

**Response of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
Yale Law School, to Questions from Senator Charles Schumer
June 16, 2006**

1. Do you agree that the bill, as drafted, mandates racial gerrymandering?

In addition to asking you to consider my response to Stuart Taylor's May 15, 2006 Article that I have annexed here, I provide a brief response below.

No. In my view, the pending Voting Rights Act ("VRA") renewal bill promotes full inclusion consistent with history and purposes of the historic 1965 law that has aptly been described as the most successful civil rights legislation ever enacted. The claim that "the bill, as drafted, mandates racial gerrymandering" is presumably based upon the view that the Section 5 preclearance standard would unavoidably lead to this outcome. Any suggestion that the bill as proposed mandates racial gerrymandering: (1) misunderstands both the historical and contemporary justifications for the VRA; (2) misconceives the application of Section 5 of the VRA; (3) manifests a selective understanding of underlying redistricting principles; and (4) misreads controlling Supreme Court precedent. I will explain the responses set out above in order.

1. The "racial gerrymandering" claim misunderstands both the historical and contemporary justifications for the VRA

The VRA was passed by Congress to enforce the guarantees of the Fifteenth Amendment after nearly a century during which its constitutional promises were disregarded in significant portions of the nation. Section 5 was a strong remedy that was necessitated by even stronger resistance to African-American political participation in the political process. It was designed to shed light on, block and/or deter discrimination

against minority voters specifically because case-by-case adjudication had proven inadequate. Federal review of voting changes in covered jurisdictions is advantageous because it “shifts the burdens of time and inertia” in favor of the groups long discriminated against. When viewed in this context it is fairly apparent that the VRA generally, and Section 5 in particular, serve to level the political playing field by placing a statutory mandate upon minority inclusion in the political process. Section 5 has been interpreted to stop deliberate efforts or those that result in the minority backsliding in the political process. Since its enactment, Section 5 has been applied to a wide range of voting changes because an equally wide range of changes have been designed to dilute minority voting power, and/or have resulted in backsliding. As previous Congressional renewal records make clear, Section 5’s preclearance provisions were not rigorously enforced for the first five years of their existence but over the last 35 or so years they have proven extremely effective. All of these Congressional reassessments have also clearly shown that voting discrimination in covered jurisdictions is persistent and entrenched. Accordingly, it is entirely improper as a matter of constitutional law, history, and/or policy to equate Section 5 with a mandate for racial gerrymandering. This provision instead serves to enforce the equality mandate in voting to which our constitution, our history, and public policy have consistently committed us since 1965.

2. The claim misconceives of the application of Section 5

Since *Beer v. U.S.* Section 5 has been interpreted to stop backsliding. For the great majority of the statute’s existence in the context of redistricting – which is the only context in which one can test the claim – Section 5 has been interpreted to protect the ability or opportunity of cohesive minority communities to elect candidates of their

choice. In practical terms it blocks or deters jurisdictions from trying to dilute minority voting strength by “cracking” or “packing”. Thus, the provision is limited in that it begins its assessment of retrogressive effects with the *status quo* or the existing level of opportunity to elect and weighs the proposed change against it. Measuring the opportunity to elect has always been a case specific analysis that takes into account a number of factors but focuses primarily on the level of racially polarized voting. This assessment requires a careful examination of election returns to determine the extent to which a white voting bloc consistently negates minority-preferred candidates. Where bloc voting is intense it may be necessary to preserve an existing majority-minority district or a district with a minority voting population that is very close to preserve the ability-to-elect. Maintaining existing minority ability-to-elect districts against deliberate efforts or efforts which result in dilution is not a mandate for “racial gerrymanders.” Legislators remain free to configure districts in a variety of ways and even to alter the configurations of majority-minority districts; they simply cannot destroy a cohesive minority group’s ability to choose its representatives.

3. The claim manifests a selective understanding of underlying redistricting principles

Several factors guide map drawers in the redistricting process, including: incumbency protection, traditional districting principles such as maintaining communities of interest, and contiguity. In addition, fidelity to one-person one-vote principles and geographic considerations substantially shape the choices available to map makers. In light of our nation’s history of residential segregation which endures (see attached Taylor response), and the national preference for single member districts, it is not surprising that majority minority districts exist – indeed it is entirely appropriate. The majority of

districts in the country are majority white due to the very same housing patterns. In view of these realities, it distorts the record to suggest that Section 5 mandates “racial gerrymandering.” Indeed, because the standard protects existing opportunities, and in light of the Supreme Court case *Shaw v. Reno* and its progeny, which limit the use of race in redistricting, the claim has very little merit.

4. The claim misreads controlling Supreme Court precedent

Finally, the bill as proposed cannot “mandate racial gerrymandering” because existing caselaw arising from the 1990’s limits the extent to which any jurisdiction can rely on race in drawing districts. The Supreme Court’s Equal Protection decisions in *Shaw v. Reno*, and *Miller v. Johnson*, among others, establish constitutional limits on so-called racial gerrymanders. The bill does not, and could not, disturb these constitutional constraints.

2. *Under the proposed bill, could districts that are not majority-minority still be considered districts in which minority voters have the ability to elect their preferred candidates of choice? If so, please explain and give an example of a district that is not majority-minority that could be considered an “ability to elect” district.*

Yes – under the proposed standard, districts that are not majority-minority may still be in a position to elect their preferred candidate of choice. As I read the new, or perhaps more accurately, restorative standard, it does not lock in current racial percentages, nor does it place primary importance on protecting “majority-minority” districts as a bright-line test. The percentage of racial minority residents in a district does not, in and of itself, mean that a minority group will or will not be able to elect its candidate of choice. In some jurisdictions, minority populations below 50% will still allow for the election of their candidate of choice; in other jurisdictions the percentage

may need to be higher. A recent example of a district that is not “majority minority” but was able to elect its candidate of choice is the Twelfth District of North Carolina that recently re-elected Mel Watt, Chairman of the Congressional Black Caucus, to the House of Representatives. Congressman Watt, who has been a key Congressional sponsor of the VRA’s renewal bill, was recently re-elected by a district that is approximately 44% black and 44% white.¹ This district presents an example of a successful “coalition district” within the meaning of *Georgia v. Ashcroft* that is not majority-minority.

3. *Under the proposed bill, must a preferred candidate of choice be a minority? If not, please explain and give an example of a non-minority who is the preferred candidate of choice for minority voters under the pre-Georgia v. Ashcroft standard.*

No. Under the proposed bill you can often, but not necessarily predict that the candidate of choice will be a minority. It is my understanding that Lloyd Doggett in the 25th Congressional District of Texas is a “non-minority preferred candidate of choice” of minority voters.

¹ MICHAEL BARONE & RICHARD E. COHEN, EDS. THE ALMANAC OF AMERICAN POLITICS 2006 1278 (2006).

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.