

Response of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
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June 16, 2006

According to Dr. Thernstrom, the Voting Rights Act makes "sure that majority-black districts stay black" and creates "racially safe boroughs." Based upon the most recent round of redistricting in 2000, does the evidence support Dr. Thernstrom's argument? Why or why not?

See attached response to Stuart Taylor column.

Dr. Thernstrom contends that taking race into account in redistricting is "political exclusion – masquerading, of course, as inclusion." Do you agree with Dr. Thernstrom? Why or why not?

See attached response to Stuart Taylor column.

Some have questioned whether the Voting Rights Act needs to be extended for twenty-five years. Can you explain why you believe the protections provided by the Voting Rights Act need to be extended for that period of time?

Although the period of time between Congressional reassessments of the temporary provisions of the Voting Rights Act is a policy choice made in light of the evidence and the well-recognized fact that the right to vote is fundamental and "preservative of all other rights." The goal of our democracy is to ensure that all citizens, including minority citizens, have an opportunity to access the political process without facing racially discriminatory practices that abridge or deny their right to vote. When enacting the Voting Rights Act in 1965 Congress hoped that issues of racial discrimination in elections would be resolved quickly. Today, as in 1982, we have learned that racism is more entrenched than initially contemplated. In fact, although some historical means of discrimination are less pervasive, new and creative methods of discrimination in the political process continue to emerge. The Act is remarkably

effective at addressing all of these methods when they appear by blocking some and deterring others.

That is why I believe that twenty-five years is an appropriate period of time for which to reauthorize the Act. We continue to face challenges to minority citizens' equal opportunity to participate in the political process. In fact, some covered jurisdictions fail to submit voting changes for several years, if at all, while others submit changes so close to elections that the timeframe in which the Civil Rights Division can evaluate these changes is severely truncated.¹ The goals of the Voting Rights Act are to achieve equal access for minority voters, enhance political participation, and prevent discrimination through dilution of minority voting strength, as well as backsliding that may undermine the success the Act has achieved. Congress can justifiably and proudly point to examples of improved race relations in many jurisdictions fostered by enforcement of the voting rights act. But the ultimate goal of the Voting Rights Act is not simply the reduction of racial or ethnic group discrimination in the political process to levels of acceptable infringement, but rather the eradication of such discrimination in the political process. Inherent in this goal is the notion that the voting discrimination, openly tolerated for nearly a hundred years after the passage of the Fifteenth Amendment, diminished everyone's vote. I believe that 25 years is an appropriate coverage period because the evidence in the record shows that discrimination on account of race and/or language minority status in covered jurisdictions continues after 40 years of preclearance and

¹ See e.g. Written Testimony of Jerome A. Gray before the House Judiciary Committee, November 1, 2005 at 3 (noting that an Alabama county failed to submit voting changes for preclearance from 1995 to 2005); See also Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 43-44 (2004) (discussing South Dakota Attorney General Bill Janklow's advisement that his state not comply with the VRA's preclearance requirement; between 1976 and 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.).

vigorous enforcement of Section 5, and more recently Section 203. The work of Section 5 remains incomplete.

On the record before Congress, it seems fairly apparent that Congress has met its duty under the *Boerne* doctrine. In this regard, it is worth noting that the Supreme Court has recognized that Congress acts as a continuous body when reviewing evidence. As the Court stated in *Fullilove v. Klutznick*,

Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.²

Each time Congress sits it is not being reconstituted, therefore all of the previous records (1965, 1970, 1975, 1982 and 1992) are properly part of the record. For practical as well as doctrinal reasons, it also stands to reason that Congress should not be required to make this substantial investment of resources every 5 years. More importantly, the frequency of the undertaking should be left to Congress' sound discretion in light of the substantial separation of powers costs that *Boerne* itself imposes.

² *Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980).

Response of Professor Drew S. Days, Alfred M. Rankin Professor of Law, Yale Law School, to Stuart Taylor's May 15th Article "More Racial Gerrymanders"

The Stuart Taylor article "More Racial Gerrymanders," published in the May 15th edition of the *National Law Journal*, and described by Senator Hatch during the May 17th, Judiciary Committee hearing restates a number of the common misconceptions about the operation and effects of Section 5. I appreciate the opportunity to clear up some of these misconceptions that may have facial appeal but that fail upon closer scrutiny. I hope to provide you, in contrast, with a more accurate picture of the reality of how Section 5 operates based upon my experience and analysis.

Taylor makes three main claims. First, he claims that Section 5 is "much misunderstood" and "would turn back the clock on racial progress by requiring more racial gerrymandering of election districts than under current law." Second, he claims that these purported "racial gerrymanders" distort district lines to create majority-minority districts that have the effect of increasing partisanship in the House, electing more liberal Democrats and more conservative Republicans. Third, he argues that "the ideological obsessions of the civil rights lobby" cause it to fail to recognize that racially polarized voting is a thing of the past, and that the discrimination that the VRA is designed to remediate is now confined to "scattered localities where old-fashioned racism remains strong." Each of these arguments is rooted in Mr. Taylor's own misunderstanding of both the operation of Section 5 itself as well as the history and ongoing nature of the violations that it is Section 5's purpose to remediate. His claim about the declining role of polarized voting is demonstrably false as the record before Congress illustrates. I will address each of the claims in turn.

Section 5 Does Not Require "Racial Gerrymanders" or Majority-Minority Districts

The article is built on the premise that Section 5 has either the purpose or the effect of creating what he characterizes as "racial gerrymanders"—districts that are unnaturally and unnecessarily packed with minority voters. To appreciate why this premise is false, one must start from an understanding, largely absent in his critique, that American politics did not begin from a baseline of racial fairness that was interrupted by the historic bi-partisan passage of the VRA. Instead, there is, now as in the past, intense racial residential segregation in the United States, caused by the legacy of slavery, Jim Crow, redlining and other factors. As my Yale Law School colleague Owen Fiss has written:

"State complicity in the creation of the ghetto has taken various forms. Some of the state's responsibility derives from the failure, for most of our history, to prevent acts of discrimination and violence aimed at keeping blacks out of white neighborhoods. In other instances the state played a more active role, for example, by enacting racial zoning ordinances or enforcing racially restrictive covenants. Though these practices were outlawed—the first in 1917, the second in 1948—they played a crucial role in the formation of the black ghetto The means by which

residential segregation has been established and maintained in the United States . . . are sinister, and their effects as lasting, as Jim Crow segregation in the South, especially when coupled with the country's traditional economic and social policies.”¹

Given the intersection of this racial segregation, population density, and a national preference for single member election districts, one would have expected that some districts, fairly drawn, would place minorities in the position of the electoral majority, and thus provide the opportunity to elect at least some African-American representatives. But for nearly a century, in the Deep South, this expectation went unrealized. From the end of the Nineteenth Century until the mid-1980s or in some states the early 1990s, well past the time of the most recent renewal of the Voting Rights Act, not a single black was elected to Congress from Louisiana, Mississippi, Alabama, South Carolina, North Carolina, or Virginia.² Slightly earlier, in the 1970s, black voters were able to elect one black representative in Georgia and two in Texas.³ In many of the rest of the Southern states covered in their entirety by Section 5, it was not until after the most recent VRA reauthorization that a single black representative was elected. For most of a century, and in some states for over a century, racially discriminatory practices thwarted the ability of black voters to elect even a single black representative. While Taylor focuses his criticism on and draws conclusions from the VRA's impact on Congressional redistricting (which is a comparatively minor aspect of the Section 5 story), he ignores the import of Section 5 at the local level, where it is particularly effective, and where many problems still persist. Section 5 of the Voting Rights Act, far from being “misunderstood,” clearly serves to prevent vote dilution practices through which district lines were widely used to “fragment” cohesive minority communities or “pack” them—that’s the very harm over which Taylor is so concerned—into a too few districts. In this way, the VRA ensures greater political fairness for all citizens, and enhances rather than erodes our democracy. These are among the factors that have led the Voting Rights Act to be widely regarded as the single most successful piece of Civil Rights legislation ever passed.

The remedial role of Section 5 can best be understood against this backdrop. Over time, Section 5 has helped minority voters escape voter disenfranchisement and dilution, and thus to approach something closer to political fairness, by requiring that districts be drawn to ensure that minority voters have the opportunity to elect candidates of their choice. But make no mistake: minorities still are dramatically under-represented in Congress. The end result of what Taylor and others call “racial gerrymandering” is that, according to one recent study, African Americans now comprise 7.5% of Congress, as compared to almost 12.9% of the population; Latinos comprise 4.7% of Congress, as

¹ Owen Fiss, *A Way Out: America's Ghettos and the Legacy of Racism* (2003) at 37-38.

² See Amicus Curiae Brief of the Congressional Black Caucus, *United States v. Hays et al.*, 515 U.S. 737 (1995), at Appendix A (LA 113 years (1990), MS 104 years (1987), AL 118 years (1993), SC 96 years (1993), AL 118 years (1993), NC 92 years (1993), VA 103 years (1993)).

³ In Georgia, Andrew Young was elected in 1973; in Texas, Barbara Jordan and Mickey Leland were elected in the 1970s. *Id.*

compared to 12.5% of the population.⁴ Minorities in fact remain *under*-represented in Congress, and also in nearly all state legislatures.⁵ It is difficult to understand how the renewal of an “anti-backsliding provision” like Section 5 would serve to “turn back the clock.” Given these facts, Tyler’s use of the phrase seems particularly misplaced.

The Voting Rights Act does not demand proportional representation nor do I argue that it should. I note the above-cited figures, however, in order to illustrate that it is a gross misreading not only of history, but also of the current state of minority representation in America, to pretend that “racial gerrymandering” has distorted our politics by *over*-representing minorities. In view of the well documented history of persistent voting discrimination,⁶ it seems, a gross exaggeration, at best, for Taylor to blame our nation’s recent experiment in legislative diversity for Congress’s institutional failings. We do not face a Hobson’s choice that pits diverse legislatures, on the one hand, against more monolithic but enlightened bodies on the other. Nor can we sacrifice the political fairness to which our Constitution and history commit us to the pursuit of what would prove, if Tyler’s advice were heeded, to be elusive partisan balancing.

Additionally, in contrast to the overwhelming majority of white electoral districts nationwide, the VRA-protected Congressional districts are not racially segregated enclaves of minorities: in fact, they tend to be among the most diverse districts in the United States. Characterizing these comparatively closely balanced minority opportunity districts—such as those from which the members of the Congressional Black Caucus in covered jurisdictions in the South are elected—as “racial gerrymanders,” and districts that share a similar racial balance but tip more comfortably toward the white majority as “more racially integrated,” raises questions about what principle guides Tyler’s vision of “integration.” The practice of evaluating claims of minority vote dilution is a nuanced process, not a mechanical one, in which DOJ attorneys engage in careful case-by-case analysis.⁷ The crucial consideration, as Nate Persily and others pointed out at the hearings, is not “majority-minority” but “opportunity to elect”: what the VRA demands is nothing more or less than the opportunity for minority voters to elect candidates of their choice.

In every debate about the Voting Rights Act, and certainly in the reauthorization 25 years ago, opponents regularly misunderstand or misstate its purpose, treating it as a mechanism for separation or exclusion. In fact, the Act elevates political inclusion as a value in a system where political exclusion was the rule. To treat the current gains by blacks and other minorities as a the product of a pathology that causes political problems—partisanship or anything else—is to undermine the very gains that have given

⁴ Carol Hardy-Fanta et al., *Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States*, Paper Delivered to the 2005 American Political Science Association, September 4, 2005, at 7.

⁵ *Id.* at 8. The only state legislatures in which African Americans are *not* under-represented are states that lie partly or entirely outside Section 5: Ohio, Illinois, and Florida.

⁶ See generally Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000).

⁷ See Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, As Intended By Congress*, 1 DUKE J. CON. LAW & PUB. POL’Y 120 (2006).

minorities a serious foothold in the political life of the nation for the first time after centuries of exclusion.

The VRA Should Not Be Blamed for Today's Partisan Atmosphere

The article suggests that the inclusionary changes that have brought blacks, and other minorities, some representation in Congress have also caused increased partisanship in the House. This argument is oft-repeated but remains unsubstantiated. Offered in this conclusory way, it lays at the feet of black voters not only the supposed pathology of their own political views (which Taylor assumes are too liberal), but also the blame for what he perceives as the Republicans' partisanship and extremism. The theory is a version of the so-called "perverse effects" theory, which argues that VRA-created districts generate pro-Republican gerrymanders, and that these Republicans then vote against the interests of the minority voters whose electoral power the Act was intended to protect. Indeed, Taylor makes this claim as well. Interestingly, this theory effectively excuses the Democratic party from any responsibility for losses that may be attributable instead to that party's failures to sharpen its message or appeal.

The trouble with the perverse effects theory is that it simply does not appear to bear the tremendous weight that its proponents foist upon it. In the immediate wake of the 1994 elections, in which Republicans took control of Congress, a great deal of ink was spilled detailing perverse effects explanations and attempting to blame the VRA for Democrats' defeat. But more recent empirical work has shown that the initial wave of studies relied on various false assumptions.⁸ One recent study found that "there is no significant difference in the level of partisan bias observed under redistricting plans with majority-minority districts and those without majority-minority districts. The claim that majority-minority districting has 'perverse effects' is not supported by the data."⁹

This is not to say that the Republicans have reaped no political gains at the margins from the Voting Rights Act's protection of minority votes—but it seems plain that Democrats can make the case for benefits as well. I want to caution against the very common misconception that these partisan effects are highly significant, or account for any significant portion of either the political balance in the House, or the level of partisanship. One of the most comprehensive studies of the 1990 round of redistricting found that as few as two, and at the most five, of the Congressional seats that went from Democratic to Republican in 1994 were directly attributable to changes in the racial composition of districts.¹⁰ The basic reason that Republicans gained seats in 1994 was that they received more votes.¹¹ The impact of the VRA on that year of political change

⁸ Delia Grigg and Jonathan N. Katz, *The Impact of Majority- Minority Districts on Congressional Elections*, Midwest Political Science Association, April 7-10, 2005, at 1.

⁹ *Id.*

¹⁰ Bernard Grofman and Lisa Handley, *Estimating the Impact of Voting-Rights-Related Districting on Democratic Strength in the U.S. House of Representatives*, in Bernard Grofman, ed., *Race and Redistricting in the 1990s* (1998) at 56-57.

¹¹ Richard L. Engstrom, *Race and Southern Politics: The Special Case of Congressional Redistricting*, in Robert P. Steed and Laurence W. Westmoreland, *Writing Southern Politics: Contemporary Interpretations and Future Directions* (2006), at 106.

has been greatly exaggerated.¹² Similarly, while the VRA is a convenient scapegoat for the current era of increased political partisanship, it obviously cannot explain increased levels of partisanship in the Senate. Nor should the VRA be blamed for the successful partisan gerrymanders that computer technology has recently allowed enterprising political partisans to use to draw maps that more accurately protect their incumbents, rendering fewer races competitive and potentially increasing partisanship.

The Persistence Of False Claims About the Purported End of Racial Polarization

Taylor repeatedly implies that we now live in a racially harmonious world in which racial polarization is a thing of the past; he would have his readers believe that whites are always ready to vote for minority candidates, and that the ongoing remedial policies aimed at ending discrimination are *themselves* the main remaining obstacle to the realization of John Lewis' vision of "all-inclusive community where we would be able to forget about race and color, and see people as people, as human beings, just as citizens." This is news that would come as a surprise to minority candidates and voters.

Throughout my career, I have listened to those who oppose the continued enforcement of civil rights laws repeat the very familiar refrain that these laws have done their work and are no longer needed. I heard that message both before and since 1982. Unfortunately, this optimistic refrain remains at odds with reality. Unfortunately, racially polarized voting is alive and well in many jurisdictions, not just a "scattered" few.¹³ Out of 6,667 House elections in white majority districts between 1966 and 1996—including special elections—only 35 (0.52%) were ever won by blacks.¹⁴ During the 1980s and early 1990s, according to one comprehensive study, not a single black candidate won in a majority-white district in the South.¹⁵

Of course, as Taylor points out, it is sometimes possible for notable candidates like Bill Richardson in New Mexico and Douglas Wilder in Virginia to win white voters' support in a way that would have been unthinkable decades ago. This is a hopeful development. But these cases are notable, and so widely discussed, precisely because they are still so very rare. It is not an accident that 74% (8,798 out of 11,867) of the non-white elected officials in 2003 were elected from VRA-protected districts.¹⁶ Indeed, in the same year that Douglas Wilder was elected in Virginia, 1989, David Duke won his

¹² *Id.* at 97-111.

¹³ See e.g. *The Voting Rights Act: The Continuing Need for Section 5: Hearing before the H. Comm. on the Judiciary*, 109th Cong. (October 25, 2005) (testimony of Prof. Richard L. Engstrom) (noting the continued presence of racially polarized voting throughout the covered southern states during the last round of redistricting, following the 2000 census); *The Continuing Need for Section 5 Preclearance: Hearing before the Senate Comm. on the Judiciary*, 109th Cong. (16 May 2006) (Written Responses from Prof. Theodore S. Arrington) (noting that throughout covered jurisdictions in the south, the effects of historical and current racial discrimination in voting echo to this day).

¹⁴ David Cannon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts*. Chicago: University of Chicago, 1999.

¹⁵ *Id.*

¹⁶ Hardy-Fanta et al., *supra* note 4, at 17.

seat in the Louisiana state house; he attracted majorities of white voters in credible statewide campaigns for both Senator and Governor in 1990 and 1991.¹⁷

Taylor argues that only “scattered localities” continue to discriminate against minorities. Although claims of this kind are widely repeated, there is strong direct evidence of the continued violations of African American, Latino, Native American, and Asian-American voting rights. When I look today at the record of post-1982 cases under Section 2 and objections under Section 5—as well as the record of voting changes withdrawn after the DOJ asks a jurisdiction for more information, and the reports of discriminatory changes averted by the prospect of a Section 5 preclearance fight—I see a picture of ongoing discrimination regrettable reminiscent of what I saw when I headed the Civil Rights Division. Yes there has been progress, which I and other supporters of the VRA welcome, but the fact that voting discrimination persists forty-one years after passage of the Act is itself powerful evidence of the deep-seated nature of the problem. It does not appear to me that Taylor’s article adequately accounts for either the history, or persistence of the efforts to dilute the electoral power of minority voters. He sees instead the accumulation of this evidence as a “huge research effort by the civil-rights lobby to find and magnify such evidence.” The effort may be huge, but in my experience, there has been no need to “magnify” anything: the evidence speaks for itself. What took “effort” was simply the immensity of the task: cataloguing the great volume of continued incidents of discrimination over a 25-year period.

Taylor cites John Lewis for his vision of an “all-inclusive community where we would be able to forget about race and color, and see people as people, as human beings, just as citizens.” It is important to consider what this vision does and does not mean. John Lewis’s goal remains the guiding principle of civil rights enforcement. We are not there yet. We will not get any closer to this goal by pretending we have reached it and abandoning the quest mid-stream. Achieving the “all-inclusive community” will require reauthorizing and continuing to enforce our civil rights laws, particularly Section 5. It is that provision’s unusual remedial power that offers genuine promise that minority voters will be brought still closer to fair levels of representation and political power.

¹⁷ Debo Adegbile, *Voting Rights in Louisiana 1982-2006* (March 2006) (report submitted to the H. Comm. on the Judiciary on Mar. 8, 2006), at 10.