Testimony of

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"Understanding the Benefits and Costs of Section 5 Pre-Clearance"

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Thank you, Mr. Chairman and Members of the Committee, for inviting me today. I am honored to have this opportunity to testify on the reauthorization of the Voting Rights Act, the most significant and effective piece of civil rights legislation in our nation's history.

My name is Nate Persily. I am a Professor of Law and a political scientist at the University of Pennsylvania Law School and a Visiting Professor of Law at Stanford Law School. I teach and write in the areas of voting rights, election law, constitutional law and the regulation of politics. Perhaps of most relevance to my testimony here today, however, are my experiences as a court-appointed, nonpartisan expert assisting judges in drawing remedial redistricting plans in New York, Maryland and Georgia. I have experienced the requirements of the Voting Rights Act firsthand. I understand both the substantial burdens the Act places on covered jurisdictions and the Act's importance in protecting the historic gains in minorities' political participation, office holding, and influence.

Since you have asked me here to discuss the costs and benefits of section 5, let me emphasize that I think the greatest benefits of this unique law occur when voting changes are least visible and the stakes for the national parties are quite low. Whereas interest groups, the media and the national parties will always pay attention to and litigate notorious changes in voting laws, such as statewide redistricting plans, the section 5 architecture proves a most useful deterrent at the local level, where elections are often nonpartisan, and voting changes would pass unnoticed but for the preclearance requirement. For changes at the state level, the potential for partisan infection of the preclearance process grows, and section 2 of the Voting Rights Act will continue to be more successful in regulating those kinds of changes.

In the coming years I believe section 5 may actually prove most important for voting changes apart from redistricting, but you have asked me here today principally to offer the perspective of one who has had to draw redistricting plans to comply with the Act and may do so again in the future. As the members of this committee know, the legal constraints on the redistricting process put linedrawers in the position of making sure that they neither disperse racial minorities into too many districts, nor overconcentrate them into too few. And while obsessing over the twin dangers of packing and cracking of minority communities, a linedrawer must also avoid drawing districts that use race as the predominant factor, and therefore likely be struck down under the Equal Protection Clause. All this must be done while abiding by the requirements of one-person, one-vote and obeying any particular state constitutional requirements.

In this vein, I would like to discuss the section of the bill that clarifies that retrogression occurs whenever a plan diminishes a racial group's "ability . . . to elect their preferred candidates of choice." With this language the bill attempts to overturn the holding of Georgia v. Ashcroft, 539 U.S. 461 (2003), which allowed jurisdictions to trade off so-called "ability to elect" or "control" districts with "influence" or "coalition" districts. The danger that Ashcroft seemed

to invite and that this legislation intends to fix is the possibility that under the cloak of "influence districts" a jurisdiction might dilute the minority vote by splitting large minority communities among several districts in which they really have no influence at all. Although the facts in Georgia v. Ashcroft concerned small shifts in districts evenly split between whites and African Americans, the holding might require preclearance of plans in which, for example, a 60 percent minority district was broken into two 30 percent minority "influence districts." Perhaps it also might allow for packing of minorities as when a plan combines a 50 percent minority district with a 30 percent minority district to create an 80 percent minority district.

The legislative history concerning this bill, however, should be clear that the "ability to elect" standard prevents both types of retrogressive changes - the dispersion of a minority community among too many districts (cracking) as well as the overcentration of minorities among too few (packing). Over the proposed 25 year tenure of this bill, packing will likely pose a greater risk to minority political opportunity than will cracking, assuming racial polarization declines. To put the matter more plainly, the "Ashcroft fix" (or "ability to elect" standard) should be seen not only as fixing Ashcroft itself but also the variety of redistricting strategies that could worsen the position of minority voters. As all seem to recognize, the proposed standard does not require that the minority percentages in current districts must be frozen for the next 25 years. Rather, it requires a sensitive inquiry as to how new redistricting plans interact with a changing political environment to worsen the position of minorities to elect candidates they demonstrably prefer.

This explanation begs the question, of course, as to what constitutes a diminution in a racial group's "ability to elect" its preferred candidates. The standard is not code for "majority-minority districts" nor does it imply the maintenance of a magic number, such as 65 percent, 50 percent, or 44 percent of the population, voting age population, or citizen voting age population. In some cases, the percentage of the voting age population necessary for the minority community to elect its candidate of choice will be much greater than 50 percent, in other areas it may be substantially lower.

More importantly, the effect of redrawing lines on minorities' ability to elect will vary across space, time and groups. It will vary across space in that the required minority percentages for one jurisdiction will differ considerably from those required for another jurisdiction. The effect of dropping the minority percentages in a district in Atlanta, for example, will be different than the same drop in a district one hundred miles to the south in rural Georgia, let alone in another state. Similarly, the effect of redistricting changes on minorities' "ability to elect" their preferred candidates will evolve over time. Over the proposed 25 year tenure of this bill, we should expect declining rates of racial polarization to alter our assumptions concerning how district changes may improve or hinder groups' ability to elect their preferred candidates. Finally, the meaning of this standard will not be consistent across groups. African Americans and Hispanics, for example, confront different types of challenges when it comes to electing their preferred candidates. In areas with high concentrations of African Americans, racial polarization in the electorate or high levels of disenfranchisement due to felony status may shape the effect of altering the minority percentages in those districts. With areas of high Hispanic concentration, in contrast, the minority group may be less politically cohesive but the high rates of voter ineligibility due to citizenship status will determine the political effect of a drop in the groups' population in the district.

The effect of redistricting on a group's "ability to elect" its preferred candidates, therefore, will depend on the political characteristics of the area in which the district is drawn. To enforce this statutory command, the Department of Justice or the U.S. District Court for the District of Columbia will need to consider the following factors, beyond the racial percentages in the districts, in their decisions whether to preclear a particular plan:

1. the extent of racial polarization in voting patterns in the district;
2. the partisanship of white voters and the probability they will vote for the minority-preferred candidate;
3. the incumbency status of the district (whether it is an open seat and if not, what is the party, race and rate of minority support for the incumbent);
4. the ability of the given minority group to control the outcome in the primary election;
5. the rates of registration, turnout, citizenship and eligibility among the various racial groups; and
6. the potential for coalitions among minority groups.

It is important that Congress recognize the nuances of the "ability-to-elect" inquiry because those looking to strike down this bill on constitutional grounds will portray it as imposing a 1960s framework on evolving political realities that will stretch to the 2030s. The legislative history should be clear that, while the ability to elect standard does not allow

as much play in the joints as did Ashcroft, nor does it freeze in place the current demographic distributions or allow for unnecessary overconcentration in the many district plans in covered jurisdictions.

Let me conclude, though, by emphasizing that this legislation should be viewed as a first step toward more transformative reform that addresses the principal barriers to minority political equality. While recognizing that the best should not become the enemy of the good, the reauthorization of the Voting Rights Act provides you with an opportunity to think broadly about the principal barriers to minority participation and political influence. Although your consideration of this legislation occurs in the shadow of what is politically possible and what is likely to be held constitutional by the Supreme Court, more transformative election reform must ultimately deal with the greatest barriers to the achievement of political equality for racial minorities, such as felon disenfranchisement, partisan election administration, or settling the voter identification controversy. A debate about the future of minority voting rights would be anemic if it did not include some discussion of the most important contemporary challenges.

The successful reauthorization of the Voting Rights Act ought to be a cause for introspection rather than celebration. It represents another milestone, the meaning of which should be judged by the ultimate destination of political equality among racial groups, rather than our success in running one more lap as a nation around the same track. Just as we should not allow our naïveté to shield us from the inherent political difficulties involved in more substantial election reform, nor should we mistake a reaffirmation of past achievements for victory in an ongoing and ever-changing battle over the right to vote.

Attachment:

Although the false dichotomy of "renew or not to renew" appeared to pervade the early discourse in the debate over reauthorization of the expiring provisions of the Voting Rights Act ("VRA"), a bipartisan coalition has emerged to support a bill that would protect most of the key provisions of the Act while responding to several important Supreme Court decisions that have limited its scope. This essay attempts to explain why all appear to agree that neither expiration nor mere renewal of the VRA is acceptable from the standpoint of one who cares about the values of political participation, equal influence, democracy, and human dignity that undergird the protections of the Voting Rights Act. Changes in the political system since 1965, as well as judicial and executive interpretations that have altered the meaning and scope of the VRA, require, at a minimum, changes in the law to realize its original intent while adapting to meet present-day challenges. Although something more than this minimalist approach is sorely needed, political constraints and the shadow cast by the Supreme Court's federalism decisions appear to have prevented the realization of more transformative election reform as part of the reauthorization of the VRA.

This essay proceeds in three parts. Part I explains why recent history has demonstrated a continuing need for a vibrant Voting Rights Act. The old barriers to minority empowerment, such as poll taxes, literacy tests, and grandfather clauses, are no longer with us, but different obstacles have been erected by both Democrats and Republicans under the banner of normal partisan politics. However, as Part II of this essay suggests, this new political reality, coupled with judicial interpretations as to what constitutes discriminatory purpose and effect under section 5 of the VRA, have taken the teeth out of section 5 while leaving it as a tool for the advancement of partisan interests. Part III lays out the options for renewing, while transforming, section 5 of the VRA and explains why Congress has chosen to work within the current structure of section 5, rather than place a number of other issues on the table. Congress has bargained in the shadow of what is politically acceptable to both parties and what a Supreme Court protective of states rights may allow under the Constitution. Both of these constraints considerably limited the available options for transforming the Voting Rights Act to respond to the principal challenges to minority political participation and influence.

I. Why Expiration is Unacceptable

When it was enacted, section 5 of the VRA represented an extraordinary remedy for an extraordinary problem. The measure remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws. No other statute on the books (1) applies only to a subset of the country; and (2) requires "covered" states and localities to get permission from the federal government (either the DOJ or the U.S. District Court for the District of Columbia) before implementing a certain type of law (in the case of the VRA, any "standard, practice or procedure with respect to

voting"). Such a remedy was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures hell-bent on depriving African Americans of their right to vote, regardless of what a federal court might order.

Today, the chorus of voices can be heard admonishing that times have changed and that section 5 should be a victim of its own success. Indeed, the Jim Crow-inspired barriers to voting, such as literacy tests and poll taxes, have largely disappeared. The numbers of Black and Hispanic officeholders are at historic highs, as are levels of minority electoral participation. Civil rights advocates are quick to point out, however, that new barriers to participation have taken the place of Jim Crow, making relevant again historic concerns about obstacles to minority voting and influence that motivated the original Voting Rights Act.

Others have described in detail the problems minority voters confronted in the 2000 and 2004 elections. In some instances, the law itself erected the barrier to voting, while in others, incompetence, partisan administration, or simply mistakes caused these problems. Civil rights advocates categorize these problems--and this is hardly an exhaustive list or one that is limited to problems for minority voters, in particular--along the following lines:

1. Felon Disenfranchisement: This includes both the actual disenfranchisement of felons as well as people erroneously placed on the list of felons and then removed from the registration rolls. Approximately 4.7 million Americans, 1.4 million of whom are African American men are disenfranchised because of such laws.

2. Registration problems: The process of voter registration used in most states relies on voters to reregister after each change of address. The most notorious recent problems involved individuals who registered to vote through private drives and had their registration forms destroyed. In other cases, voters or interest groups mailed in registration forms by the appropriate deadline but swamped local offices were unable to process them in time for those voters to show up on the rolls. Other problems concerned technical violations on registration forms, such as when a person failed to check off the boxes attesting to citizenship or mental competence, but affirmed that they were qualified to vote.

3. Barriers to voting by registered voters: Under this category would fit all the factors that inhibit participation at the polling place, such as burdensome voter identification requirements, long lines at polling places, insufficient quantity of voting machines or ballots, or polling places that were unable to handle voters with disabilities or language difficulties. One might also place in this category problems related to absentee ballots or early voting. In some areas, for instance, early voting stations were placed far away from areas with high concentrations of minorities.

4. Provisional ballots: The most litigated aspect of the 2004 election occurred before any ballot was cast. In particular, Democrats sought to establish that provisional ballots cast by registered voters would be counted regardless of the precinct in which they were cast. As it turns out, states differed greatly in their propensity and procedures for counting provisional ballots. In addition, many polling places had an insufficient number of provisional ballots on hand, and poll workers often failed to give provisional ballots to those who had a right to them and gave them to those who had a right to cast a normal ballot. Of the 1.9 million provisional ballots cast in the last election, close to 1 million were cast in counties with substantial non-English speaking populations covered by Section 203 of the Voting Rights Act.

5. Precinct maladministration: While a catchall for the above, this category also includes the many ways polling place administrators misapplied the law or incorrectly advised voters concerning who can vote and how to vote. This would include requiring identification from voters despite no legal obligation for them to provide it and giving voters the wrong ballots or incorrect advice as to how to vote. In addition, one might also include in this category the misinformation (whether intended or not) given to voters prior to voting, for example, telling them the wrong address for a polling place or mailing them an inaccurate sample ballot. Furthermore, perhaps the greatest obstacle to effective minority participation has been the underfunding of election administration in poorer neighborhoods with the concomitant long lines and shortage of voting booths.

6. Errors or fraud in vote tabulation: Into this category would fit any failure to count a legal vote or the counting of an illegal (or non-existent) vote.

7. Voting technology and ballot design: Because of the 2000 Florida fiasco most states bought some new voting equipment for the 2004 election. However, in many states, such as Ohio, the old error-prone punch cards remained, and in others, transitions to new technology, such as electronic voting machines, caused their own problems or raised much publicized concerns about security of the vote. Underappreciated, though, are problems with ballot design, such as the famed butterfly ballot, that often confuse first-time voters, or long ballots, which on electronic voting machines will lead voters to spend several minutes scrolling through different offices.

8. Voter "suppression" or "intimidation": In the weeks preceding the 2004 election, much was made of anticipated "challenges" to voters. On election-day, widespread challenges to voter qualifications did not materialize. Nevertheless, with each election and each added qualification for voting (such as identification requirements), civil rights groups often point to the increased risk that the presence and actions of poll watchers will be a source of intimidation, deterring certain groups of voters from showing up on election day.

In delineating these categories, I presage the later argument that these types of problems are more pressing than the high profile legal issues of redistricting and vote dilution. In any event, the problems from the last two elections remind us that much work remains to be done in order to remove the remaining and recurring barriers to minority participation and influence.

Perhaps it is so obvious that it need not be said, but the important difference between the classic forms of disenfranchisement and these new barriers to minority participation and influence concerns the transformation of partisan politics, particularly but not exclusively in the South, and the place of minority voters caught in the crossfire of this new party politics. When Congress first passed the Voting Rights Act, the Republican Party was almost completely absent from the "Solid South." The burdens of section 5 fell on White Democratic legislatures and local jurisdictions that generally felt threatened by minority enfranchisement.

Although President Johnson reportedly said "there goes the South" when he signed the Civil Rights Act the year before the passage of the VRA, the nascent Republican Party did not pose a real threat to Democratic hegemony in the region until the late 1980s. Today, African American voters are solidly Democratic, but the South is anything but. As a result, the viciousness of partisan politics, as taken out on the most loyal and growing share of Democrats, presents itself as obstacles to minority participation and influence.

Both parties have incentives to diminish minority influence. On the one hand, Republicans have an incentive to inhibit participation particularly by African Americans who vote overwhelmingly for Democratic candidates. However, the Democrats too have an incentive in the redistricting process to spread minority voters most efficiently in order to maximize the number of Democratic seats. Although sporadic, old-style, race-based discrimination of the Jim Crow vintage remains, this new partisan context for the hindering of minority influence requires different tools than those mandated for a time when race, rather than party, dominated election policy and Southern politics, in general.

II. Why Renewal "As-Is" Is Unacceptable

Given the recurring problems sketched out above, the natural course of action is not to budge on what has been the most effective piece of civil rights legislation in American history. This is especially true at a time when the political environment is not exactly conducive to expanding voting rights protections, given the fact that election law changes, in general, are now often viewed as a zero-sum game between the parties. Anyone who urges tampering with the VRA must confront the quite legitimate criticism that we simply do not know how bad politics could be if the stranglehold of section 5 were removed. Indeed, the fact that DOJ rarely objects to voting changes in covered jurisdictions may suggest section 5 is working as intended, just as it may suggest it has outlived its usefulness. If changing section 5 or allowing it to expire would lead us to a politics similar to that of pre-1965, no one could possibly argue in favor of such a development. However, the question now, as in previous discussions over reauthorizations, is whether the current section 5 deals with the principal problems that minority voters face in a political context that has changed dramatically since the enactment of the VRA.

First, the coverage formula or trigger found in section 4 of the VRA, while never having perfectly captured the universe of jurisdictions that deserve suspicion, has become more over and underinclusive since 1982. As even advocates for the current proposal have demonstrated, those jurisdictions currently covered are hardly the worst or most notorious offenders when it comes to erecting barriers to minority participation and influence. Neither Ohio nor

Florida (except for a few counties), for example, are covered jurisdictions, nor are any number of other areas with large minority populations and levels of partisan competition that make these types of problems both likely and electorally significant. Of course, we should not merely care about such problems in areas of heavy competition, and for that matter, uncompetitive states may contain competitive areas, competitive primaries or idiosyncratic competitive elections that make such tactics likely. Indeed, section 5 is most effective at the local level when elections are often held on a nonpartisan basis, and the parties view the stakes as relatively low. However, the jurisdictions that had tests or devices and low voter turnout in 1964 or 1968 or English-only ballot materials and low turnout in later years (and are therefore covered under section 5 today) do not appear to be characteristically different than the next ten voting rights offenders, however we choose to identify them.

Second, as Richard Hasen has argued, it is far from clear that renewing section 5 with the outdated coverage formula would be constitutional. Given the renewed vigor with which the Supreme Court has been striking down "incongruent" and "disproportionate" laws enacted under Congress' power under section 5 of the Fourteenth Amendment, one can only wonder whether the historic precedents upholding congressional power to enact the Voting Rights Act and its amendments would suffice to uphold a reauthorized VRA with an old coverage formula. Even though a majority of the current Court probably does not have the nerve to strike down the VRA, Congress should be acutely aware of the need to develop a record of discrimination and infringement of the right to vote in the covered jurisdictions if the current trigger is to pass constitutional muster.

Third, concerns about politicization of the preclearance process have placed into doubt whether current preclearance procedures are adequate to the task of combating the new challenges to minority participation and influence. In the last two elections and throughout the current redistricting cycle, the Department of Justice (DOJ) has rarely objected to changes in voting practices and procedures in covered jurisdictions. If the preclearance process has become subtly infected with partisan motives and the voting section of the Civil Rights Division at the DOJ has lost much of its historical independence, there is great risk that political appointees (of whichever political affiliation) at the DOJ will deny preclearance to changes that might be detrimental to their party, while granting it to laws that might retrogress with respect to minority voters yet benefit their party. Allegations of partisanship arose with respect to the preclearance of the Georgia law requiring photo identification for voters, the mid-decade Republican gerrymander of Texas's congressional districts, and the DOJ's use of its preclearance authority to hold up a state court plan for Mississippi's congressional districts.

The risk of partisan application of the VRA with respect to redistricting plans has also increased with the Supreme Court's decision in Georgia v. Ashcroft. Having articulated a standard for retrogression that is vague and manipulable, the Court left DOJ with the difficult job of evaluating the effect of a redistricting plan on minority influence and control. Although it is too early to know how such a standard will work in practice, the decision leaves open the possibilities either (1) that the DOJ could object to all kinds of redistricting changes that excessively concentrate or overly disperse minority communities of whatever size or (2) that section 5 may be virtually toothless in regulating redistricting. Ashcroft gutted the retrogression standard established by Beer v. United States, and appears to allow a covered jurisdiction to opt for any range of redistricting policies, eschewing more formulaic rules such as "no decrease in the number of majority-minority districts" or even "no decrease in the number of districts where minorities can elect their candidates of choice." Rather, a jurisdiction can opt for minority "influence" (however defined) or "control": that is, a jurisdiction could justify the creation of several 25 to 35 percent minority districts or a few 60 percent districts and not retrogress. Georgia v. Ashcroft has its defenders and insofar as the Beer standard may have led to dilution by way of packing, it needed to be changed. However, the effect of Ashcroft is to make pointless the preclearance procedures for redistricting plans, or worse, to leave open the possibility that an amorphous standard will succumb to the partisan whims of those who will enforce it.

## III. Transforming the Voting Rights Act

Because neither expiration nor mere reauthorization provide acceptable options, the Congress is left with the more difficult course of action of updating section 5 of the VRA to confront the new challenges to minority participation and influence. To do so, Congress has chosen to work within the current structure of section 5 rather than discard that complicated architecture altogether and think broadly about what measures could best protect minority participation and influence.

### A. Working within the current structure but updating it

Inertia and familiarity, as well as the inherent political difficulties in crafting any election law with partisan consequences, are strong factors that have led to the presumption in favor of keeping the basic structure of section 5.

The salient features of section 5 are the section 4 trigger and coverage formula, bailout requirements, preclearance procedures, definition of covered changes, and the standard for denying preclearance (that is, retrogression).

i. Trigger and coverage

As described in greater detail above, the old triggers for section 5 coverage are necessarily overinclusive and underinclusive of the jurisdictions of concern for minority voting rights violations. Jurisdictions that are currently covered operated a "test or device" (such as a literacy test) in 1964 or 1968 and had low voter registration and turnout, or they utilized English-only ballot materials and had low voter turnout in later years pursuant to the VRA amendments. This coverage formula captures some jurisdictions that may not need be covered (e.g., counties in New Hampshire and Michigan) while leaving uncovered many areas that have seen the greatest number of problems (e.g., Ohio and most of Florida). The questions for this most recent renewal of sections 4 and 5 are whether the universe of covered jurisdictions should remain the same; and if not, whether a formula akin to that used in the past or one completely different should be used to identify covered jurisdictions. So long as section 5 is going to apply to certain parts of the country and not others, it seems that the coverage formula needs to reflect the areas of greatest concern for violations of minority voting rights.

The challenge now, as in the past, is to figure out how to apply a constitutionally defensible and neutral coverage formula to capture a foreseeable group of jurisdictions. At the time of the passage of the original VRA racially disparate rates of voter turnout provided a rough metric of the propensity of a jurisdiction to enact racially discriminatory voting laws. Developing a new trigger that captures a foreseeable group of jurisdictions with the greatest potential to discriminate in voting and that will withstand constitutional challenge turns out to be a very difficult task. It is no wonder that the Congress has chosen merely to keep the current trigger in place rather than gamble on one the Supreme Court has not previously considered.

One can better understand Congress's resignation by exploring other possible triggers, each of which covers too many or too few jurisdictions, is politically unpalatable to one or the other party, or would be deemed unconstitutional. One option would be a formula that combines some measure of the racial diversity of a jurisdiction with some phenomenon indicating either a history of racial discrimination or some likelihood that racially disparate barriers to voting or influence might materialize. Measuring racial diversity is hardly a difficult task and is already a part of the language assistance provisions (Section 203) of the VRA. The racial diversity part of the trigger could be as simple as requiring coverage for any jurisdiction where the racial minorities combined amount to some share of the population: 10%, 20%, or some other figure. Indeed, if feasible (that is, if Congress were willing to pass it), the measure of racial diversity alone might be a sufficient trigger.

A trigger based solely on racial percentages would sweep so broadly that concerted opposition in Congress would emerge, and the Court would find the coverage formula to be unconstitutional. A trigger defined only by the racial percentage of a jurisdiction might run into two constitutional difficulties. The first concerns Congressional power to enact a new section 5. Without evidence of past or potential future racial discrimination or unconstitutional deprivation of the right to vote, a law passed through the Enforcement Clauses of section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment would not be congruent and proportional to the constitutional violations the law seeks to prevent or remedy. Second, coverage based solely on racial percentages could run afoul of the rule laid out in Miller v. Johnson and its progeny. Those cases struck down congressional districts in which race was the predominant factor in their creation. So too with a trigger based solely on the presence of a certain percentage of racial minorities could one argue that the law was excessively race-based.

Fearing these potential constitutional pitfalls and avoiding a massive expansion of the geographic reach of section 5, Congress could still have attempted to follow the tradition of a dual-pronged trigger while investigating options other than the one currently in the Act. Doing so presents the difficult problem of finding some factor that indicates the likelihood that a threat to minority voting or influence will materialize. Voter registration or turnout statistics did this at a time when discrimination manifested itself in ways that inhibited minority participation in measurable ways. It is unclear that such statistics would do so today - although, this is an empirical question that Michael McDonald's work begins to answer. A trigger based on evidence of preclearance denials or successful voting rights suits would likely cover too few jurisdictions, though, and runs into the problem that the heretofore successful operation of section 5 may have prevented the development of evidence that would justify its renewal. In other words, the absence of litigated voting rights violations or preclearance denials could mean either that a jurisdiction is a good actor or that it is

a bad actor successfully constrained by the VRA. No one knows the ratio of bad to good actors covered under the current section 5, or how bad actors would behave were they not subject to the preclearance requirements.

Besides those based on some pattern of legal violations, other formulas for the trigger might include some measure of partisan competition (if the hypothesis presented above is true about the use of certain tactics becomes more likely in a competitive environment), the number of complaints received on election day, the number of spoiled ballots (undervotes and overvotes) in recent elections, the number of provisional ballots cast or the share that were counted, the share of the minority community legally disenfranchised, or some other data indicating incompetent or unequal election administration. However, even if able to overcome the high political hurdles that would be obstacles to enactment, any trigger based on those types of concerns will be less parsimonious and transparent than those historically upheld by the Supreme Court and might lead to considerable debate as to which jurisdictions are, in fact, covered by the VRA. If Congress were to experiment with a more adventurous trigger for Section 5, it should also legislate a "backup trigger" akin to the one presently in force that would take effect in the event the Court declares the experiment unconstitutional.

ii. Bailout

Depending on how many states and local jurisdictions would be covered after application of a new trigger, it might make sense to change the process for bailing out of coverage. If the coverage formula were to include more jurisdictions, it might be desirable to make it easier for "good" jurisdictions to bail out. Although it is somewhat a wonder why more jurisdictions have not bailed out of coverage, the fact that very few jurisdictions have bailed out of section 5 coverage might indicate that the conditions for bailout need to be rethought. Moreover, alongside a new coverage formula, a different bailout provision might provide greater incentives for jurisdictions to adopt best practices that protect minority participation and influence. Indeed, if, as I have argued above, many of the worst offenders are currently uncovered and increased coverage threatens the constitutionality of a revised VRA, a more permissive bailout regime may make the VRA more effective and more likely to be declared constitutional.

If the coverage formula were to be expanded, a more permissive bailout formula could be predicated on the erasure of voting inequalities between racial groups. In other words, if a jurisdiction could show that participation rates had achieved a certain base threshold and that no racial differences in participation were present, perhaps it could be freed of the strictures of preclearance. Other criteria for bailout, in addition or substitution for the above, could include the achievement of some goal concerning minority influence or electoral success. Whatever the target, a regime that is focused on rewarding good behavior may be more effective at achieving the goals of the Voting Rights Act than is one preoccupied with deterring and punishing the guilty.

iii. Preclearance procedures

The salient features of the preclearance process that Congress might reform would be the roles of the DOJ and U.S. District Court for the District of Columbia as well as, perhaps, the timetable for the preclearance process and the implications of a denial or grant of preclearance. Under the current structure, covered jurisdictions must get permission ("preclearance") from the Attorney General (DOJ) or the D.C. District Court before they can implement or administer any "standard, practice or procedure with respect to voting." Because of the interests in expedited preclearance of such submissions, there is no right to appeal a favorable grant of preclearance.

If evidence grows that DOJ is unreliable as a protector against retrogression, then perhaps more cases should be thrown into the federal courts--either in D.C. or the local district court. Of course, the scope of the current section 5, which applies to all practices and procedures with respect to voting, is too broad to throw all cases of preclearance into the courts. However, one could envision a new section 5 that requires certain voting changes (e.g., statewide redistricting plans) to be precleared only by a federal court or that allows for some appeal from a grant of preclearance by the DOJ. In particular, allowing those who have submitted letters to the DOJ in the process of a preclearance submission to a right to appeal from a DOJ grant of preclearance (akin to that for other administrative agency proceedings) could mitigate the alleged partisanship infecting the preclearance process.

It turns out that requiring judicial review of DOJ preclearance decisions presents significant procedural challenges or runs the risk of duplicating the process of litigation under Section 2. If one were to follow an administrative agency model, then those who object to preclearance could appeal to a court to review the DOJ decision. Presumably, there would need to be some criteria as to who could object, such as limiting it to those who submitted letters to the DOJ when it was considering the preclearance submission. In addition to defining the universe of objectors, the proper

defendant needs to be determined: DOJ, the jurisdiction seeking preclearance, or both. Most importantly, the burden of proof needs to be determined. Under current preclearance procedures, the jurisdiction has the burden to prove to the DOJ or the U.S. District Court that a change is not retrogressive. Under the administrative agency model, the burden would shift to the appellant (in this case the person or group arguing against preclearance), who would argue that the covered change retrogresses or that the DOJ's decision was otherwise legally deficient.

If a new VRA places the burden of proof on the person or group claiming a law retrogresses, then the litigation becomes strangely similar to normal litigation under Section 2 of the Voting Rights Act, which provides for a private right of action to address voting laws enacted by any jurisdiction in the country that have a discriminatory effect. To be sure, the legal standard with a revised section 5 would be lower: proving retrogression requires showing that the law makes minorities worse off than the status quo, while proving a section 2 violation requires a more difficult showing of discriminatory effect. However, after Georgia v. Ashcroft, the inquiries with respect to redistricting require similar investigations and showings. It would be the rare case indeed when a plaintiff could merely prove that a redistricting plan makes minorities worse off by reducing their influence or ability to elect their candidates of choice, without also proving that the plan dilutes the minority vote. The similarity between the claims is not itself a reason to bar judicial review; rather it shows that once the burden has shifted, the intended virtues of the section 5 architecture greatly diminish.

Moreover, establishing judicial review of DOJ decisions with the intended goal of preventing partisanship from infecting the preclearance process could have the unintended effect of gaming by litigants seeking to hold hostage a law or redistricting plan. If all grants of preclearance could end up in federal court, then any politically aggrieved or ornery litigant - whatever his or her motives - could tie up the law in litigation for just enough time to make it unenforceable for the upcoming election. The more permissive the regime of judicial review, the more tied up the courts will be in an election season, and the more likely these machinations become. Given this potential downside, it may make sense simply to require judicial review for certain changes with respect to voting to go to the U.S. District Court in the first instance for preclearance. Statewide redistricting plans or statewide measures governing voter qualifications could be left to the courts, while DOJ could still have the task of preclearing minor changes.

iv. Scope

One area that is unlikely to require change is the definition of a covered change, that is, a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." The Court has read this expansively, and because the newest challenges to minority participation and influence do not necessarily fit within the categories of historical changes, advocates will be unlikely to retreat from the expansive definition. Some changes that have required preclearance may have proven to pose no threats to minority participation and influence, and Congress could specifically exempt them. If a new section 5 were to have a greater geographic scope, more burdensome preclearance procedures, or a stricter standard for retrogression, perhaps narrowing the laws in its purview could be one way to relieve the administrative burden on the states and the federal body charged with oversight.

Although the scope of section 5 is unlikely to change, it may make sense to recognize in the law what those who work in this field recognize implicitly: a clear distinction can be made between changes to redistricting plans, which have generated the most controversy, and all other voting changes, concerning which the DOJ rarely denies preclearance. Indeed, it may make sense to craft different procedures or standards for redistricting plans than for other changes. As indicated above, I believe that the non-redistricting election law changes represent greater threats to minority voting rights than do redistricting plans, although others hold the exact contrary point of view. In either case, there is little reason to hold to the view that the procedures and standards for review of the moving of a polling place should be the same as those for a congressional districting plan. In fact, the comparatively close attention DOJ has given to redistricting plans, as well as the new Georgia v. Ashcroft standard seemingly applicable only to redistricting, have already separated out redistricting for different treatment under section 5. One decision Congress could make in the process of reauthorizing section 5 is to recognize this difference explicitly in the law by requiring certain types of laws to undergo more rigorous review than others.

v. Preclearance Standards

The standard for denial of preclearance has undergone substantial change in the last decade or so. The triumvirate of Reno v. Bossier Parish I & II, and Georgia v. Ashcroft has left a section 5 considerably different than the one that began the 1990s or existed in earlier decades. In deciding whether to reauthorize section 5, Congress is considering whether it ought to overturn or respond to these decisions and if so, how. The relevant questions then are (1) whether

section 5 ought to encompass violations of section 2 or other laws and constitutional provisions, (2) whether discriminatory purpose, rather than mere retrogressive purpose, can serve as a basis for denial of preclearance, and (3) whether the standard for retrogressive effect ought to be flexible or rigid.

1. The interaction between Section 2 and Section 5
Reno v. Bossier Parish I made clear that the retrogression standard for section 5 differs considerably from the vote dilution standard of section 2. Section 5, the Court held, requires a more manageable standard than section 2, one that focuses only on whether the voting change makes minorities worse off. Congress could make clear in a revised section 5, however, that the DOJ or U.S. District Court for D.C. can deny preclearance on the basis of a plan's discriminatory effect or purpose, rather than merely its retrogressive effect or purpose.
The greatest criticism of such a move would come from those who see the section 2 standard as particularly onerous or the relevant litigation as overly complicated and drawn out for an administrative preclearance process. Historically, it has been easier to identify whether a law makes minority voters worse off than it is to identify whether a law discriminates. The latter inquiry for redistricting plans, for example, required a multifactor test concerning the extent of racially polarized voting in a jurisdiction and the required minority percentages needed for those voters to have an equal opportunity to elect their candidates of choice. However, with the Court's decision in Georgia v. Ashcroft (if not before), the preclearance process, especially for redistricting plans, has required a level of proof from a jurisdiction comparable to section 2 litigation, as noted above.

If Congress wishes to get more imaginative, not only could it collapse section 2 into the section 5 inquiry, but it could give the DOJ (or a court or other administrative body) the right to deny preclearance for any legal violation. Congress could give the DOJ the power to deny preclearance if the law violates one-person, one vote, the constitutional prohibition on racial gerrymandering, or any number of other statutes from the Help America Vote Act to the Americans with Disabilities Act. Expanding DOJ authority in this way would dramatically change the preclearance process and would make judicial review of DOJ decisions that much more important. However, it would not continue to place the DOJ in the uncomfortable position of giving its partial blessing to a law that it will later seek to have a court strike down.

2. Discriminatory or Retrogressive Purpose?
Reno v. Bossier Parish II established that voting changes motivated by a discriminatory purpose deserve preclearance so long as their purpose or effect is not retrogressive. One simple change Congress has made in the bill currently under debate clarifies that a voting change with a discriminatory purpose should not receive preclearance. This change may invite closer scrutiny as to whether a new VRA is disproportionate and incongruent to violations of the Fourteenth or Fifteenth Amendments, which require both discriminatory purpose and effect. However, apart from the general complaints about DOJ misuse of the preclearance process, it is difficult to justify DOJ acquiescence to a law that it knows is motivated by an attempt to discriminate against racial minorities. Perhaps some might fear that DOJ lawyers will dedicate themselves to finding discriminatory purpose where there is none. Even if there is some truth to that statement, Congress could clarify the evidence that constitutes discriminatory purpose, constrain DOJ's ability to deny preclearance on that basis, or provide for judicial review of its decisions.

3. Redefining Retrogression
The most significant change in the proposed legislation is the attempt of Congress to overturn Georgia v. Ashcroft. As mentioned above, the Court's decision in Georgia v. Ashcroft defangs section 5 considerably, seeming to allow almost any plausible argument as to how the splitting or packing of the minority community by a redistricting plan maintains minority influence at a sufficient level. The current proposal attempts to correct the Court's decision by clarifying that voting changes should not be precleared if they have the purpose or effect of "diminishing the ability of citizens of the United States on account of race or color . . . to elect their preferred candidates of choice." Indeed, the bill goes so far as to say "[t]he purpose . . . of this section is to protect the ability of such citizens to elect their preferred candidates of choice."

It is far from obvious what the move to an "ability to elect" standard means. To most observers, the bill attempts to reinstate the standard from Beer v. United States, which placed primacy both on the number of districts in which minority voters constituted a majority as well as the racial breakdown of such districts. The bill therefore rejects the holding of Ashcroft that a jurisdiction can opt for a greater number of influence districts at the expense of "control districts" in which minorities can elect their candidates of choice. This newly legislated standard would seem intended to prevent retrogression by way of "cracking," in which, for example, the jurisdiction eliminates a 60 percent minority

district in order to create two 30 percent minority districts. It is less clear whether the standard prevents retrogression by way of "packing," as when a jurisdiction consolidates two 40 percent minority districts into one 80 percent super-majority-minority district.

So long as Congress eschews a rigid rule that reifies the position of majority-minority districts - that is, districts in which minorities constitute a majority of the voting age population or citizen voting age population - what is meant by an "ability to elect their preferred candidates of choice" will still be context dependent. In order to evaluate whether a drop in the minority percentage of a district retrogresses even under this standard one would need to know several things: (1) the extent of racial polarization in voting patterns in the district; (2) the partisanship of white voters and the probability they will vote for the minority-preferred candidate; (3) the incumbency status of the district (whether it is an open seat and if not, what is the party and race of the incumbent); (4) the ability of the given minority group to control the outcome in the primary election; and (5) the rates of registration, turnout and eligibility among the various racial groups. Although these questions are necessarily complex and no universal truths can govern voter behavior and district character across the vast array of covered jurisdictions, Congress should at least make clear that this new standard does not somehow sanction retrogression by way of increased packing of minorities.

If Congress fails to do so, the Court may nevertheless interpret the words "ability to elect," in such a way as to avoid constitutional difficulties and reinstitute a standard akin to that articulated in Ashcroft. Constitutional challenges to the new standard will take two forms. First, some will argue that Congress does not have the power under the Enforcement Clauses to prevent states from reducing the number of "ability to elect" districts. There is nothing inherently unconstitutional about moving from a few of such districts toward a greater number of influence districts, and therefore the new VRA is an incongruent and disproportionate remedy for the problem of racially discriminatory redistricting plans. Second, challengers will argue that the standard necessarily uses race predominantly and runs afoul of the Court's decisions in Shaw v. Reno and its progeny. Those cases hold that the courts should strictly scrutinize and usually strike down districts which were predominantly drawn on the basis of race. Challengers to the "ability to elect" standard will argue that such language is itself a command to use race predominantly in the construction of districts or at least makes the creation of such unconstitutional districts more likely.

b. Completely Transforming the Voting Rights Act: Placing Other Issues on the Table

Although Congress has chosen to work within the existing framework of section 5, the reauthorization debate ought to provide an opportunity to think broadly about the barriers to minority political access and influence that remain unaddressed by that particular law. In a sense, the compromise worked out by the two parties exists almost like a fragile sculpture, with everyone wanting to keep their distance for fear that touching it would lead to it crashing to the ground and shattering into a thousand pieces. Indeed, bipartisan compromise is so rare nowadays, and especially so when the issue is one that will affect the political fortunes of those voting on the law, that one must appreciate the delicacy of the political deal that has been reached and the impulse not to rock the pedestal on which it stands. To put the matter simply, how could anyone possibly be against reauthorizing the Voting Rights Act, the most successful piece of civil rights legislation in American history?

While recognizing that election law reform is almost always the product of second-best solutions, it would be unfortunate if the energy that has animated the debate over the VRA's reauthorization ended with its passage. At some point, the nation will deal with the problems of increasing rates of felon disfranchisement, for example, or iron out a compromise between the anti-fraud and greater access sides of the voter identification debate. The politics of those issues may make resolution unlikely in the short term, but any discussion over voting rights and minority political participation would be anemic if it ignored those problems and focused all its energies on the more difficult and abstract questions, such as redistricting.

The same should be said concerning three intractable and uniquely American problems with our electoral system: (1) election oversight by partisan officials, (2) entrusting administration in the polling places often to incompetent volunteers, and (3) decentralization of authority that leads to inconsistency with respect to voting rights. These problems do not plague minority voters, in particular; they have defined business-as-usual when it comes to the process we use for choosing those who govern us. Nevertheless, if we were to address these deep structural problems in our system, many of the most contentious issues that have occupied election lawyers' attention in recent years would fade away in importance.

The successful reauthorization of the Voting Rights Act ought to be a cause for introspection rather than celebration. It represents another milestone, the meaning of which should be judged by our ultimate destination, rather than our success in running one more lap as a nation around the same track. Just as we should not allow our naïveté to shield

us from the inherent political difficulties involved in more substantial election reform, nor should we mistake a reaffirmation of past achievements for victory in an ongoing and ever-changing battle over the right to vote.