways in which jurisdictions continue to suppress minority voting strength, illustrating that voting discrimination still exists on a wide scale, and confirming that Section 5 helped to stop various discriminatory voting changes.⁹⁰ Those discriminatory changes appeared in various forms, including redistricting plans, at-large elections, candidate qualification requirements, annexations, and polling place relocations.

The congressional record includes important evidence regarding the number and scope of objections interposed by DOJ to various proposed voting changes attempted by covered jurisdictions. For example, the House Judiciary Committee Report included a table that revealed that there were more than 700 objections between 1982 and 2005⁹¹ contrasted with the fewer than 700 objections interposed between 1965 and 1981.⁹² This evidence illustrates that Section 5 continues to play an important role today, leading Congress to conclude that “attempts to discriminate persist and evolve, such that Section 5 is still needed to protect minority voters in the future.”⁹³ Finally, the record amassed by Congress during the 2006 reauthorization bears remarkable resemblance to the record underlying the 1975 reauthorization, upheld in *City of Rome*, and the record underlying the 1982 reauthorization, recognized as exemplary legislation by the Supreme Court on numerous occasions.⁹⁴

II. ASSESSING THE EVIDENCE AMASSED BY CONGRESS DURING THE 2005-2006 REAUTHORIZATION RECORD

While this article acknowledges the collective contributions various witnesses to Congress made during the 2005-2006 reauthorization, it will focus on the most salient type of evidence that illuminated the present-day realities for voters in the covered jurisdictions. This article asserts that the

⁹⁰ 152 CONG. REC. S8372-73 (2006).

⁹¹ See H.R. REP. NO. 109-478, at 22 (2006).

⁹² See *id.* The author recognizes that some might quibble with the significance of the observations regarding the greater number of DOJ objections interposed between 1982 and 2005, relative to the period between 1965 and 1981. Some might argue that the two periods were different in length (sixteen years compared to twenty-three years). In addition, some might argue that the number of objections during the earlier period would have been higher had DOJ focused more on enforcement than on increasing minority voter registration following the Act's initial passage. Others might argue that even though the raw number of objections was greater between 1982 and 2005, the proportion of proposed changes to which DOJ has objected has dropped because of an increase in overall submissions for preclearance. However, these arguments ignore a number of factors, including the impact of the Supreme Court's rulings in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) and *Reno v. Bossier Parish School Board*, 528 U.S. 320, 335-41 (2000) [hereinafter *Bossier Parish II*], which significantly curtailed DOJ's ability to interpose objections to discriminatory voting changes prior to the amendments made during the VRA reauthorization.

⁹³ H.R. REP. NO. 109-478, at 21.

⁹⁴ See *infra* Parts III.B, III.C.

evidence will be important to courts assessing whether there was a reasonable basis for Congress to reauthorize and extend Section 5. The evidence presented by litigators and advocates illustrates that Section 5 is a “congruent and proportional” piece of legislation that responds to grave levels of ongoing voting discrimination in those areas covered under the Act.

Those witnesses who live, work, and litigate in the covered jurisdictions carried the labouring oar with respect to the presentation of evidence to Congress regarding ongoing voting discrimination in the covered jurisdictions.⁹⁵ Presentations regarding the successfulness of Section 5 were often balanced by the political realities facing those who regularly litigate and advocate on behalf of minority voters in the covered jurisdictions. Their testimony, war stories, and views from the trenches brought to life the reality of continued voting discrimination and racial exclusion. Litigators and advocates helped Congress uncover the severe problems that continue to take place in small local jurisdictions where voting controversies are least likely to garner serious media or public attention.⁹⁶ Local and federal legislators added the views of their constituents.

A. *The 2006 Reauthorization Record*

The evidence compiled in the legislative record underlying the congressional reauthorization of Section 5 generally falls into three material categories: evidence of the success of Section 5 as a statutory tool that combats voting discrimination; evidence of ongoing voting discrimination in the covered jurisdictions; and legal analyses and studies considering the constitutionality of Section 5 or other doctrinal issues. The evidentiary forms included oral and written testimony, studies, analyses, reports, law review articles, judicial findings from voting rights cases, and objection letters issued by the DOJ. Witnesses included members of Congress, litigators and

⁹⁵ See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 183 n.32 (2007) (observing “[t]hat the debate in the Senate hearings revealed a bit of a rift between legal academics and voting rights advocates”). For another brief commentary regarding a perceived rift between academics and policymakers, see Posting of Rick Hasen, *Overton (VRA Renewal): The Conflict Between Scholars and Policymakers*, to Election Law Blog, http://electionlawblog.org/archives/cat_vra_renewal_guest_blogging.html (July 20, 2006, 16:41 EST) (“[A]cademics . . . sometimes make judgments without having reviewed the complete legislative record ourselves.”) (quoting Spencer Overton, Professor, The George Washington University Law School).

⁹⁶ See Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 617 (2005) (recognizing problems that occur at the local level that evidence the continuing need for protection of minority voters and contending that protection of minority voting rights in local government represents Section 5's most important modern-day function). See also *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 129 (2006) (supplemental statement of Nathaniel Persily, Professor, University of Pennsylvania Law School) (observing that “the greatest effect of Section 5 can be felt at the local level, where elections are usually nonpartisan and the stakes as viewed by the national parties and interest groups are seen as relatively low”).

practitioners, private citizens, scholars and academics, historians, technical experts, local and state officials, and DOJ representatives.

The viewpoints regarding Section 5 varied widely. There was evidence to support and oppose reauthorization, various proposed amendments to Section 5's structure, and testimony from a number of witnesses who expressed ambivalence about congressional authority to renew Section 5 after *Boerne*.⁹⁷ The complexity of the evidence makes clear that Congress's approach was deliberative, thoughtful, and comprehensive in its scope. But in the post-reauthorization context, the evidence regarding ongoing voting discrimination will prove most helpful in ensuring that Section 5 withstands constitutional scrutiny. Litigators and advocates played a notable role by proffering the type of evidence that will be of significant value to courts as they weigh whether Congress had a sufficient basis to exercise its authority.

If sheer size were the determining factor, the amount of evidence amassed by Congress also stands as evidence of the particularly deliberative approach during the 2006 reauthorization process. Congress considered more evidence and committed more resources to studying the problem of ongoing voting discrimination in covered jurisdictions than it had to any other issue in several years.⁹⁸ It compiled over 20,000 pages of records by the conclusion of hearings in both chambers.⁹⁹ A careful, page-by-page anal-

⁹⁷ For extensive discussion of the debates, negotiation, and deals that preceded Congress's vote to reauthorize Section 5, see generally James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007). A number of witnesses expressed concerns regarding the constitutionality of a renewed Section 5. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act*, supra note 18, at 214-19 (statement of Richard L. Hasen, Professor, Loyola Law School) (describing perceived deficiencies in the congressional record); *id.* at 220-25 (statement of Samuel Issacharoff, Professor, New York University School of Law); *The Continuing Need for Section 5 Pre-Clearance*, supra note 18, at 198-207 (statement of Richard H. Pildes, Professor, New York University School of Law) (describing perceived inadequacies in the congressional record compiled for the 2006 reauthorization).

⁹⁸ During a particularly poignant moment in the floor debate preceding the floor vote in the House of Representatives, Rep. James Sensenbrenner pulled out, in dramatic fashion, hard copies of the extensive volumes of materials Congress had amassed in its effort to study and determine whether there was a continuing need for the expiring provisions of the Voting Rights Act. As the books piled on the table before him, a number of them slipping to the floor, Sensenbrenner passionately observed that he had never seen Congress invest more time or resources into studying an issue presented before it:

Based upon the committee's record . . . it is one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a Member of this body. All of this is a part of the record that the Committee on the Constitution headed by Mr. Chabot of Ohio has assembled to show the need for the reauthorization of the Voting Rights Act. . . . In fact, the extensive record of continued abuse compiled by the committee over the last year, which I have put on the table here today, echoes that which preceded congressional reauthorization of the VRA in 1982.

152 CONG. REC. H5143 (2006).

⁹⁹ Rep. Steve Chabot, then-chairman of the Subcommittee on the Constitution in the House of Representatives, made particular note of the size of the congressional record, observing that:

ysis of the entire 2006 legislative record indicates that the DOJ provided approximately 4,119 pages, including 2,370 pages of Section 5 objection letters issued between 1980 and 2005 and 1,240 pages of formal legal documents such as complaints, consent decrees, and orders arising from enforcement actions brought under Sections 4(e), 4(f)(4) and 203 of the Act.¹⁰⁰

B. Substantive Assessment of the 2006 Legislative Record: Evidence of Ongoing Discrimination

A number of voting rights practitioners and lawyers testified and submitted written material focusing directly on the matters that they litigate and the problems that they observe as advocates. This evidence strongly supports a reasonable and sufficient basis for Congress to believe that constitutional violations of the right to vote persisted.

Many of the key witnesses in the 2006 reauthorization process provided testimony revealing notable patterns of discrimination currently taking place in the covered jurisdictions. Their testimony revealed that the discrimination was not random and sporadic. Instead, they exposed striking similarities between the kinds of incidents taking place across the covered jurisdictions. In addition, their testimony made clear that increasingly sophisticated forms of discrimination were emerging in those areas. Against this backdrop, their testimony demonstrated that Section 5 was an effective prophylactic tool that helped block and deter discrimination and underscored the fact that occasional success stories should not be used as a reason to terminate Section 5. Ultimately, Congress appeared persuaded that Section 5's success was due to the statute's design, not because the need for it had expired.¹⁰¹

Since October of 2005, our subcommittee has held 12 hearings, heard testimony from 47 witnesses, and compiled over 12,000 pages on the Voting Rights Act [O]ur committee has devoted more time to this legislation than on any other matter since I became chairman of the Constitution Subcommittee 6 years ago.

152 CONG. REC. H5136 (2006) (concluding that “[t]he extensive testimony from a large number of diverse organizations demonstrated a clear need to reauthorize the Voting Rights Act”).

¹⁰⁰ Michelle Kuo, Memorandum on Congressional Materials Related to the 2005-2006 Voting Rights Act Reauthorization, Internal NAACP Legal Defense and Educational Fund Document, Summer 2007; citations for all the materials (memorandum on file with author).

¹⁰¹ Senator Edward Kennedy offered a formal statement during the reauthorization, observing “unimaginable” levels of progress since the Act was passed in 1965. 152 CONG. REC. S7967 (2006). However, Kennedy observed that “the goal of the Voting Rights Act was to have full and equal access for every American regardless of race” and that “[w]e have not achieved that goal.” *Id.* at S7968. Kennedy also noted:

Twenty-five years is not a long time when compared to the centuries of oppression that the law is intended to overcome. While we have made enormous progress, it takes time to overcome the deep-seated patterns of behavior that have denied minorities full access to the ballot. Indeed, the worst thing we could do would be to allow that progress to slip away because we ended the cure too soon. . . . We need to ensure that jurisdictions know that the act will be in force for a sufficiently long period that they cannot simply wait for its expiration, but must eliminate discrimination root and branch.

1. High Levels of Recalcitrance

The 2006 reauthorization yielded evidence of continued voting discrimination on the part of particularly recalcitrant jurisdictions. These jurisdictions drew multiple DOJ objections or resisted the mandates of the Act. For example, Congress received testimony noting that, since the Act was passed in 1965, DOJ had objected to every redistricting plan offered for Louisiana's State House legislative seats, regardless of whether those plans were submitted for administrative or judicial preclearance.¹⁰²

Another example concerned the long-standing battle over Mississippi's dual-registration system. During its 1890 constitutional convention, Mississippi adopted a dual registration system which required voters to register separately for municipal and non-municipal elections. In 1987, in *Operation PUSH v. Allain*,¹⁰³ a federal district court determined that the dual-registration requirement was motivated by a discriminatory purpose.¹⁰⁴ Despite this ruling, Mississippi adopted a new registration system but failed to obtain preclearance. Private citizens successfully filed a Section 5 enforcement action to force the state to submit the change for clearance.¹⁰⁵ Following its review of that change, DOJ interposed an objection, finding that the newly adopted system had a racially discriminatory purpose and effect.¹⁰⁶ Subsequently, the Mississippi legislature moved to adopt a unitary registration system, but these efforts were vetoed by then-Governor Kirk Fordice, prompting a group of private citizens to file another suit that eventually led to the adoption of a unitary registration system.¹⁰⁷

Morehouse Parish, Louisiana also exhibited resistance to the requirements of the VRA. After DOJ interposed a 1991 objection to a redistricting plan that sought to "pack"¹⁰⁸ African American voters in the City of Bastrop, the Morehouse Parish Police Jury responded by twice resubmitting the

Id.

¹⁰² *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15-17 (2005) [hereinafter *To Examine the Impact and Effectiveness of the Voting Rights Act*] (statement of the Hon. Marc Morial, President and CEO, National Urban League).

¹⁰³ 674 F. Supp. 1245 (N.D. Miss. 1987).

¹⁰⁴ *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1725 (2006) [hereinafter *Voting Rights Act: Evidence of Continued Need*] (report of RenewtheVRA.org, prepared by Robert B. McDuff, Attorney, Jackson, Mississippi). See also *PUSH*, 674 F. Supp. at 1251-52.

¹⁰⁵ *Voting Rights Act: Section 5 — Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 19-20 (2005) [hereinafter *Voting Rights Act: Section 5 — Preclearance Standards*] (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute). See also *Young v. Fordice*, 520 U.S. 273 (1997).

¹⁰⁶ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 55 (statement of Wade Henderson, Executive Director, Leadership Conference on Civil Rights).

¹⁰⁷ *Young*, 520 U.S. at 273.

¹⁰⁸ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 4540 (statement of Debo P. Adebile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.). Packing entails the placement of as many minority voters into as few districts as possible in order to

same plan with only a few superficial changes. Only when DOJ interposed a third objection did the Police Jury finally address the material concerns raised over the packing of minority voters and submitted a plan that did not over-concentrate African American voters.¹⁰⁹

2. *Evidence of Discriminatory Purpose Among the Covered Jurisdictions*

A number of witnesses provided evidence of covered jurisdictions proposing changes that appeared to be motivated by discriminatory purpose.¹¹⁰ This type of evidence served two distinct purposes during the 2006 reauthorization. First, it helped to provide a strong basis for Congress to amend Section 5 in response to the Supreme Court's ruling in *Reno v. Bossier Parish School Board*, which eliminated discriminatory purpose as grounds for the denial of preclearance.¹¹¹ Ultimately, these amendments helped to clarify that Congress intended for Section 5 to reach voting changes that were discriminatory in both effect and purpose.¹¹² Additionally, this evidence helped underscore Congress's authority to renew Section 5 since intentional discrimination lies at the core of activity prohibited under the Fifteenth Amendment.

The legislative record includes evidence regarding various discriminatory purpose objections interposed by DOJ between the 1982 and 2006 reauthorization periods.¹¹³ Purpose-based objections were also interposed to redistricting plans that fragmented,¹¹⁴ minimized minority voting strength to

reduce their influence and minimize their overall voting strength. For elaboration, see *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

¹⁰⁹ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 4540 (statement of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.).

¹¹⁰ See Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 286, 292-97 (2006) (analyzing DOJ objections interposed between 1980 and 2005 and concluding that of the 722 objections, 436 included indicia of discriminatory intent as a basis for the objection); see also *Voting Rights Act: Section 5 — Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 180-81 (2006) [hereinafter *Voting Rights Act: Section 5 — Preclearance Standards*] (appendix to McCrary et al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*).

¹¹¹ 528 U.S. 320, 335-41 (2000).

¹¹² See Tucker, *supra* note 97 at 221-23 (describing the changes made to Section 5 in order to reflect congressional intent that discriminatory purpose was grounds for denial of preclearance).

¹¹³ See McCrary et al., *supra* note 110; see also *Voting Rights Act: Section 5—Preclearance Standards*, *supra* note 110, at 15-16 (statement of Mark A. Posner, Attorney-at-Law) (noting that purpose-based objections to voting changes that were not necessarily retrogressive in effect began under the leadership of former Assistant Attorney General Bradford Reynolds during the Reagan administration and recounting multiple purpose-based objections to proposed redistricting plans for various Mississippi counties following the 1980 decennial redistricting cycle).

¹¹⁴ See *Voting Rights Act: Section 5 — Preclearance Standards*, *supra* note 110, at 19-20 (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute) (noting that a post-1980s congressional redistricting plan in Georgia fragmented the black population

protect white incumbents,¹¹⁵ or reduced the size of elected bodies in order to diminish minority voting opportunities.¹¹⁶

Cases in which courts made findings or heard evidence of intentional discrimination in the covered jurisdictions also revealed evidence of discriminatory purpose. For example, in *Bone Shirt v. Hazeltine*,¹¹⁷ the court found “there was ‘substantial evidence that South Dakota officially excluded Indians from voting and holding office.’”¹¹⁸ In *St. Bernard Citizens for Better Government v. St. Bernard Parish School Board*,¹¹⁹ plaintiffs brought a challenge to a parish redistricting plan, alleging that the reduction in the size of the school board and the addition of two at-large seats violated Section 2 of the VRA by diluting minority voting strength.¹²⁰ During a hearing in the case, State Senator Lynn Dean, the parish’s highest ranking official, admitted that he used the word “nig*er,” had done so recently, and did not consider the term to be “racial.”¹²¹ Ultimately, the plaintiffs prevailed in challenging the plan and the court credited evidence regarding a history of official discrimination in the parish, among other evidence.¹²²

3. *The Tipping Point: Discrimination in the Face of Growing Minority Populations*

Congress also received evidence of high levels of resistance from jurisdictions with growing minority populations. Often, these changes arose when minority voters were poised to become the numerical majority in a particular jurisdiction. One compelling example concerned Kilmichael, Mis-

and that a legislator who headed the redistricting committee used racial epithets to express his opposition to drawing black majority districts); *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 54 (statement of Wade Henderson, Executive Director, Leadership Conference on Civil Rights) (describing 1991 objection to redistricting plans submitted by officials in Selma, Alabama, that unnecessarily fragmented the African American voting population).

¹¹⁵ See *Voting Rights Act Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 189-90 (2006) (statement of Fred Gray, Senior Partner, Gray, Langford, Sapp, McGowan, Gray & Nathanson) (describing a 1998 objection to a redistricting plan for the Tallapoosa County Commission that impaired the ability of black voters to elect a candidate of their choice in order to protect a white incumbent).

¹¹⁶ See *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 53 (testimony of Wade Henderson, Executive Director, Leadership Conference on Civil Rights) (describing a DOJ objection to a 2003 proposal in Chilton County, Alabama, that sought to reduce the size of an elected body and repeal cumulative voting in an effort to retrogress minority voting strength).

¹¹⁷ 200 F. Supp. 2d 1150 (D.S.D. 2002).

¹¹⁸ See *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 1163 (statement of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, Fnd.); see also *The Continuing Need for Section 5*, *supra* note 17, at 14 (statement of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, Fnd.).

¹¹⁹ No. CIV.A. 02-2209, 2002 U.S. Dist. LEXIS 16540 (D. La. August 26, 2002).

¹²⁰ *Id.* at *2-3.

¹²¹ *Id.* at *33.

¹²² *Id.* at *34.

Mississippi.¹²³ Three weeks prior to the election, the white incumbent mayor and a five-member, all-white Board of Aldermen cancelled the election. DOJ objected to the cancellation, and, despite resistance, eventually compelled local officials to reschedule and move forward with the election. The House Judiciary Committee Report described the actions of Kilmichael officials as ones “intentionally developed to keep minority voters and candidates from succeeding in the political process.”¹²⁴ When the election was finally held, African Americans won the mayoral seat and three of the five aldermanic positions.¹²⁵

Another example comes from Louisiana, where discrimination emerged in Orleans Parish to preserve white political power in the face of the parish’s shrinking white population.¹²⁶ The legislative record includes evidence showing that Louisiana’s proposed plan eliminated outright a majority black district in Orleans Parish. That district provided black voters the opportunity to elect candidates of their choice on the grounds that the move was necessary to guarantee proportional representation of whites in Orleans Parish.¹²⁷ White population loss during the prior decade prompted the change, and the state conceded that its goal was to diminish black opportunity in order to increase the electoral opportunity of white voters in New Orleans.¹²⁸ At one point, the state significantly altered its legal theory in the case, prompting the D.C. District Court to issue an order “condemning the Louisiana House of Representatives for a mid-course revision in its litigation theory and tactics.”¹²⁹ Ultimately, the state dismissed its action seeking judicial preclearance of the plan and entered into an eve-of-trial settlement that restored the black opportunity district in Orleans Parish.

Some witnesses also provided significant evidence from outside the Section 5 context that illustrates efforts to fracture minority voting strength

¹²³ Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq. (December 11, 2001), available at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_121101.htm.

¹²⁴ H.R. REP. NO. 109-478, at 36 (2006).

¹²⁵ *Continuing Need for Section 5 Pre-Clearance*, supra note 18 (statement of Anita Earls, then-Director of Advocacy, University of North Carolina Law School’s Center for Civil Rights) (observing that “without Section 5, voters in the town [of Kilmichael] would not have been able to elect new town officials, and the existing officials would have been able to enact a single-member districting plan that unfairly diluted the voting strength of black voters”).

¹²⁶ *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 591-96 (statement of Debo P. Adebile, Associate Director of Litigation, NAACP Legal Defense and Fund).

¹²⁷ *Id.*

¹²⁸ See DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA, 1982-2006 13-18 (2006), available at <http://www.civilrights.org/issues/voting/LAVRA.pdf>; see also Louisiana House of Representatives et al. v. Ashcroft, No. 1:02-cv-62 (D.D.C. Jan 17, 2003) (unpublished order) (on file with the author).

¹²⁹ *Louisiana House of Reps.*, No. 1:02-cv-62. The strong language of the D.C. District Court’s order condemning the state of Louisiana’s litigation tactics is but one example of the evidence of “gamesmanship” (or ingenious defiance) that some conservative commentators believe is necessary to show the continuing need for Section 5. *Id.*

as minority communities become more politically cohesive. This testimony illustrates the level of consciousness that elected officials exhibited towards changes in minority numbers and political clout. One recent case highlighted during the reauthorization was *LULAC v. Perry*,¹³⁰ a challenge to a politically driven and racially heated mid-decade redistricting plan in Texas. In *LULAC*, the Supreme Court considered various challenges to Texas's 2003 congressional redistricting plan, which eliminated minority electoral opportunity despite a growing, politically cohesive Latino community. In particular, the plan removed Latino voters from congressional District 23 because the Latino voters in the area were "becoming increasingly politically active and cohesive."¹³¹ In response, the Court found that the redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation."¹³² Witnesses elaborated upon the motivation underlying Texas's mid-decade redistricting plan, testifying that officials "eliminated minority electoral opportunity in the face of growing numbers of politically cohesive Latino voters" and noting that "one of the periods of greatest danger for minority voting power occurs at the very time that minority communities are poised to exercise it."¹³³ Although the Court made its findings in the context of a Section 2 challenge, this testimony helped illustrated the important role that Section 5 stands to play in ferreting out proposed voting changes that worsen the position of minority voters despite their growing numbers and political clout.

4. Abuse of Discretion by Local Officials

Congress also considered evidence that discretionary judgment by election officials, and the official actions that result from this discretion, present opportunities for discrimination against minority voters. Because these actions represent voting changes subject to Section 5 review, they can also be blocked through the preclearance process.¹³⁴ Examining the seemingly innocuous actions taken with respect to white voters and contrasting these with official actions (or lack thereof) on behalf of minority voters also reveals powerful evidence of ongoing discrimination.

¹³⁰ *League of United Latin Am. Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006).

¹³¹ See generally *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 357-60 (2006) (statement of Nina Perales, Southwest Regional Counsel, Mexican American Legal Defense and Education Fund); see also *LULAC*, 126 S. Ct. at 2621 (also connecting racial polarization with "the possible submergence of minority votes — throughout Texas").

¹³² *LULAC*, 126 S. Ct. at 2621.

¹³³ *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 233 (2006) (statement of Sherrilyn Ifill).

¹³⁴ See *Foreman v. Dallas County*, 521 U.S. 979 (1997) (holding that county's exercise of its "discretion" pursuant to a state statute to adjust procedure for appointing election judges did not compel finding that county could make such a change without obtaining preclearance).

One example concerned a proposed annexation for the town of North, South Carolina. DOJ interposed an objection to one of the town's proposed 2003 annexation requests after finding that officials had "been racially selective in [their] response to both formal and informal annexation requests" from white and black residents.¹³⁵ DOJ determined that while "white petitioners ha[d] no difficulty in annexing their property to the town," officials "provide[d] little, if any, information or assistance to African-American petitioners."¹³⁶ The evidence showed that race was "an overriding factor in how the town respond[ed] to annexation requests."¹³⁷ This abuse of discretion and disparate treatment of minority voters constitutes the kind of discrimination that Congress sought to capture through Section 5's pre-approval procedures.

5. *Evading Section 5 Obligations*

Witnesses also presented evidence that numerous jurisdictions failed to obtain preclearance for particular voting changes.¹³⁸ Most recently, in *North Carolina State Board of Elections v. United States*,¹³⁹ a three-judge district court enjoined the North Carolina Board of Elections from implementing the state court's 2002 legislative redistricting plan before it was precleared by the court or the Justice Department. In *United States v. Georgia*,¹⁴⁰ a three-judge court enjoined state officials from administering or implementing their redistricting plan until they obtained preclearance. Although enforcement actions are not evidence that a contested voting change is necessarily retrogressive or discriminatory in violation of Section 5, these actions do make clear that jurisdictions routinely move to implement voting changes, often large in scope, while failing to comply with federal law.

One of the starkest examples of a jurisdiction completely evading its obligations under Section 5 concerned Shannon and Todd Counties of South Dakota.¹⁴¹ Private citizens there brought a Section 5 enforcement action to force the state to begin submitting its voting changes as required by law.¹⁴² Together, these jurisdictions had evaded their obligations for several years

¹³⁵ Letter from R. Alexander Acosta, Assistant Attorney General, U.S. Department of Justice, to H. Bruce Buckheister, Mayor, Town of North, South Carolina (September 16, 2003), available at http://www.usdoj.gov/crt/voting/sec_5/ltr/1_091603.html.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See H.R. REP. NO. 109-478, at 41-42 (2006) (finding that "covered jurisdictions continue to resist submitting voting changes for preclearance, as required by Section 5").

¹³⁹ 208 F. Supp. 2d 14 (D.D.C. 2002).

¹⁴⁰ No. 1:96-CV-700-JEC, 1996 WL 480861 (N.D. Ga. April 9, 1996).

¹⁴¹ *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 131 (2005) (appendix to the statement of Laughlin McDonald, Director, ACLU Voting Rights Panel). Shannon and Todd Counties are the only two covered counties in South Dakota.

¹⁴² *Voting Rights Act: Section 5 of the Act — History, Scope, and Purpose*, Vol. II, *supra* note 17, at 3290 (statement of Bryan Sells).

by failing to submit nearly 600 voting changes. The South Dakota example illustrates the willing and deliberate efforts on the part of local and state officials to disregard Section 5 while opponents argued that Section 5 had outlived its utility. Had these jurisdictions complied, there may have been an even greater swath of evidence for Congress to consider in assessing whether Section 5 remained necessary to protect the rights of Indian voters in South Dakota.

6. *Discrimination Based on Minority Language Status*

Congress also received evidence regarding the discrimination faced by minority-language voters. In particular, witnesses provided evidence to Congress about the need for bilingual election-related materials in certain communities.¹⁴³ Witnesses also provided evidence of the hostility expressed by some local officials to the Act's Section 203 minority language provision. Finally, evidence was presented connecting the failure to make bilingual election materials available to the low participation rates among minority-language voters.¹⁴⁴

Congress received evidence highlighting problems in Tarrant County, Texas, where Spanish-language translations of the ballot were "utterly incoherent, because they had been done by a non-Spanish-speaking staff in the county elections administrator's office."¹⁴⁵ Congress also learned about a recent 2002 suit mounted by the Mexican American Legal Defense and Education Fund ("MALDEF") against the city of Seguin, Texas, that sought to dismantle a majority Latino district to prevent Latinos from gaining a majority of seats on the city council in the face of a growing Latino population.¹⁴⁶ Key evidence was also offered indicating that of the 101 counties investigated, eighty percent were unable to produce voter registration forms, official ballots, provisional ballots, and their written voting instructions in a

¹⁴³ *Voting Rights Act: Section 203 — Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 77 (2005) (statement of Jacqueline Johnson, Executive Director, National Congress of American Indians) (describing particular needs of American Indians and Native Americans in Alaska and observing that many Native voters speak English as a second language and prefer to follow complicated ballot issues in their first language).

¹⁴⁴ *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 124-26 (2005) (statement of Juan Cartagena, General Counsel, Community Service Society) (highlighting results from a Pew Hispanic Center study that revealed that forty-seven percent of eligible Latinos voted in the 2004 presidential election compared to sixty-seven percent of whites). *But see Voting Rights Act: Sections 6 and 8 — The Federal Examiner and Observer Program: Hearing Before the Subcomm. of the H. Comm. on the Judiciary*, 109th Cong. 12-14 (2005) (statement of Penny L. Pew, Elections Director, Apache County, Arizona) (noting that turnout among voters in the Navajo Nation increased substantially after county conducted outreach to Navajo community and made bilingual materials available).

¹⁴⁵ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 309.

¹⁴⁶ *Section 5 of the Act — History, Scope, and Purpose*, *supra* note 17, at 86.

manner compliant with the language minority provisions of the Voting Rights Act.¹⁴⁷

7. *Small Town Discrimination*

Congress also received significant evidence highlighting the impact of Section 5 in combating discrimination in small, isolated communities. A Texas-based litigator observed that “Section 5 mitigates discriminatory election practices not only in congressional redistricting but also at the State and local levels.”¹⁴⁸ Other witnesses presented evidence from outside the voting context to show that discrimination remains entrenched at the local level.¹⁴⁹

8. *Racial Appeals in Political Campaigns and Other Ballot Box Barriers*

Also of significance was evidence regarding potentially discriminatory polling location changes, Election Day intimidation, and other barriers that make it more difficult for minority voters to access the ballot box.¹⁵⁰ For example, one witness provided an account regarding racial appeals in political campaigns in Charleston County, South Carolina. In his view, “[t]he most telling of these examples were white candidates running ads or circulating fliers with photos of their black opponents — sometimes even darkened to leave no mistake — to call attention to the black candidates’ race in case any white voter happened to be unaware of it.”¹⁵¹ Evidence of racial appeals illustrates one of many ways that race continues to infect the political process. This makes it more difficult for minority candidates to compete equally against non-minority candidates.

9. *Discrimination Documented by Federal Observers*

Evidence regarding the Act’s federal observer provision also demonstrated the discrimination and intimidation faced by minority voters inside

¹⁴⁷ See NINA PERALES ET. AL., VOTING RIGHTS IN TEXAS, 1982-2006 4 (2006), available at <http://www.civilrights.org/issues/voting/TexasVRA.pdf>.

¹⁴⁸ *Section 5 of the Act — History, Scope, and Purpose*, supra note 17, at 86.

¹⁴⁹ *Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Jose Garza, Voting Rights Attorney, League of United Latin American Citizens) (noting maintenance of racially segregated cemetery and county health office in Taft, Texas).

¹⁵⁰ For a thorough record of all racial appeals identified in Section 2 cases, see Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, University of Michigan Law School, 39 U. MICH. J.L. REFORM 643 (2006).

¹⁵¹ *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 84 (2005) [hereinafter *Examination of the Scope and Criteria for Coverage*].

polling places. A number of witnesses described various barriers to minority voter participation in the covered jurisdictions on Election Day.¹⁵² Witnesses emphasized the continuing need for the Act's federal observer provisions, which allow the Justice Department to deploy non-partisan individuals to monitor polling sites when concerns arise regarding potential harassment and intimidation.¹⁵³ Others emphasized that the federal observer program created a system of checks and balances that allowed officials in the covered jurisdictions to make necessary improvements based on DOJ reports of problems.¹⁵⁴

A former federal official who helped supervise the federal observer program provided compelling accounts of disparate treatment of black and white voters at polling places:

White poll workers treated African American voters very differently from the respectful, helpful way in which they treated white voters If the [white] voter's name was not found, often he or she either was allowed to vote anyway, with his or her name added to the poll book, or the person was allowed to vote a provisional or challenged ballot If, however, the voter was black, the voter was addressed by his or her first name and either was sent away from the polls without voting, or told to stand aside until the white people in line had voted.¹⁵⁵

The report issued by the House Judiciary Committee concluded that “[t]he assignment of Federal officials to [the covered] jurisdictions demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations.”¹⁵⁶ Testimony concerning the recent 2004 federal election

¹⁵² See *Voting Rights Act: Section 203 — Bilingual Election Requirement (Part 1): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 18 (2005) [hereinafter *Bilingual Election Requirement*] (statement of Margaret Fung, Asian American Legal Defense and Education Fund) (describing various racially derogatory statements made to Asian American voters at a number of polling sites around the country during the 2004 elections).

¹⁵³ *Voting Rights Act: Sections 6 and 8 — The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 17-19 (2005) [hereinafter *Voting Rights Act: Sections 6 and 8*] (statement of Barry H. Weinberg, Former Deputy Chief and Acting Chief, Voting Section, Civil Rights Division, U.S. Dep't. of Justice) (noting that federal observers are the “eyes and ears of the Justice Department” and play a critical role in the law enforcement process by documenting harassment and intimidation of voters).

¹⁵⁴ *Id.* at 12-14 (statement of Penny L. Pew, Elections Director, Apache County, Arizona) (noting that the observer program has functioned as a check-and-balance feature in the county's translator program).

¹⁵⁵ *Id.* at 30 (statement of Barry H. Weinberg, former Deputy Chief and Acting Chief, Voting Section, Civil Rights Division, U.S. Dep't. of Justice).

¹⁵⁶ H.R. REP. NO. 109-478, at 44 (2006).

cycle revealed that DOJ deployed more than 1,400 federal observers to 105 jurisdictions to ensure that minority voters maintained access to the polls.¹⁵⁷

10. *Persistence of High Levels of Racially Polarized Voting*

Strong evidence was also presented to Congress regarding significant levels of racially polarized voting in the covered jurisdictions, particularly in the Deep South.¹⁵⁸ This evidence helped illustrate the important role that Section 5 plays in maintaining minority districts that provide minority voters an opportunity to elect candidates of their choice. High levels of polarized voting decrease the likelihood that minority candidates can successfully run in at-large systems or in districts where they do not hold an effective majority. Polarized voting also makes it more likely that jurisdictions can employ exclusionary devices to further disadvantage minority voters.¹⁵⁹

C. *Analyzing the Statutory Structure and Its Effectiveness*

1. *Evidence Regarding the Deterrent Effect of Section 5*

Some of the strongest evidence of Section 5's effectiveness came from testimony regarding its deterrent effect. Various practitioners and litigators provided examples of jurisdictions altering a voting change because of local pressure from representatives of the minority community who warned of a DOJ objection.¹⁶⁰ Others observed that jurisdictions made alterations to or altogether withdrew proposed voting changes from the administrative preclearance process after receiving requests from the Justice Department for more information.¹⁶¹ This suggested a conscious effort to ameliorate the discriminatory or retrogressive aspects of the change.

¹⁵⁷ *Id.*; *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2006) [hereinafter *Modern Enforcement of the Voting Rights Act*] (statement of Wan J. Kim, Assistant Attorney General, Civil Rights Division, U.S. Dep't. of Justice).

¹⁵⁸ See *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 49-50 (2005) (statement of Richard Engstrom, Professor, The University of New Orleans) (sharing findings from his expert analysis of elections in Louisiana between 1991 and 2002 and concluding that seventy-eight of ninety electoral contests revealed high levels of racial divisions in candidate preferences).

¹⁵⁹ *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 19 (2005) (statement of Theodore Shaw).

¹⁶⁰ *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 21, 26 (2006) (statement of Robert B. McDuff, Attorney, Jackson, Mississippi).

¹⁶¹ See *Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearings on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 50 (2006) (statement of Chandler Davidson, Professor Emeritus, Rice University) (observing that since 1982, "there were more than 200 proposed discriminatory submissions that jurisdictions withdrew from" DOJ consideration after receiving letters from DOJ suggesting

A number of witnesses observed the deterrent effect of Section 5. Drawing from his experience working in Mississippi, one witness observed:

I cannot tell you how many times I have talked to legislators, city council members, lawyers in the State Attorney General's Office, or lawyers for localities who have really now internalized sort of the goals of Section 5, and who, when voting changes are being made, assess the impact on all groups, all racial groups, and reach out to all groups, to try to determine if a solution can be developed that satisfies everyone's concerns in light of the very deep racial fault line that still exists in the south and in other parts of the country due to the history of discrimination.¹⁶²

Similarly, an Alabama-based attorney observed that Section 5 discourages officials from engaging in discriminatory practice, providing pressure that would not be there without Section 5.¹⁶³ However, there is also compelling evidence that many jurisdictions continue to discriminate against minority voters despite Section 5.¹⁶⁴ Thus, practitioners and litigators generally offered a story about the impact of Section 5 in their communities that included evidence of success alongside persisting problems.

2. *Risk of Retraction in the Face of the Termination of Section 5*

The now-Chairman of the Senate Judiciary Committee, Senator Patrick Leahy, observed that evidence of Section 5's success should be viewed in a limited manner and concluded that Section 5 should not be "a victim of its success."¹⁶⁵ He also noted, "abandoning a successful deterrent just because it works defies logic and common sense. Why risk losing the gains we have made? When this Congress finds an effective and constitutional way to prevent violations of the fundamental right to vote, we should preserve it. Now is no time for backsliding."¹⁶⁶ A number of witnesses offered evidence of the

that the changes would be blocked if not withdrawn or substantially altered). *See also Voting Rights Act: Evidence of Continued Need: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, Vol. II, 109th Cong. 2553 (2006) (statement of Luis Ricardo Fraga & Maria Lizet Ocampo, Stanford University) (concluding that letters seeking more information on submitted voting changes "increased the impact of the DOJ on submitted changes by 110 percent, i.e., doubling the number of changes that were not precleared by the DOJ").

¹⁶² *Modern Enforcement of the Voting Rights Act*, *supra* note 157, at 26 (statement of Robert B. McDuff, Attorney, Jackson, Mississippi).

¹⁶³ *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) [hereinafter *Understanding the Benefits and Costs of Section 5 Pre-Clearance*] (testimony of Fred Gray, Attorney, Montgomery, Alabama).

¹⁶⁴ *See supra* Section II.B.

¹⁶⁵ 152 CONG. REC. S7745 (2006) (rejecting the counterargument made by Samuel Issacharoff, *Is Section 5 of the Voting Rights Act A Victim of its Own Success*, 104 COLUM. L. REV. 1710 (2004)).

¹⁶⁶ 152 CONG. REC. S7745.

potential for retraction by highlighting DOJ objections to voting that were specifically aimed at reversing gains achieved on behalf of minority voters through affirmative litigation under other provisions of the Act.¹⁶⁷ Another witness observed that Section 5 was not only necessary but “imperative to prevent the backsliding that history has demonstrated will occur when it comes to full enfranchisement of African Americans” and cautioned that Congress’ failure to reauthorize Section 5 would “affirmatively invite retreat by changing and weakening the protections of the Voting Rights Act.”¹⁶⁸ One witness provided an assessment of the problems that continued in Alabama¹⁶⁹ and cautioned that if “Section 5 is not reauthorized Alabama will attempt rapidly to reverse or to undermine the gains African Americans have made under the Voting Rights Act in the last three decades.”¹⁷⁰ Given the universe of evidence presented regarding ongoing voting discrimination, a court would likely find that Congress properly exercised its predictive judgment about the backsliding that would likely occur in the absence of Section 5.¹⁷¹

3. *The Limited Utility of Section 2 as a Comprehensive Remedial Provision*

One witness, whose views were informed by her experience litigating voting rights cases between the 1982 and 2006 reauthorizations,¹⁷² under-

¹⁶⁷ *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 6-7 (2005) (statement of the Hon. Jack Kemp, former member of Congress, former Sec’y of Housing and Urban Development, Founder and Chairman of Kemp Partners) (discussing DOJ objection to City of Freeport, Texas, proposal to return to at-large voting system after Latino voters succeeded in electing candidates of their choice under a court-ordered, single-member district plan).

¹⁶⁸ *Understanding the Benefits and Costs of Section 5 Pre-Clearance*, *supra* note 163, at 192-93 (statement of Fred Gray, Attorney, Montgomery, Alabama). See generally STEVEN F. LAWSON, IN PURSUIT OF POWER: SOUTHERN BLACKS AND ELECTORAL POLITICS, 1965-82 (1985) (focusing on the enforcement of the Voting Rights Act of 1965 in the South by exploring the efforts of civil rights forces to protect the black ballot and concluding that despite successes, vigilance remains necessary and that our political system must be made more responsive to the desires of black voters).

¹⁶⁹ *Reviewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 371 (2006) (offering an important examination of Section 5’s progress in Alabama between 1982 and 2006); JAMES BLACK-SHER, EDWARD STILL ET AL., VOTING RIGHTS IN ALABAMA, 1982-2006 (2006).

¹⁷⁰ *Section 5 of the Act — History, Scope, and Purpose*, *supra* note 17, at Vol. II 3198.

¹⁷¹ See generally Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER 183 (Ana Henderson ed., 2007).

¹⁷² Earls’ perspective was shaped by her experience as Director of Advocacy at the University of North Carolina Center for Civil Rights, Deputy Assistant Attorney General for Civil Rights at the Department of Justice, and Director of the Voting Rights Project of the Lawyers Committee for Civil Rights Under Law. See *Section 5 of the Act — History, Scope, and Purpose*, *supra* note 17, at Vol. I 7-8, 78-79, Vol. II 3181-92; *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3-4 (2006).

scored that Section 2 would be inadequate without Section 5 to enforce it.¹⁷³ The witness observed that “Section 5 operates to protect the gains that plaintiffs obtain through Section 2 litigation”¹⁷⁴ and highlighted this point through the example of Elizabeth City, North Carolina — a jurisdiction that agreed to implement single member districts following a Section 2 lawsuit but instead adopted a mixed plan with four single-member districts and four at-large residency districts.¹⁷⁵ Ultimately, an objection from DOJ prevented the city from defying its obligations to remedy the Section 2 violation.¹⁷⁶

Another witness highlighted the important role that Section 5 plays in the Section 2 context. In particular, the witness recounted his experience mounting a Section 5 enforcement action to help implement a remedial plan that was put in place after a federal district court determined that the at-large election system for the Texas-based Northeast Independent School District (“NEISD”) violated the Section 2 vote dilution provision of the Voting Rights Act.¹⁷⁷ Although the school district was resistant to implementing single-member districts, it was only after LULAC “secured an injunction blocking the bond election and ordering the school district to submit the bond election for preclearance . . . [that] the Defendant school district agreed to adopt single member districts and LULAC agreed to support the preclearance of the bond election.”¹⁷⁸ The successful Section 5 enforcement action resulted in the district adopting single-member districts and the election of the first Latino and African American school board members.¹⁷⁹

Evidence of the complexity and high costs associated with Section 2 also helped underscore the important role played by Section 5. Litigators with decades of VRA litigation experience presented practical evidence regarding the relative speed of the Section 5 preclearance process compared with the complex, costly, and time-consuming process under the Act’s Section 2 provision.¹⁸⁰ Litigators presented evidence to Congress indicating that Section 2 cases require the retention of costly experts including historians, social scientists, and statisticians, and noted that in the State of Mississippi,

¹⁷³ See *Continuing Need for Section 5 Pre-Clearance: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 146 (2006) (statement of Anita Earls, Director, Advocacy, Center for Civil Rights, University of North Carolina School of Law) (using example of litigation concerning Mississippi’s dual registration requirements to illustrate ways in which Section 5 and Section 2 often work together to protect minority voters).

¹⁷⁴ *Id.* at 145.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Examination of the Scope and Criteria for Coverage*, *supra* note 151, at 34 (statement of Jose Garza, Counsel for the League of United Latin American Citizens).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Section 5 of the Act — History, Scope, and Purpose*, *supra* note 17, at Vol. II 2-3, 3227-34; *An Introduction to the Expiring Provisions of the Voting Rights Act*, *supra* note 18, at 10-11 (statement of Laughlin McDonald, Executive Director, Southern Regional Office of the ACLU). See also *id.* at 141 (report published by the Federal Judicial Center) (noting that voting rights cases impose almost four times the judicial workload of the average case).

“there are not enough lawyers who specialize in this area to carry the load.”¹⁸¹

Witnesses also testified that, without Section 5’s protections, litigators would be faced with the burden of proving intentional discrimination under other provisions of the VRA.¹⁸² Some witnesses observed that this burden is a difficult one to carry because “most federal judges have been extremely reluctant to label local officials or communities as racists” and “a legislative body can always provide a non-racial reason for enacting a new voting practice.”¹⁸³

4. Section 5: Creating a System of Checks and Balances

Another witness offered an important perspective regarding the role that Section 5 has played in fostering greater communication between elected officials and private citizens.¹⁸⁴ The witness documented one example of private citizens operating a system of checks and balances against jurisdictions that may otherwise have been inclined to adopt voting changes that would harm minority voters.¹⁸⁵ The witness stated that, throughout Alabama, the “threat of Section 5 . . . has worked to get local governments to do the right thing.”¹⁸⁶ The witness then described recent interaction with officials in Barbour County, Alabama, following the county’s initial plan to reduce the black voting age population of a majority black district.¹⁸⁷ After the witness vehemently opposed the plan and cautioned that it was violating the

¹⁸¹ *Modern Enforcement of the Voting Rights Act*, *supra* note 157, at 96 (statement of Robert B. McDuff, Attorney, Jackson, Mississippi).

¹⁸² *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 34 (2005) at 3230 (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).

¹⁸³ *Section 5 of the Act — History, Scope, and Purpose*, *supra* note 17, at 3230 (statement by Laughlin McDonald, Director, ACLU Voting Rights Project). Notwithstanding any difficulty proving intentional discrimination, the author disagrees with Hasen’s underlying conclusion that Congress was “hard-pressed” to identify evidence of intentional discrimination during the 2006 reauthorization process. For elaboration on the “Bull Connor is Dead” problem, see Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 179 (2005).

¹⁸⁴ The witness, Jerome Gray, drew from his time as the State Field Director for the Alabama Democratic Conference, a position he held for twenty-five years, and as a former member of the Alabama Advisory Committee to the U.S. Commission on Civil Rights. In addition, Gray coauthored an important chapter on civil rights struggles in Alabama that appears in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE 1965 VOTING RIGHTS ACT, 1965-1990* 38 (Chandler Davidson & Bernard Grofman eds., 1994). For more analysis of the system of checks and balances that Section 5 has helped produce in the covered jurisdictions, see SPENCER OVERTON, *STEALING DEMOCRACY* 169 (2006).

¹⁸⁵ *Voting Rights Act: Section 5 — Preclearance Standards: Hearings on H.R. 109-69 Before the H. Subcomm. on the Constitution of the Comm. on the Judiciary*, 109th Cong. 45 (2005) (statement of Jerome Gray, State Field Director, Alabama Democratic Conference).

¹⁸⁶ *Id.* at 45-46.

¹⁸⁷ *Id.*

requirements of Section 5, the Barbour County Redistricting Commission corrected the problems.¹⁸⁸

5. *Fostering Principles of Participatory Democracy*

Deference to congressional judgment is also particularly appropriate given the notable impact that Section 5 has had on the development of a more participatory political process in the covered jurisdictions. The deterrent effect of Section 5 has encouraged the exercise of good government as elected officials have been more inclined to make choices that benefit all voters at the outset. In addition, Section 5 has encouraged more dialogue and exchange between minority voters and elected officials. This is the kind of interaction necessary in any healthy democracy.¹⁸⁹ These important ancillary benefits of Section 5 provide a basis for courts to review the legislative record with a deferential standard.

One witness crystallized the positive impact that Section 5 has had in some communities, noting that Section 5 “has made unlikely buddies of people who are ready, willing and able to communicate in a civil, democratic way as we engage in the process of representative government and full civic participation.”¹⁹⁰ An attorney who helped a number of jurisdictions bail out under the Act observed that the bailout provisions operate in tandem with Section 5 to “provide additional incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and . . . improve[d] existing election practices.”¹⁹¹

A report presented to Congress describing the benefits of Section 5 found that the preclearance process presents the public with an opportunity to take a “second look” at a particular voting change and examines whether it negatively impacts minority voters.¹⁹² A North Carolina-based attorney shared similar findings about the impact of Section 5 through testimony regarding her experience in Caswell County, North Carolina. She found that the “views of minority voters on issues ranging from polling place location

¹⁸⁸ *Id.*

¹⁸⁹ See OVERTON, *supra* note 184, at 169 (arguing that voting should present “meaningful opportunit[ies] for citizens to participate in government and check politicians”); Michael Kang, *Race and Democratic Contestation*, 117 *YALE L.J.* 734 (2008) (supporting values of more democratic debate, greater civic engagement and participation, and richer political discourse, which are generated through a process that the author describes as “democratic contestation”).

¹⁹⁰ *Voting Rights Act: Section 5 — Preclearance Standards: Hearings on H.R. 109-69 Before the H. Subcomm. on the Constitution of the Comm. on the Judiciary*, 109th Cong. 45 (2005) (statement of Jerome A. Gray, State Field Director, Alabama Democratic Conference) (describing a recent incident in Lanette, Alabama, where the city clerk changed rules for processing absentee ballot requests, but abandoned her effort and started to comply with the law after Gray informed her that her actions constituted a change subject to preclearance).

¹⁹¹ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at Vol. II 2676-77 (statement of J. Gerald Hebert, Legal Counsel to jurisdictions using bailout provision).

¹⁹² *Id.* at Vol. II 1471 (2006) (statement of JoNel Newman, Special Counsel, ACLU of Florida, and Assistant Professor of Clinical Education, University of Miami School of Law).

to the composition of election districts were taken into account because of the requirements of Section 5.”¹⁹³ This witness also observed that the requirements that jurisdictions confer with contacts in the minority community is “one important way that changes having a harmful effect on minority voters are stopped before they ever reach the stage of an official objection or judicial determination.”¹⁹⁴

D. Evidence Regarding DOJ Litigation & Enforcement Efforts

Congress also analyzed an important body of evidence about DOJ’s litigation and enforcement efforts that illustrated the breadth and depth of ongoing voting discrimination. Presented by the federal government, this evidence proved critical to Congress’s efforts to assess the effectiveness of Section 5.¹⁹⁵ The evidence from DOJ litigators and other representatives included information regarding DOJ objections, Section 5 enforcement actions, requests for more information issued by DOJ to officials seeking administrative preclearance of a voting change, Section 5 declaratory judgment actions brought in the D.C. District Court, and deployments of federal observers.¹⁹⁶

An examination of DOJ objections yields perhaps the strongest evidence. Analysis of objections interposed between 1980 and 2005 revealed that 436 of 722, or more than 60%, included discriminatory intent as at least part of the grounds for the objection.¹⁹⁷ This particular body of evidence revealed systemic patterns of ongoing discrimination throughout the covered jurisdictions.¹⁹⁸ A former senior DOJ official observed that “[b]ecause the

¹⁹³ *The Continued Need for Section 5 Pre-clearance: Hearing on S. 109 Before the S. Comm. on the Judiciary*, 109th Cong. 141 (2006) (statement of Anita S. Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights).

¹⁹⁴ *Id.*

¹⁹⁵ *Voting Rights Act: Section 5 of the Act — History, Scope, and Purpose, Vol. I: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 225-1684 (2005) [hereinafter *Section 5 of the Act—History, Scope, and Purpose*] (statement of Bradley Schlozman, Acting Assistant Attorney General, Civil Rights, DOJ) (submitting copies of all Section 5 DOJ objection letters since 1982 (among other materials), which provided statements regarding the DOJ’s rationale for interposing objections to changes deemed retrogressive or discriminatory).

¹⁹⁶ *See id.*

¹⁹⁷ *See Voting Rights Act: Section 5 — Preclearance Standards*, *supra* note 105, at 180-81 (appendix to Peyton McCrary et al., *supra* note 110).

¹⁹⁸ Underscoring the systemic nature of the evidence, Representative F. James Sensenbrenner highlighted some of the evidence culled from a number of the covered jurisdictions revealing, in his opinion, the continuing need for the Act’s protections. In particular, he observed:

Let’s look at Georgia. Since 1982, there have been 91 objections, 91 objections submitted by the Department of Justice. And since 2002, there have been seven voting rule changes that were withdrawn by the State because of DOJ objections. Texas, 105 objections imposed by DOJ since 1982, and 14 voting rule proposals were withdrawn by the State because of voting rights concerns in the last 4 years. Mississippi, 112 objections since 1982, and Federal observers have been sent to this State 14

Department has built a tradition of excellence and meticulousness in its Section 5 review process, jurisdictions will think long and hard before passing laws with discriminatory impact or purpose.”¹⁹⁹

In addition to objections interposed by DOJ, Congress also undertook careful analysis of declaratory judgment actions brought in the District Court for the District of Columbia. Although done with relative infrequency, some Section 5 covered jurisdictions file suit in the D.C. District Court to obtain judicial preclearance of a proposed voting change.²⁰⁰ Several of the unsuccessful declaratory judgment actions, highlighted during congressional hearings, underscore the problem of ongoing voting discrimination.²⁰¹

E. Reports and Materials Offered by Litigators and Advocates

Beyond the presentations made by individual witnesses, there were also several comprehensive reports and studies added to the legislative record. These reports served as important aids for Congress determining whether Section 5’s protections were still necessary. More importantly, the vast majority of these studies corroborated the personal experience testimony of witnesses. For commentators and courts apt to criticize the value of anecdotal accounts, these empirical studies provided equally probative evidence regarding ongoing discrimination.

times to monitor elections since 2002, most recently last year. Louisiana, 96 objection[s] since 1982, eight Department of Justice objections to voting rules have been lodged since 2002, most recently in 2005, and 10 voting rule proposals withdrawn by the State in the last 4 years. South Carolina, 73 objections since 1982. North Carolina in the covered jurisdictions, 45 objections since 1982. And Alabama, 46 objections, and Federal observers have been assigned to the State 65 times since 2000 to monitor elections. Arizona, 17 objections since 2002, and Federal observers have been assigned to that State 380 times since 2000 to monitor elections, including 107 since 2004.

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¹⁹⁹ *To Examine the Impact and Effectiveness of the Voting Rights Act*, *supra* note 102, at 66 (statement of Joseph D. Rich, formerly of DOJ’s Civil Rights Division).

²⁰⁰ It is often unclear what motivates jurisdictions to pursue this method of preclearance because it is more costly and time-intensive than pursuing preclearance through the administrative process. However, it appears that some jurisdictions that seek judicial preclearance are aware of the potentially problematic aspects of their proposed voting change and are thus engaging in a type of “forum shopping,” hoping to obtain a more favourable outcome from a court than they would from the DOJ.

²⁰¹ For example, the D.C. District Court denied judicial preclearance to a plan that sought to implement an at-large election method for the Sumter County Council in South Carolina. *Sumter County v. United States*, 596 F. Supp. 35 (D.D.C. 1984). In the declaratory judgment action, the Court found that the county “failed to carry [its] burden of proving that the legislature did not pass Act 371 in 1967 for a racially discriminatory purpose at the insistence of the white majority in Sumter County.” *Id.* at 38. In addition, the court noted that the at-large method of election would have diminished “the value of the then-increasing voting strength of the black minority” and may also have had the residual effect of “prevent[ing] formation of a black majority senate district.” *Id.* Finally, the court observed that a single-member plan would likely have provided the opportunity for black voters to elect candidates of their choice in three of seven districts. *Id.* at 37.

Among the comprehensive bodies of evidence were transcripts and recordings from ten hearings sponsored by the National Commission on the Voting Rights Act in 2005.²⁰² The Commission hearings, conducted throughout the covered jurisdictions, aimed to evaluate discrimination in voting since Congress reauthorized the temporary provisions of the Voting Rights Act of 1982.²⁰³ These hearings broadened the range of views and experiences presented to Congress.

In addition, the ACLU's Voting Rights Project compiled an important report that examined cases concerning compliance with federal and state election laws across thirty-one states. This report, entitled *The Case for Extending and Amending the Voting Rights Act, Voting Rights Litigation, 1982-2006*, was particularly significant because it provided first-hand accounts of the issues presented and challenges encountered by the ACLU during its handling of more than 293 voting cases since 1982.²⁰⁴

Another critical piece of the congressional record included a set of comprehensive reports examining voting discrimination in a number of the covered jurisdictions. These reports, commissioned by the Leadership Conference for Civil Rights Education Fund,²⁰⁵ provided a micro-level analysis of Section 5's effectiveness in the covered jurisdictions of Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia.²⁰⁶ These reports focused on the period following the 1982 renewal and reflected the experiences of litigators and practitioners during this time period.

Finally, another important empirical study, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, by Ellen Katz et al., was presented to Congress by Representative Steve Chabot.²⁰⁷ The study identified 323 lawsuits, encompassing 748 decisions that addressed Section 2 claims since 1982 in both covered and

²⁰² *To Examine the Impact and Effectiveness of the Voting Rights Act*, *supra* note 102, at 148-963 (2005). The efforts of the National Commission, spearheaded by the Lawyers' Committee for Civil Rights Under Law, was composed of a diverse group of individuals, including Honorary Chair Charles Mathias, Chair Bill Lann Lee, John Buchanan, Chandler Davidson, Dolores Huerta, Elsie Meeks, Joe Rogers, and Charles Ogletree.

²⁰³ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at Vol. I 12 (statement of Bill Lann Lee, Chair, National Commission on the Voting Rights Act and former Assistant Attorney General, Civil Rights Division, DOJ).

²⁰⁴ *Id.* at 19-20, 378-1269 (statement of Nadine Strossen, President, ACLU and Professor of Law, New York Law School).

²⁰⁵ More information regarding this educational and research collaborative is available at <http://www.civilrights.org> (follow "About" hyperlink; then follow "LCCREF" hyperlink).

²⁰⁶ *Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 45-48 (2006) (statement of Wade Henderson, Executive Director, Leadership Conference on Civil Rights).

²⁰⁷ *To Examine the Impact and Effectiveness of the Voting Rights Act*, *supra* note 102, at 964-1124 (including study from the Voting Rights Initiative of the University of Michigan Law School).

non-covered jurisdictions.²⁰⁸ The study found that racial bloc voting in covered jurisdictions was more extreme and severe relative to that in non-covered jurisdictions.²⁰⁹

F. *The Debate Regarding Empirical Versus Anecdotal Evidence*

Likely challengers to Section 5 may attempt to minimize the evidence in the congressional record as “anecdotal” and not empirical in nature.²¹⁰ However, these critiques are misguided and trivialize a probative body of evidence on the question of ongoing voting discrimination. Courts have recognized that anecdotes complement statistical data and other technical forms of evidence.²¹¹ Moreover, these critiques incorrectly suggest that anecdotal evidence is unreliable and that there is a judicial-type evidentiary standard that must be satisfied during the presentation of testimony to Congress. Evidentiary standards that apply in the judicial context should not be imported into the legislative context. Levying such a burden on Congress would dramatically transform the fact-finding and deliberative function of legislators by essentially requiring that legislators assume the role of judges when conducting hearings.

First-hand stories presented by non-expert, private citizens regarding experiences and encounters with voting discrimination are extremely important aids in Congress’s assessment of whether voting discrimination persists. In the voting rights context, anecdotal evidence has proven to be of particular value in helping plaintiffs satisfy their burden of proof on critical points.²¹²

²⁰⁸ See Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 204-14 (Ana Henderson ed., 2007).

²⁰⁹ *Id.* at 220 (Table 8.5).

²¹⁰ Plaintiff’s Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment, at 51-52, *NAMUD v. Gonzales*, No. 1:06-CV-01384 (D.C. Cir. Aug. 4, 2006), available at <http://yalelawjournal.org/images/pdfs/plaintiff2.pdf>.

²¹¹ See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (noting that such anecdotes bring “the cold numbers convincingly to life”); *McReynolds v. Sodexho Marriott Serv., Inc.*, 349 F. Supp. 1, 17 (D.C. Cir. 2004) (finding value in both statistical disparities between African Americans and whites with respect to promotions, as well as in supporting anecdotal evidence); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 168 (2d Cir. 2001) (noting that anecdotes “provide[] ‘texture’ to the statistics”). But see *Tennessee v. Lane*, 541 U.S. 509, 542 (2004) (noting that “unexamined, anecdotal” evidence does not suffice and certain anecdotal accounts were not sufficiently detailed to determine whether the instances of “unequal treatment” were irrational, and thus unconstitutional); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001) (observing that unexamined, anecdotal accounts of adverse, disparate treatment by state officials does not constitute legislative findings).

²¹² A number of courts have found significant value in anecdotal evidence, particularly in the context of Section 2 vote dilution claims. See, e.g., *Rural West Tenn. African-Am. Affairs Council v. Sundquist*, 209 F.3d 835, 844 (6th Cir. 2000) (crediting lower court’s consideration of “a complex body of statistical and anecdotal evidence” in determining that contested plan unlawfully dilutes African American voting strength in rural west Tennessee); *Askew v. City*

III. COMPARING AND CONTRASTING THE 2006 RECORD WITH RECORDS FROM PRIOR REAUTHORIZATIONS

An examination of the reauthorization processes following the Act's initial enactment²¹³ illustrates a progression in the methodology employed by Congress to determine the continued need for the protections afforded by Section 5. This evolution is the direct result of increasingly sophisticated and complex forms of evidence being presented to Congress. The sheer volume and variety of evidence considered by Congress suggests a very conscientious approach to its factfinding role. Given that the Supreme Court has upheld prior enactments of Section 5 on records that were comparable, if not slightly less comprehensive than that underlying the 2006 reauthorization, the Court will likely uphold Section 5 again.

A. *The 1970 Reauthorization*

In 1970, Congress examined the impact that Section 5 had in the covered jurisdictions during the preceding five years and noted significant under-enforcement of the Act's provisions by DOJ. Congress concluded that a five-year extension was "both reasonable and necessary to permit the dissipation of the long established political atmosphere and tradition of discrimination in voting because of color in those States and subdivisions in which literacy tests and low registration have gone hand in hand."²¹⁴

B. *The 1975 Reauthorization*

In 1975, Congress exhibited a slightly more studied approach to the problem of ongoing voting discrimination relative to the 1970 reauthorization period. The 1975 process resulted in a ten-year extension of the Act's

of Rome, 127 F.3d 1355 (11th Cir. 1997) (concluding that both empirical and anecdotal stand as evidence of the minority community's political cohesiveness); *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996) (noting that plaintiffs bear the burden of establishing who is the preferred minority candidate in each election and that this burden can be satisfied through the presentation of evidence, anecdotal or otherwise); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (noting that the preference of the black electorate might be proved through the use of anecdotal testimonial evidence, among other things). In a future project, the author hopes to more fully address the concerns of skeptics who question the probative value of anecdotal evidence, given the central role such evidence has historically played in voting rights cases, while offering thoughts on how such evidence should be weighed by courts.

²¹³ For a careful discussion of the legislative proceedings and constitutionality of Section 5 prepared shortly after the Act's initial enactment, see Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L.R. 1 (1965).

²¹⁴ H.R. REP. NO. 109-478, at 9 (2006). Congress also instituted a temporary, nationwide ban on literacy tests and determined that it was necessary to extend the period of time during which a jurisdiction had not employed a test or device in order to terminate its covered status under the Act.

special provisions,²¹⁵ a permanent ban on literacy tests,²¹⁶ and an expansion of the scope of jurisdictions subject to the Section 5 preclearance requirement.²¹⁷ In February and March of 1975 there were thirteen days of hearings sponsored by the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. The hearings resulted in over 1,625 pages of record. The Subcommittee considered evidence from a wide variety of sources, entertained several proposed amendments, and examined information pertaining to all aspects of the bill. Witnesses included members of Congress, bill sponsors, the Assistant Attorney General of the United States, members of the United States Commission on Civil Rights, local and state officials, private citizens, and various civic organizations with special interest in the Voting Rights Act of 1965.²¹⁸ Congress also afforded those who could not make a personal appearance the opportunity to submit written material into the record.²¹⁹ During April and May of 1975, the Senate Subcommittee on Constitutional Rights conducted seven days of hearings and heard from a similarly diverse range of witnesses, specifically soliciting the views of state election officials in the covered jurisdictions.²²⁰ In total, the Senate Subcommittee on Constitutional Rights heard from twenty witnesses and compiled a record that was over 1,080 pages in length.²²¹

Since Congress was only considering reauthorization and not enacting a new provision, an extensive record was not required. Nonetheless, Congress compiled a record replete with new examples of discrimination.²²² The evidence from litigators and advocates regarding the experiences of minority voters in the covered jurisdictions, and in the newly covered jurisdiction of Texas,²²³ proved critical. Numerous witnesses described a cultural shift as a

²¹⁵ Congress opted for a longer extension period, ultimately choosing to renew the temporary provisions of the Act for "another ten years." H.R. REP. NO. 94-196, at 38 (1975).

²¹⁶ *Id.* at 3-4.

²¹⁷ Specifically, Congress opted to extend Section 5 coverage to new geographic areas which met certain criteria. H.R. REP. NO. 109-478, at 9-10. The revised trigger formula resulted in extended coverage to those political subdivisions of a state that maintained a "test or device" on November 1, 1972 as a qualification for voting and those jurisdictions that the Director of the Census determined had less than fifty percent of their voting age persons either registered to vote on November 1, 1972, or voting in the presidential election of 1972. PUB. L. NO. 94-73, 89 STAT. 402 (1975); H.R. REP. NO. 94-196, at 39. This expanded scope of Section 5 coverage was a direct response to the extensive record that Congress had developed, which demonstrated the discrimination against and high illiteracy rates among language minorities. H.R. REP. NO. 109-478, at 10.

²¹⁸ See H.R. REP. NO. 94-196, at 3-4.

²¹⁹ *Id.* at 4.

²²⁰ S. REP. NO. 94-295, at 10 (1975).

²²¹ See *Extension of the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 126 (1975) [hereinafter *1975 Senate Extension of the Voting Rights Act*].

²²² *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 637 (1975) (noting that Congress is not necessarily required to seek new evidence in order to justify continued enforcement of the Fifteenth Amendment).

²²³ During the 1975 reauthorization, Congress extended the "special remedies of the Voting Rights Act" to "citizens of language minority groups based on their right to vote under the Fourteenth and Fifteenth Amendments" because "language minorities experience voting dis-

result of the Voting Rights Act but noted that Section 5's protections were necessary because race relations remained fragile and many minority voters had not yet developed confidence in the political process.²²⁴

The testimony demonstrated that officials were moving away from tests and devices that resulted in outright disenfranchisement, instead finding more sophisticated ways to discriminate against minority voters.²²⁵ Numerous witnesses presented testimony regarding the economic reprisals by employers against minority voters for exercising their new franchise rights.²²⁶ In addition, there was significant testimony regarding the severe levels of intimidation faced by minority voters.²²⁷ Congress also heard testimony about white boycotts of black- and Latino-owned businesses in response to business owners' encouragement of minority voter registration, particularly in small, isolated communities.²²⁸

crimination and exclusion caused by unequal educational opportunities and by acts of physical, economic, and political intimidation." H.R. REP. NO. 94-196, at 40.

²²⁴ *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 126 (statement of Nicholas Katzenbach, Executive Committee, Lawyers' Committee for Civil Rights Under Law) (noting that black political participation still remained in its infancy and extension of the Act was necessary to its continued development); *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 630 (statement of Armand Derfner, Lawyers' Committee for Civil Rights Under Law) (noting that Section 5 is "likely to induce a change in people's attitude over a period of time" but that there is "no change overnight"); *id.* at 133 (statement of John Lewis, Executive Director, Voter Education Project ("VEP")) (noting that it would take time to deal with the "psyche of black people" who lived in tremendous fear and remembered the bombings and shootings they once faced in trying to exercise their right to vote).

²²⁵ *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 127 (statement of Frank R. Parker, Mississippi Office, Lawyers' Committee for Civil Rights Under Law) (noting that poll tax requirement was eliminated but replaced with similarly burdensome requirement that voters present their social security number, driver's license number, motor vehicle license tag number, and address provided on last tax form); *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 629 (statement of Armand Derfner, Lawyers' Committee for Civil Rights Under Law) (noting shift from preventing blacks from voting to preventing them from winning and ultimately to preventing them from winning very much); *id.* at 130 (statement of John Lewis, Executive Director, VEP) (noting "new barriers to black participation in southern politics," including gerrymandering, annexing, consolidating, changing polling places, and changing election methods, among other tactics).

²²⁶ *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 130 (statement of John Lewis, Executive Director, VEP) (noting the "threat of economic reprisal against those who might register to vote for the first time"); *id.* at 521 (statement of Modesto Rodriguez, Pearsall, Texas) (providing several compelling examples of economic intimidation and observing that "white people are using the threat of economic reprisal to attempt to keep the Mexican American from becoming politically active and exercising a free franchise").

²²⁷ *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 127 (statement of Frank R. Parker, Mississippi Office, Lawyers' Committee for Civil Rights Under Law) (observing that local circuit clerk in Madison County, Mississippi, drew a gun on local black advocates trying to help a black voter complete a complex registration form); *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 668 (statement of Dr. Aaron E. Henry, President, Mississippi State Conference of NAACP) (noting that registrars in Mississippi often asked newly registered black voters for the names of their employers, creating fear among blacks that they might face job loss).

²²⁸ *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 521 (statement of Modesto Rodriguez, Pearsall, Texas) (noting example of a white-led boycott against a Latino tenant farmer in Pearsall, Texas, after the farmer's son became politically active and was named president of a local Chicano political organization).

Many of the examples of discrimination raised during the 2005-2006 reauthorization period bear a striking resemblance to examples of discrimination highlighted during the 1975 reauthorization. For example, during both the 1975 and 2006 reauthorizations, Congress received comparable testimony regarding aggressive challenges mounted against minority voters,²²⁹ deceptive practices,²³⁰ denial of the right to register and vote to minority college students,²³¹ intimidation by local law enforcement,²³² and the movement of polling places to inaccessible locations for minority voters.²³³ There

²²⁹ *Id.* at 522 (statement of Modesto Rodriguez, Pearsall, Texas) (noting that “new gimmick used by whites to intimidate Mexican Americans is to challenge elections won by Mexican Americans” based on alleged voting irregularities).

²³⁰ *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 804 (statement of Rafael Moreno, Tejano Political Action Committee) (noting that significant number of Latino voters during an April 1975 city council election were told to return to the polling place at 9 pm because of broken voting machine even though polls closed at 7 pm). *Compare Voting Rights Act: Evidence of Continued Need*, *supra* note 104, at 1753 (observing that black voters were the targets of deceptive election practices, including signs posted in predominately black districts advertising the wrong election date, in North Carolina during the November 2004 election) with *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 856 (statement of Vilma S. Martinez, President and General Counsel, Mexican American Legal Defense and Educational Fund) (attacking local officials’ refusal to establish a polling site in Chicano neighborhood of Villa Coronado, Texas).

²³¹ *Compare Examination of the Scope and Criteria for Coverage*, *supra* note 151, at 67 with *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 856 (statement of Vilma S. Martinez, President and General Counsel, Mexican American Legal Defense and Educational Fund) (noting challenge to Texas statute that requires a student to intend to reside indefinitely as his domicile in order to vote in jurisdiction). *See also An Introduction to the Expiring Provisions of the Voting Rights Act*, *supra* note 18, at 23 (statement of Chandler Davidson, Professor Emeritus, Rice University) (noting that Waller County, Texas, officials have attempted to prevent students at Prairie View A&M, an historically Black college, from voting in county elections).

²³² *Compare Section 5 of the Act — History, Scope, and Purpose*, *supra* note 17, at 3257 (statement of Jose Garcia of the Institute for Puerto Rican Policy and the Latino Voting Rights Network) (discussing the intimidating effects of the use of off-duty police officers and other law enforcement personnel as poll watchers in Latino communities, among other things) with *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 133 (statement of Frank R. Parker, Mississippi Office, Lawyers’ Committee for Civil Rights Under Law) (noting that poll watchers for black candidates were arrested or threatened with arrest in Copiah County, Mississippi), and *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 522 (statement of Modesto Rodriguez, Pearsall, Texas) (noting that local law enforcement officials walk around polling places in Latino areas “brandishing guns and billy clubs” to find reasons to arrest Latino voters).

²³³ *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 111 (statement of John Lewis, Executive Director, Voter Education Project) (noting that voting booths were moved to segregated places that are considered places of hostility in the black community); *id.* at 122 (statement of Nicholas Katzenbach, Executive Committee, Lawyers’ Committee for Civil Rights Under Law) (noting that DOJ objected to a proposed polling place change in St. Landry Parish, Louisiana, where officials sought to move polling place to the Knights of Columbus Hall — a venue where Blacks were generally denied access); *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 522 (statement of Modesto Rodriguez, Pearsall, Texas) (noting that whites moved polling place outside of a barrio, resulting in a dramatic decrease in the number of Chicanos voting). *Compare The Continuing Need for Section 5 Pre-Clearance*, *supra* note 18, at 60-61 (testimony received regarding DOJ objection to North Harris and Montgomery Community College District proposal to reduce the number of polling places from eighty-four to twelve; DOJ also observed that under the proposed change, the site with

was additional evidence regarding selective annexations, in which officials granted annexation requests of whites while ignoring requests from minority communities.²³⁴ Although a number of litigators and practitioners highlighted stories of progress, their testimony made clear that this progress was fragile and that change occurred at a slow pace.²³⁵ Finally, witnesses also testified that some jurisdictions covered by Section 5 defied their obligations by failing to submit voting changes for preclearance, a problem that was certainly more acute during the Act's infancy.²³⁶

C. *The 1982 Reauthorization*

The 1982 reauthorization process²³⁷ was equal in intensity and scope to the 1975 reauthorization process. Between May and July of 1981, the House Judiciary Subcommittee on Civil and Constitutional Rights conducted eighteen days of hearings, including regional hearings in Montgomery, Alabama, and Austin, Texas.²³⁸ Remarkably, the Subcommittee heard or received written testimony from 156 witnesses.²³⁹ Congress considered evidence from both current and former members of Congress; two former Assistant Attorneys General of the U.S. Department of Justice; members of the U.S. Commission on Civil Rights; civil rights leaders; state and local government officials; members and representatives of various civic, union, and religious

the smallest proportion of minority voters served just 6,500 voters, while the site that served a population that was 79.2% black and Hispanic served over 67,000 voters.”) *with 1975 House Extension of the Voting Rights Act*, *supra* note 60, at 495 (statement of William Boyd Oliver, Pastor, Plymouth United Church, Beaumont, Texas) (noting polling place changed to a gun club believed to have a policy of excluding black members).

²³⁴ Compare Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to H. Bruce Buckheister, Mayor, North, South Carolina (September 16, 2003) (objecting to a proposed annexation in the town of North, South Carolina, because of official action that was “racially selective” in manner, i.e., where white petitioners had no difficulty in annexing their property to the town while “town officials provide[d] little, if any, information or assistance to black petitioners”) *with 1975 House Extension of the Voting Rights Act*, *supra* note 60, at 523 (statement of Modesto Rodriguez, Pearsall, Texas) (highlighting examples of Cotulla and Pearsall, Texas, where local councils granted annexation requests of white areas while rejecting similar requests from minority communities, resulting in significant dilution of minority voting strength).

²³⁵ *1975 House Extension of the Voting Rights Act*, *supra* note 60, at 129 (statement of John Lewis, Executive Director, Voter Education Project) (noting that “increase of black participation has brought the dawning of a new day for Southern politics” and “[d]emagogues of the past are now trying hard to acquire a new public image”).

²³⁶ *1975 Senate Extension of the Voting Rights Act*, *supra* note 221, at 108 (statement of John Lewis, Executive Director, Voter Education Project) (noting that Georgia and Alabama have enacted 158 and 161 changes, respectively, without preclearance).

²³⁷ For a general discussion of the 1982 reauthorization and an argument for stronger DOJ enforcement of Section 5, see Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 1-82 (1983).

²³⁸ H.R. REP. NO. 97-227, at 2 (1981).

²³⁹ See *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 1-2813 (1981) [hereinafter 1981 House Hearing].

organizations; social scientists; voting rights attorneys; and private citizens.²⁴⁰ The House record was over 2,800 pages long.²⁴¹ The Subcommittee on the Constitution of the Senate Judiciary Committee conducted nine days of hearings between January and March, 1982, heard from fifty-one witnesses, and generated a record over 2,900 pages in length.²⁴²

The ensuing full Senate floor debate was heated. It lasted for seven days in early June 1982 and overcame a filibuster led by Republican Senator Jesse Helms.²⁴³ Despite initial hostility from opponents, the Senate passed an amended version of the House bill by a vote of eighty-five to eight on June 18, 1982.²⁴⁴

The 1982 reauthorization process, like the preceding 1975 process, yielded evidence of ongoing discrimination that was very similar in nature and scope to that presented to Congress during the 2006 reauthorization period. During this period, evidence suggested that jurisdictions resorted to increasingly sophisticated procedural devices to undercut minority voting strength.²⁴⁵ As minority voters increased in numbers, local officials in the covered jurisdictions moved to adopt new schemes aimed at repressing minority voting strength.²⁴⁶ Witnesses provided testimony revealing the barriers to minority voting in the covered jurisdictions,²⁴⁷ including testimony regard-

²⁴⁰ H.R. REP. NO. 97-227, at 2-3.

²⁴¹ See *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Sen. Comm. on the Judiciary*, 97th Cong. 1-1850 (1982) [hereinafter *1982 Senate Hearing*]. After a floor debate in the House, the bill was passed by a sizeable margin of 389 to 24. See 127 CONG. REC. H7011 (daily ed. Oct. 5, 1981).

²⁴² S. REP. NO. 97-417, at 3, reprinted in 1982 U.S.C.C.A.N. at 180.

²⁴³ 128 CONG. REC. S7139 (daily ed. June 18, 1982).

²⁴⁴ *Id.*

²⁴⁵ *1981 House Hearing*, *supra* note 241, at 17 (statement of Vernon Jordan, President, National Urban League) (observing that sophisticated procedural devices now employed by covered jurisdictions include adopting anti-single shot laws, implementing majority run-off requirements, and authorizing annexations of white areas).

²⁴⁶ See *id.* at 1806-07 (statement of Raymond H. Brown, Director, Voting Rights Project, Southern Regional Council) (sharing results of study of two Southern states and concluding that once black voters “come within striking distance of electing candidates responsive to their needs,” local officials propose and implement manipulative election schemes that have resulted in massive under-representation of blacks).

²⁴⁷ See *1982 Senate Hearing*, *supra* note 241, 1653 (statement of Hon. Walter Fauntroy, Delegate of the District of Columbia) (noting that black citizens in Montgomery, Alabama, and Marengo County, Alabama, were required to present social security numbers as a prerequisite to registering to vote); *id.* at 315-16 (statement of Ruth J. Hinerfield, President, League of Women Voters of the United States) (noting incident in Edinburg-McAllen, Texas, where officials ordered a single voting machine in a precinct with large numbers of Latino voters, resulting in election day delays and long lines, and where precinct election judge told League of Women Voters representation that the problems started when “those Mexicans started to vote”); *id.* at 1130-31 (statement of Thomas C. McCain, Chairman, Democratic Party, Edgefield, South Carolina) (noting that because of lingering resistance, many black voters are deterred from registering to vote in Edgefield, South Carolina); *1981 House Hearing*, *supra* note 239, at 1526 (statement of Dr. Joe Reed, Chairman, Alabama Democratic Conference) (noting the chilling effect that results from short hours for voter registration, designation of polling places at white establishments and low numbers of black poll workers).

ing discriminatory polling place changes,²⁴⁸ intimidation at the hands of law enforcement,²⁴⁹ proposed consolidations,²⁵⁰ and the failure to provide minority language assistance.²⁵¹ Numerous witnesses highlighted the importance of the federal observer program as a tool to ensure minority voter access to the polls in light of these problems.²⁵²

Congress also heard testimony about the refusal of jurisdictions to allow minority voters the equal opportunity to elect a candidate of their choice, either by attempting to switch to an at-large system²⁵³ or by refusing to change to a system that would allow the choice.²⁵⁴ Other witnesses highlighted Section 5's positive impact in covered jurisdictions but noted that

²⁴⁸ *1981 House Hearing, supra* note 241, at 1450 (statement of Hon. Robert Abrams, State Attorney General, State of New York) (noting 1974 DOJ objection involving polling places that were located in majority white apartment complexes but not similarly located in complexes with mostly minority tenants); *id.* at 1769 (statement of Arthur S. Fleming, Chairman, U.S. Commission on Civil Rights) (noting 1977 objection to proposed polling place in Raymondville, Texas, where Mexican Americans felt unwelcome).

²⁴⁹ *Id.* at 2069 (statement of Joseph E. Lowery, President, Southern Christian Leadership Conference) (recounting assault by sheriff's deputies in Johnson County, Georgia, in response to voter registration efforts on behalf of black voters); *id.* at 1565-66 (statement of Maggie Bozeman, President of Pickens County, Alabama branch of NAACP) (observing intimidation at the hands of law enforcement when black voters mobilize registration drives and sheriff harassment of black voters casting absentee ballots in Pickens County, Alabama).

²⁵⁰ *Id.* at 1450 (noting 1975 objection to consolidation of two Democratic leadership districts that would have dismembered a majority-minority district).

²⁵¹ *See 1982 Senate Hearing, supra* note 241, at 291 (statement of Vilma Martinez, Executive Director and General Counsel, Mexican American Legal Defense and Educational Fund) (noting that officials are not providing necessary minority language assistance, in part because they believe assistance is not needed and would foster "cultural separatism"). Martinez also cited results of an extensive MALDEF survey examining needs of Spanish-speaking citizens in the covered jurisdictions and observed that "35 percent of all respondents would be less likely to register if there was no one to help in Spanish" and "33 percent would be less likely to vote if there were no ballot in Spanish . . ." *Id.* at 308. *See also 1981 House Hearing, supra* note 239, at 1490-93 (statement of Arnold Torres, Congressional Liaison, League of United Latin American Citizens) (noting need for minority language assistance); *id.* at 1909-11 (statement of David Dunbar, General Counsel, National Congress of American Indians) (observing need for language assistance in Navajo communities in Southwest and noting ninety percent of Navajos speak their native tongue); *id.* at 1914-20 (statement of John Trasvina, Commissioner, Citizens Advisory Committee on Elections, San Francisco) (noting problems with provision of minority language assistance throughout California).

²⁵² *See id.* at 1617 (statement of Larry Fluker, President of Conecuh County, Mississippi, branch of the NAACP) (noting that 12 of 140 poll workers in Conecuh County were black, despite the fact that the black population of the county was over forty percent, and recounting need to call in federal observers after white city clerk purged over 200 black voters from the registration rolls).

²⁵³ *1982 Senate Hearing, supra* note 241, at 1188 (statement of Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law) (referring to report cataloguing various efforts to minimize and cancel out black voting strength in Mississippi, including thirteen counties and forty-six cities and towns that sought to change to at-large elections between 1965 and 1979).

²⁵⁴ *Id.* at 373 (statement of Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union Foundation, Inc.) (noting that white officials in Terrell County, Georgia, resisted creating additional majority-minority districts, despite the fact that blacks composed majority of the population because they wanted blacks to "participate but not to dominate the political situation . . .").

these gains were fragile and required an extension of the Act's protections.²⁵⁵ Congress also heard testimony regarding various objections interposed by the Justice Department that helped open the door for more electoral opportunities for minority voters.²⁵⁶

Witnesses also presented testimony about high levels of racially polarized voting in the covered jurisdictions and the maintenance of at-large election systems that disadvantaged minority voters.²⁵⁷ Other witnesses revealed severe problems of discrimination in small jurisdictions. These incidents did not garner significant media attention, but they illustrated the particular need for the statute's protections at the local level.²⁵⁸ Congress also received testimony describing the particularly vulnerable status of small, rural communities where officials did not comply with Section 5 obligations and minority voters were not mobilized to react.²⁵⁹ These off-the-radar areas provided a strong basis for Congress to renew Section 5 since the statute's protections had not yet taken root there and local officials exhibited high levels of resistance to the Act.

The Voting Rights Act: Its Effect in Texas, a report, provided examples of discrimination faced by Chicanos in the State of Texas and the benefits provided by Section 5.²⁶⁰ Surveyed findings from NAACP chapters in the covered states such as Alabama, Florida, Georgia, Mississippi, and Texas revealed a number of continuing barriers to minority voter participation.

²⁵⁵ *1981 House Hearing*, *supra* note 239, at 1281 (statement of Hon. Paul Ragsdale, Texas State Representative, Dallas) (noting that seven years of coverage in Texas is "hardly time enough for a political culture appreciative of minority participation to develop in a state which for generations has excluded blacks and Mexicans Americans"); *id.* at 1578-79 (statement of Prince Arnold, Sheriff, Wilcox County, Alabama) (noting that despite progress, efforts were underway to undo gains among black voters in Wilcox County, Georgia, and noting threats to his life during his bid for sheriff's seat in 1978 election).

²⁵⁶ *Id.* at 1274-77 (statement of Hon. Bernardo Eureste, Member, San Antonio City Council) (noting ripple effect of Section 5 objection interposed to proposed annexation in San Antonio, that influenced city adoption of single-member districts).

²⁵⁷ *See 1982 Senate Hearing*, *supra* note 241, at 1004-54 (concluding that polarized voting in conjunction with at-large election makes Latino success a virtual impossibility).

²⁵⁸ *See 1981 House Hearing*, *supra* note 239, at 1253 (statement of Ruben Bonilla, National President, League of United Latin American Citizens) (recounting 1978 local election in Rockport, Texas, in which Mexican American candidate challenged a white candidate who died before election was held and after the incumbent's death, Anglo community mobilized in support of the dead white candidate to specifically block election of Mexican American candidate).

²⁵⁹ *See id.* at 2078 (statement of Prof. Howard Ball, Chairman, Department of Political Science, Mississippi State University) (distinguishing cities with more politically active minority citizens such as Jackson, Mississippi, from smaller towns, where community members are not able to pressure the local attorneys to comply with their preclearance obligations or to mount complaints with the DOJ); *id.* at 172 (statement of Reverend Jesse L. Jackson, President, Operation PUSH) (highlighting example in Edgefield, South Carolina — home of Strom Thurmond — where black voters submitted complaints to DOJ regarding non-compliance with Section 5 but were ignored).

²⁶⁰ *See 1981 House Hearing*, *supra* note 239, 37-52 (report by Rolando L. Rios, Director of Litigation, Southwest Voter Registration Education Project) (noting DOJ objection to proposed annexation in Victoria, Texas, that annexed numerous Anglo areas to counter voting strength of growing Latino population).

These violations included intimidation of black voters at the polls, annexation of white subdivisions to black districts, inadequate notice regarding polling place changes, and increased filing fees for black candidates.²⁶¹

Some witnesses also highlighted under-enforcement of the Act by DOJ.²⁶² Other witnesses observed that covered jurisdictions failed to comply with their Section 5 obligations by not submitting changes for preclearance with little fear of reprisal by the Justice Department.²⁶³ This evidence bolstered the argument to keep Section 5's protections in place for a longer period, to bring about a cultural change among particularly recalcitrant officials in the Deep South.²⁶⁴

This proposed amendment to the Act, in response to the Supreme Court's ruling in *Mobile v. Bolden*,²⁶⁵ resulted in some of the more contentious debates during this reauthorization. Other witnesses testified to the need for this revision by providing evidence of the increasingly sophisticated forms of discrimination in the covered jurisdictions, which made discriminatory intent very difficult to prove.²⁶⁶ Many of the witnesses who focused on

²⁶¹ See *id.* at 60 (statement of Benjamin L. Hooks, Executive Director, NAACP).

²⁶² See 1982 Senate Hearing, *supra* note 241, at 665 (statement of Hon. Henry J. Kirksey, State Senator, Jackson, Mississippi) (noting failure of the DOJ under the Reagan administration to adequately enforce the protections of the Act); *id.* at 561-62 (statement of Joaquin G. Avila, Associate Counsel, Mexican American Legal Defense and Educational Fund) (noting DOJ's insensitivity to the protection of the voting rights of Latino voters and highlighting the Department's reversal of its position on the City of Lockhart's adoption of a numbered place system and staggered terms, after initially interposing an objection to the change).

²⁶³ See *id.* at 596-97 (statement of Steve Suits, Executive Director, Southern Regional Council) (condemning failure of the DOJ to assure that every electoral change by local and state jurisdictions is submitted and identifying more than 750 not precleared changes among the six southern states); 1981 House Hearing, *supra* note 265 (statement of Prof. Howard Ball, Chairman, Department of Political Science, Mississippi State University) (recounting admissions of non-compliance by white officials in rural parts of Mississippi); *id.* at 232 (statement of Hon. Julian Bond, Member of Georgia Legislative Black Caucus and President of the Atlanta Branch NAACP) (citing several Georgia counties with sizeable black populations, including Morgan, Early, Clay, Miller, Pike, Dooly, and Calhoun, that failed to submit changes for preclearance).

²⁶⁴ See *id.* at 23-24 (statement of Lane Kirkland, President, AFL-CIO) (advocating placement of burden on the covered jurisdictions to prove that the legacy of voting discrimination had been overcome and that several years of federal government response had brought about a total change of heart no longer necessitating Section 5's protections); *id.* at 181 (statement of Archibald Cox, Chairman, Common Cause) (observing that hard-won gains of the Act are fragile and concluding that it would be naïve to believe that engrained habits of discrimination have been removed so quickly).

²⁶⁵ 446 U.S. 55 (1980).

²⁶⁶ 1982 Senate Hearing, *supra* note 241, at 1648 (statement of Hon. Harold Washington, Representative in Congress from Illinois) (observing that intent standard was particularly onerous in the voting rights context given the reality of political decision-making at the local level in which "decisions are often reached at dinner parties, in closed meetings, at private clubs, and in back rooms, in places where . . . no reasons are stated for the decision."); see also *id.* at 246 (statement of Benjamin L. Hooks, Executive Director, NAACP) (noting difficulty of proving intent); *id.* at 1612 (statement of Arnoldo S. Torres, National Executive Director, League of United Latin American Citizens) (supporting incorporation of results test into Section 2); *id.* at 1367 (statement of Drew Days, Associate Professor of Law, Yale University) (same); *id.* at 1167 (statement of Arthur S. Fleming, Chairman, U.S. Commission on Civil Rights) (same).

the Section 2 amendments also provided evidence countering opponents' arguments that the statutory provision was an adequate substitute for Section 5. These witnesses observed that Section 2 litigation was complex, costly, and protracted and, therefore, an inadequate replacement for the speedy administrative mechanism found in Section 5.²⁶⁷

IV. CONCLUSION

The record amassed by Congress during the 2005-2006 reauthorization process illustrates the intensity with which Congress approached, studied, and analyzed the problem of ongoing voting discrimination in jurisdictions covered by Section 5.²⁶⁸ That record evidenced significant problems at the city, county, and state levels, including problems like "small" voting changes such as polling place moves, to "complex" changes such as state-wide redistricting plans. The kind of evidence considered by Congress included empirical data from studies, personal accounts provided by citizens, findings of discrimination presented by litigators, and analyses presented by scholars. Given this considerable body of evidence and the similarities between the kind of evidence underlying the recent and prior reauthorization periods, courts will be reluctant to upset congressional judgment and are likely to uphold the constitutionality of Section 5 once again.

The Article's analysis of the congressional records underlying the last three reauthorization periods suggests that courts reviewing constitutional challenges to Section 5 will find most useful the testimony of witnesses who revealed the experiences of persons in the covered jurisdictions.²⁶⁹ This most recent reauthorization process illustrates the centrality of evidence concerning the practical realities experienced by voters in the covered jurisdictions.²⁷⁰ This evidence is crucial to enable Congress to measure the extent of

²⁶⁷ See 1981 House Hearing, *supra* note 239, at 423-27 (statement of Jack Greenberg, Director-General Counsel, NAACP Legal Defense and Education Fund) (describing complexities, costs, and delays associated with Section 2 litigation).

²⁶⁸ During the 2005-2006 reauthorization, Congress not only renewed Section 5 but also offered a number of substantive changes to the statute that clarify congressional intent regarding the scope of changes deemed objectionable under Section 5. In particular, these changes were aimed at addressing the impact of two recent Supreme Court rulings on the Section 5 preclearance process, *Bossier Parish II*, 528 U.S. 320 (2000), and *Georgia v. Ashcroft*, 539 U.S. 461 (2003). These changes are beyond the scope of this article; however, they restore the strength and reach of Section 5 and make it more likely that we will see increasing numbers of objections interposed in future years. This is good news, given the recent wave of election reforms and discriminatory voting changes that have emerged in the post-*Bush v. Gore* era. 531 U.S. 98 (2000). These voting changes, including purge schemes that rely on flawed matching methodology, mandatory photo identification requirements, and aggressive challenges by poll watchers all stand as new threats to minority voters' access to the political process.

²⁶⁹ The author's examination of the legislative record suggests that the body of voting rights scholarship that looks beyond doctrinal and jurisprudential issues alone and considers practical evidence of voting discrimination will prove particularly valuable to courts assessing the constitutionality of Section 5.

²⁷⁰ Considering some of the arguments of those now seeking to contest the weight of evidence in the congressional record, the author argues that the development of a national

ongoing voting discrimination in the covered jurisdictions and determine the effectiveness of the Section 5 preclearance provision in combating or deterring discrimination. Moreover, the testimony concerning ongoing discrimination allowed Congress to decide that there was a sufficient basis to extend the protections afforded by the preclearance provision.

cataloging system or archive for evidence of discrimination would likely benefit any future congressional considerations of Section 5's utility. Any such archive would be one that litigators and practitioners, private citizens, and others might use to document instances of alleged voting discrimination taking place in the covered jurisdictions. The information compiled in this archive could then be used to complement, compare, or contrast the body of evidence presented to Congress during subsequent examinations of Section 5. In addition, in suggesting that litigators and advocates played a particularly important role during the 2005-2006 reauthorization process, this Article invites criticism from those who may argue that the record was built by persons with particular vested interests in the process. However, those claims have little merit since the reauthorization process was driven by a Republican-led Congress that provided opportunities for members of Congress on both sides of the aisle to offer evidence and extend invitations to witnesses of their choice. Moreover, there was no requirement that these witnesses present testimony expressing any particular set of ideological or political positions.

