TESTIMONY OF DR. ABIGAIL THERNSTROM, ADJUNCT SCHOLAR AT THE AMERICAN ENTERPRISE INSTITUTE, ON THE VOTING RIGHTS AMENDMENT ACT, S 1945: UPDATING THE VOTING RIGHTS ACT IN RESPONSE TO *SHELBY COUNTY V. HOLDER*, JUNE 25, 2014, DIRKSEN SENATE OFFICE BUILDING, RM 106.

Thank you Mr. Chairman and members of the committee for the opportunity to testify today. My name is Abigail Thernstrom, and I am an adjunct scholar at the American Enterprise Institute. I have a Harvard Ph.D. in Government and from 2001 to 2013 I was first a commissioner and then vice-chair of the U.S. Commission on Civil Rights. I am also the author of two books on the Voting Rights Act.

I do not agree with the premises upon which this hearing rests. I believe the decision in *Shelby County* was absolutely right; section 4's coverage formula still rested on 1972 voter participation data, making the act a period piece. Moreover, the statute today needs no updating. Its permanent provisions provide ample protection against electoral discrimination.

In 1965 the passage of the Voting Rights Act marked the death knell of the Jim Crow South. The exclusive hold of whites on political power made all other forms of racial subjugation possible. The act was an indispensable and beautifully designed response to a profound moral wrong. It stood on very firm constitutional ground, and was animated by a clear principle: Citizens should not be judged by the color of their skin when states determine eligibility to vote. The enactment of the law was one of the great moments in the history of American democracy.

Over time, the Voting Rights Act morphed in an unanticipated direction—a change that has had both benefits and costs. The act's original vision was one that all decent Americans shared: racial equality in the American polity, such that blacks would be free to form political coalitions and choose candidates in the same manner as other citizens. But in the racist South, it soon became clear, that equality could not be achieved—as originally hoped—simply by giving blacks the vote. Merely providing access to the ballot was insufficient after centuries of slavery, another century of segregation, ongoing white racism, and persistent resistance to black political power. More aggressive measures were needed.

In response, Congress, the courts, and the Justice Department, in effect amended the law to ensure the political equality that the statute promised. The law came to mandate districting plans that ensured what were called racially "fair" results—districts carefully drawn to reserve legislative seats for blacks and Hispanics, districts that would protect minority candidates from white competition.

Ordinarily, there are no group rights to representation in the American constitutional order. True political equality demands not group rights to representation, but a political system that recognizes citizens as individuals with fluid identities, free to emphasize their racial and ethnic heritage as they wish and to coalesce in any manner they might choose. Nevertheless, a less radical approach could not have solved the deep-seeded problem of massive black disfranchisement in one region of the country. Draconian federal legislation was needed.

The race-conscious maps did work to promote minority office holding. Covered and non-covered states in the South became almost indistinguishable by the measure of blacks elected to state legislatures. But while federally mandated race-driven districts served a purpose, today they are no longer needed. Whites vote for black candidates at every level of government.

Voting rights scholar Daniel Lowenstein has drawn a nice analogy. The race-conscious districting was a temporary measure to give blacks "a jumpstart in electoral politics," he has written. But "the guy who comes and charges up your car when the battery's dead, he doesn't stay there trailing behind you with the cable stuck as you drive down the freeway. He lets it go."

It's time to let race-driven districting go the way of those jumper cables. America is better off with the increase in the number of black elected officials who gained office, in large part due to the deliberate drawing of majority-minority districts. But black politics has come of age, and black politicians can protect their turf, fight for their interests, and successfully compete even for the presidency, it turns out. It's a new world.

In today's America, the costs of continuing to insist on race-based electoral arrangements are very high. And thus reinstituting preclearance in some jurisdictions is a grave mistake. The enforcement of the statute herded black voters into what even Rep. Mel Watt once called "racial ghettos" – political ghettos that have generally rewarded minority politicians who win by making the sort of overt racial appeals that are the staple of invidious identity politics.

In such districts, officeholders tend to be pulled to the left—or, in any case, are certainly under no pressure to run as centrists. Their left-leaning tendencies, along with a reluctance to risk elections in majority-white settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office and none made a serious bid for the presidency before Barack Obama. It is doubtful that anyone can imagine, for instance, South Carolina representative James Clyburn building a national campaign, despite the fact that he is a well-respected, long-serving political figure. Nevertheless, he's a *black* politician with a majority-*black* constituency. His race was his ticket to Congress.

The contrast with Barack Obama's history is striking. In 2000, Obama ran in the Democratic primary in Chicago for a U.S. House seat. "I've always thought," Michael Carvin once said,

> the best thing that ever happened to Obama was [that] he ran for a heavily minority black congressional district in Chicago and lost. If he had won, he would have just become another mouthpiece for a group that is ghettoized in Congress and perceived as representing certain interest groups in the legislature.

Obama did, however, win a seat in the U.S. Senate in 2004, and his status as a senator from a heavily white state enabled him to transcend that perception.

Blacks running in majority-minority districts, not acquiring the skills to venture into the world of competitive politics in majority-white settings—that is not the picture of

political integration, equality, and the vibrant political culture that the Voting Rights Act should promote. By another measure, as well, equality may be compromised by race-conscious districting. The creation of these districts has not overcome the heritage of political apathy created by the long history of systematic disfranchisement; their residents are generally less politically engaged and mobilized, with the result that turnout is generally low, a number of scholars have concluded.

A particularly troublesome section of the bill is ‘‘(4) DETERMINATION OF PERSISTENT, EXTREMELY LOW MINORITY TURNOUT.” It provides that jurisdictions may be brought under coverage and deprived of their ordinary rights to govern themselves if any of several statistical measures indicate that minority voters have lower turnout rates than others. It is hard to believe that anyone familiar with basic demography ever reviewed this section. It assumes simplistically that if minority participation is low by some measure, it must be the fault of the jurisdiction—that its political process must be somehow flawed, and that the jurisdiction has to be kept under closely supervised probation until it remedies this alleged wrong. This simplistic assumption flies in the face of an abundance of social science knowledge about voting behavior.

This is clear from even a quick glance at the Census Bureau’s estimates of participation in the 2012 presidential elections that are available in the Voting and Registration section of the Census Bureau web site. The tables there reveal, first, that racial/ethnic groups that differ in their average age can be expected to have different rates of voter turnout. Old folks are far more likely to vote than young ones are. In the 2012 presidential election, just 38 percent of eligible voters aged 18-24 actually cast a ballot, compared to 73 percent of those in the 65-74 age bracket. (It should be noted that there was nothing peculiar about the 2012 elections. This pattern, and the others discussed below, show up in every election in recent decades.) Since the Hispanic population today includes many more young people than elderly ones, the group can be expected to have lower turnout rates than non-Hispanics. The bill takes this to be proof that public officials are doing something to suppress the minority vote. This is ridiculous. It is impossible to know what any local government could do to force the young to vote at the same rate as the old. Should the police be ordered to round up youths and march them into the voting booths?

Education is a second powerful force driving electoral turnout. Everywhere in the United States, electoral participation is notably higher among the well educated than among those with little education. In 2012, only 37 percent of eligible voters with less than nine years of schooling turned up at the polls, but 75 percent of college graduates. Since both blacks and Latinos have less schooling on the average than non-Hispanic whites, lower minority turnout rates in a community are not evidence that that the local political process is flawed and that its elections need to be regulated and monitored by the federal government.

Turnout disparities along racial or ethnic lines can also be the result of residential mobility. Newcomers to a community are much less likely to turn out at the polls than long-settled residents. In 2012, just 41 percent of Americans who had resided at their

current address for less than a month cast a ballot; 76 percent of their counterparts who had lived in the same home for five years or more voted in November.

Two other closely related drivers of voting behavior are family income and home ownership. In 2012, just 39 percent of people in families with annual incomes below $10,000 cast a vote. For those from families earning more than $150,000 it was 77 percent. Similarly, 65 percent of homeowners turned out to vote, but only 41 percent of renters.

That whites, blacks, Latinos, and Asians are not equally likely to turn out at the polls is not at all surprising, since they differ from each other in their age structure, education, income, and rates of home ownership. We can expect to find substantial racial/ethnic disparities in turnout rates because the various groups differ in major demographic characteristics that determine turnout levels. No one has found a formula that would tell us how to engineer equal levels of voter registration and turnout among groups that vary dramatically in their average age, educational attainment, length of residence in the community, family income, and rate of home ownership.

Furthermore, changes over time in turnout levels of particular groups in particular communities are not prima facie evidence that a jurisdiction is doing anything wrong. They are likely the result of geographic mobility that brings into the jurisdiction more people whose social characteristics make it likely that their turnout levels will be very low.

In sum, forces far beyond the control of any state, and of any of its political subdivisions, result in glaring disparities in rates of electoral participation. The framers of the entire section of the proposed legislation focused on the issue of "low minority turnout" seem oblivious to what every social scientist knows. It would extend federal control over a great many jurisdictions that have made every possible effort to provide equal opportunity to elect candidates of their choice to all of the citizens. If the Congress were to enact the measure as written, I very much doubt that it would survive the scrutiny of the Supreme Court of the United States.

Another problem with this section of the proposed legislation is its casual disregard of how the evidence about turnout at the the local level is to be found. The bill blithely states that "in each odd-numbered calendar year" the Attorney General of the United States "in consultation with the heads of the relevant offices of the government" will provide "figures determined using scientifically accepted statistical methodologies." This seems to imply that the necessary data are already in the hands of the federal government; all the Attorney General needs to do push the right button and it will pop up on his computer screen.

But the only official figures on current turnout rates are those derived from the American Community Survey, and those rates are available only for *whole states*. (A handful of southern states do have a race question on the registration forms, but the vast majority of states do not.) The current CPS election studies offer *no information* about group differences in voter turnout in *local* jurisdictions. For the nation's smaller political

subdivisions, accurate numbers would require a complete canvas of the population. There are no "scientifically accepted statistical methodologies" to obviate the need for it.

Gathering the data for local jurisdictions would be a massive and very costly undertaking. One option would be a biennial national Registration and Voting Census conducted like the Decennial Census but confined to gathering information about the race/ethnicity of registrants and voters. What would that cost? Collecting data from a nation with a population over 300 million is a massively expensive endeavor.

A partial solution would be to pass on the huge costs of this effort to lower levels of government by requiring that all jurisdictions in the U.S. include a question about race and ethnicity as part of the voter registration process. Voter lists would have to be color-coded, just as they were in the days of Jim Crow. This would be useful, but it would only tell us something about the electoral participation of those who are registered, and would leave unknown the number of eligible voters who were not.

It is stunning that the drafters of this bill gave little thought to the problem of assembling the data that will be demanded by the amended statute, as envisioned.

Finally, placing each registrant in a racial box will be offensive to many who consider election day to be a civic ritual celebrating the fact that we are one people. If it is so vital to have information color-coded why don't we go all the way and list the race of each *candidate* on the ballot, which would make the gathering of information pertinent to much voting rights litigation easier.