

# **Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act**

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*After collecting and analyzing extensive data on the state of voting rights in jurisdictions covered by section 5 of the Voting Rights Act, we conclude that there is no longer sufficient justification for the preclearance mandate. Greatly increased minority voter registration rates, minority voter turnout rates, and number of minority elected officials all indicate that the aim of the act has been fulfilled—voting rights and representation for minorities have solidified and section 5 should be allowed to expire.*

## **Introduction to the Studies**

In anticipation of congressional hearings on the reauthorization of section 5 of the Voting Rights Act (VRA) in 2007, the Project on Fair Representation at the American Enterprise Institute, led by Visiting Fellow Edward Blum, commissioned two social scientists to gather data on the state of minority participation in the election process in the jurisdictions covered by the statute.

The authors of these studies, Ronald Keith Gaddie, Professor of Political Science at the University of Oklahoma and Charles Bullock III, Richard B. Russell Professor of Political Science at the University of Georgia, have produced extensive voting behavior scholarship in addition to acting as expert witnesses in dozens of voting rights cases throughout the country.

Section 5 of the VRA requires all of nine states and parts of seven others to seek permission—or, "preclearance"—from the United States Attorney General or from the United States District Court for the District of Columbia before any election practices or procedures can be changed. The states fully covered by section 5 are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Also covered are various townships and counties in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

The Bullock-Gaddie studies analyze all of the covered jurisdictions in the fully- and partially-covered states. For the purposes of comparison, Bullock and Gaddie also analyze the voting behavior of three states and one city not covered by section 5: Arkansas, Oklahoma, Tennessee, and the city of Milwaukee, Wisconsin. The studies examine a variety of election criteria, including:

1. Black and Hispanic voter registration rates.
2. Black and Hispanic election turnout rates.
3. Success and failure of black and Hispanic candidates.
4. White cross-over support for minority candidates.
5. Racial polarization levels using three different methodologies.

Although the trends in minority election criteria vary from state to state, the data makes quite clear that **(a) there is no crisis in minority voting rights in 2006** compared to what there was in 1965 when the act was passed or in subsequent years when additional jurisdictions were added; and **(b) there is no quantifiable difference in the voting**

**rights exercised by minorities in covered jurisdictions than in non-covered jurisdictions.** Moreover, many of the minority electoral criteria we studied indicate that the covered jurisdictions often afford greater opportunity to blacks and Hispanics than many jurisdictions not covered by Section 5.

### **Assessment of Voting Rights Progress in the Section Five Covered Jurisdictions Since 1965**

The Bullock-Gaddie studies examine the electoral opportunities for blacks and Hispanics in the states fully- and partially-covered by section 5 of the Voting Rights Act.<sup>1</sup>

#### *Voting Registration Rates, Voter Participation Rates, Growth of Minority Officeholders*

The Voting Rights Act of 1965 had one central objective: eliminating the voting barriers that faced millions of African-Americans living in the South. The act accomplished this by banning literacy tests, providing federal voting registrars, and criminalizing harassment of African-American voters in targeted jurisdictions.

Section 4 of the Voting Rights Act is known as the “trigger” mechanism because it presents the formula to identify which jurisdictions are “covered” by the act. If a jurisdiction met two different criteria during the 1964 presidential election year, it was swept into coverage under section 4. The first was whether the jurisdiction used a literacy test or other device in the voter registration process. Although many jurisdictions throughout the country used literacy tests, southern registrars tended to use fraudulent ones with the specific aim to keep blacks from registering. Whether it was requiring an applicant to interpret a complex section of the state’s constitution or read from a newspaper written in a foreign language, the results in most of the South were the same: blacks failed while whites passed. The second criterion in determining coverage was voter registration and turnout rates. A jurisdiction was eligible for section 4 coverage if its voter registration rates as of November 1, 1964, or its electoral participation rates in the November 3, 1964, presidential election were below 50 percent. To be covered by section 4, the state or jurisdiction had to meet both criteria. In other words, if a state or jurisdiction used a literacy test *and* if registration or turnout was below 50 percent, then that state or jurisdiction was swept into coverage.

The Bullock-Gaddie studies measure growth rates in minority voter registration, election participation, and number of elected minority officials. As the tables below demonstrate, by 2000, the gaps between whites and blacks in these categories had virtually been eliminated. Moreover, in some section 5 jurisdictions, minority registration and turnout rates exceed those of whites.

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<sup>1</sup> The states examined in their entirety are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; counties and townships studied are in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

## Understanding the Data

Table 1 depicts the 2000 election voter registration and turnout data for the six southern states covered by section 5 of the Voting Rights Act in 1965. The average registration and turnout for the six states are both higher than the national average. The black deficit shows the gap between white and black rates, which in most states is negligible and well below the national average. In Georgia, Mississippi, and South Carolina, blacks now register at higher rates than whites.

Table 2 displays the 2000 election Latino registration and turnout rates for two other states covered by section 5 which were added in 1975: Texas and Arizona. While the gap between white and Latino voter participation persists, the gap in states covered by section 5 is smaller than it is in non-covered states with comparable Latino populations.<sup>2</sup>

Table 3 examines the number of black elected officials in states covered and not covered by section 5. The percentage increase in first ten year period, 1970 to 1980, was huge, especially for states in the South. States covered by section 5 saw increases from 203 to 750 percent; however, southern states not covered by section 5 made impressive gains as well. Tennessee gained 261 percent and Arkansas 312 percent. Growth from 1980 to 2000 was less dramatic but the trends in non-covered states again follow those of covered states. It is difficult to argue, then, that section 5 drove the change in the number of black elected officials in the six covered states; it seems more likely that broader changes in the South opened the door to increased election of black officials everywhere.

Table 4 compares the percentage of black elected officials, by state, to the black percentage of the state population in 2000. In states covered by section 5, the percentage of officials who are black is much higher than in non-section 5 states, even when their taking higher percentage black populations into consideration.

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<sup>2</sup> Latinos as a percentage of the total state population. See U.S. Census 2000 Data, U.S. Bureau of the Census, [www.census.gov](http://www.census.gov)

Table 1

**2000 Voter Registration Data**

<b>Registration Rates for States Covered by Section 5</b>			
<b>State</b>	<b>Black Registration</b>	<b>White Registration</b>	<b>Black Rgstn Deficit</b>
Alabama	72.0%	74.5%	2.5%
Georgia	66.3%	59.3%	-7.0%
Louisiana	73.5%	77.5%	4.0%
Mississippi	73.7%	72.2%	-1.5%
South Carolina	68.6%	68.2%	-0.4%
Virginia	58.0%	67.6%	9.6%
Six-state average	68.7%	69.9%	1.2%

**2000 Voter Turnout Data**

<b>Turnout Rates for States Covered by Section 5</b>			
<b>State</b>	<b>Black Voter Turnout</b>	<b>White Voter Turnout</b>	<b>Black Turnout Deficit</b>
Alabama	57.2%	60.8%	3.6%
Georgia	51.6%	48.3%	-3.3%
Louisiana	63.2%	66.4%	3.2%
Mississippi	58.0%	61.2%	3.2%
South Carolina	60.7%	58.7%	-2.0%
Virginia	52.7%	60.4%	7.7%
Six-state average	57.2%	59.3%	2.1%

<b>Registration Rates for Select States Not Covered by Section 5</b>			
<b>State</b>	<b>Black Registration</b>	<b>White Registration</b>	<b>Black Rgstn Deficit</b>
Arkansas	60.0%	59.5%	-0.5%
Oklahoma	57.4%	69.5%	12.1%
Tennessee	64.9%	61.9%	-3.0%
Nationwide	67.5%	71.6%	4.1%

<b>Turnout Rates for Selected States Not Covered by Section 5</b>			
<b>State</b>	<b>Black Voter Turnout</b>	<b>White Voter Turnout</b>	<b>Black Turnout Deficit</b>
Arkansas	52.2%	49.0%	-3.2%
Oklahoma	44.5%	59.3%	14.8%
Tennessee	52.6%	52.3%	-0.3%
Nationwide	56.8%	61.8%	5.0%

Source: U.S. Census 2000 Data, U.S. Bureau of the Census, www.census.gov

Table 2

2000 Voter Registration Data				
State	Latino Registration	White Registration	Black Registration	Latino Registration Deficit
<b>States Covered by Section 5</b>				
Arizona	33.4%	55.3%	46.2%	21.9%
Texas	43.2%	61.8%	69.5%	18.6%
<b>States Not Covered by Section 5</b>				
California	29.5%	67.2%	62.5%	37.7%
Colorado	41.5%	70.1%	64.2%	28.6%
New Mexico	49.4%	73.4%	B*	24.0%
National	34.9%	65.6%	63.6%	30.7%

2000 Voter Turnout Data				
State	Latino Turnout	White Turnout	Black Turnout	Latino Turnout Deficit
<b>States Covered by Section 5</b>				
Arizona	27.1%	48.7%	32.1%	21.6%
Texas	29.5%	48.1%	57.5%	18.6%
<b>States Not Covered by Section 5</b>				
California	24.5%	60.4%	52.5%	35.9%
Colorado	33.0%	59.4%	46.8%	26.4%
New Mexico	39.5%	66.1%	B*	26.6%
National	27.5%	56.4%	53.5%	28.9%

Source: U.S. Census 2000 Data, U.S. Bureau of the Census, [www.census.gov](http://www.census.gov)

\* B indicates that the base number is too small to show the derived measure

Table 3

**Change in Number of Black Elected Officials from 1970 to 2000**  
in States Covered by Section 5 and Selected States Not Covered By Section 5

1970*		1980			2000		
State	Black Elected Officials	State	Black Elected Officials	Change since 1970	State	Black Elected Officials	Change since 1980
<b>States Covered by Section 5</b>		<b>States Covered by Section 5</b>			<b>States Covered by Section 5</b>		
Alabama	70	Alabama	238	240.0%	Alabama	731	207.1%
Georgia	30	Georgia	249	730.0%	Georgia	582	133.7%
Louisiana	65	Louisiana	363	458.5%	Louisiana	701	93.1%
Mississippi	67	Mississippi	387	477.6%	Mississippi	897	131.8%
North Carolina	40	North Carolina	247	517.5%	North Carolina	498	101.6%
South Carolina	28	South Carolina	238	750.0%	South Carolina	540	126.9%
Virginia	30	Virginia	91	203.3%	Virginia	250	174.7%
<b>Select States Not Covered by S5</b>		<b>Select States Not Covered by Section 5</b>			<b>Select States Not Covered by Section 5</b>		
Arkansas	55	Arkansas	227	312.7%	Arkansas	502	121.1%
Oklahoma	25	Oklahoma	77	208.0%	Oklahoma	104	35.1%
Tennessee	31	Tennessee	112	261.3%	Tennessee	177	58.0%

Source: Various volumes of the *National Roster of Black Elected Officials* (Joint Center for Political and Economic Studies, Washington, D.C.)

\* We display here data from years relevant to the Voting Rights Act (VRA) authorization. The Joint Center first published data on the number of black elected officials in 1970, the first year the act was reauthorized. 1980 marked the presidential election preceding the most recent reauthorization of the VRA in 1982. 2000 is the most recent presidential election year for which there is data on the number of black elected officials.

Table 4

<b>Black Elected Officials by State, Relative to Black Population in 2000</b>				
<b>State</b>	<b>Black Elected Officials</b>	<b>Total Elected Officials</b>	<b>Percent Black Officials</b>	<b>Percent Black of Voting Population</b>
<b>States Covered by Section 5</b>				
Alabama	731	4,385	16.67	24.0
Georgia	582	6,529	8.91	26.6
Louisiana	701	5,051	13.88	29.7
Mississippi	897	4,754	18.87	33.1
North Carolina	498	5,820	8.56	20.0
South Carolina	540	3,943	13.70	27.2
Virginia	250	3,104	8.05	18.4
<b>States Not Covered by Section 5</b>				
Arkansas	502	8,408	5.97	13.9
Oklahoma	104	8,989	1.16	6.9
Tennessee	177	6,950	2.55	14.8
National	512,699	9,040	1.76	11.4

Source: U.S. Census 2000 Data, U.S. Bureau of the Census, [www.census.gov](http://www.census.gov) and *Black Elected Officials: A Statistical Summary, 2000* by David A. Bositis, (The Joint Center for Political and Economic Studies; Washington, D.C., 2002)

## Assessment of the Vestiges of Discrimination in Voting in 2006

The congressional findings in H.R. 9 and S 2703 assert that “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.” (H.R. §2(2)) As evidence of discrimination, the bill cites:

- (A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;
- (B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;
- (C) the continued filing of section 2 cases that originated in covered jurisdictions; and
- (D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.

**We do not find the bill’s justifications for section 5 reauthorization compelling.** We will analyze claims (A) and (C) in this paper. We will not deal with (B)’s claim that the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia justifies reauthorization because the number of claims presented there so small as to be insignificant when compared with the number of submissions made annually to the Department of Justice.<sup>3</sup> The claims in (D) are outside the scope of our research on section 5.

### *(1) Objections Interposed in Section Five Jurisdictions*

The raw number of objections interposed by the Department of Justice to voting changes or procedures in the section 5 jurisdictions is an insufficient measurement to support reauthorization. In fact, the annual objections as a percentage of total submissions are so low as to warrant the exact opposite conclusion—section 5 should be allowed to expire.

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<sup>3</sup> As identified in the testimony of Bradley J. Schlozman, “Section 5 Declaratory Judgment Actions—Complete Listing of All Actions Filed in the U.S. District Court of the District of Columbia Seeking a Declaratory Judgment that Proposed Voting Change Does not Violate Section 5,” hearing before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, October 25, 2005.

Testimony and data presented by Acting Assistant Attorney General Bradley J. Schlozman on October 25, 2006, before the U.S. House Subcommittee on the Constitution belies this conclusion. Schlozman notes:

“For reasons of expense and timing, the vast majority of voting changes by covered jurisdictions are submitted to the Attorney General for administrative review. The Voting Section of the Civil Rights Division receives roughly 4,000-6,000 submissions annually, although each submission may contain numerous voting changes that must be reviewed. Redistricting plans are only a small portion of those submissions. For example, in Calendar Year 2003, we received a total of 4,628 submissions, 400 of which were redistricting plans. In Calendar Year 2004, we received 5,211 submissions, 242 of which involved redistricting plans. In Calendar Year 2005, we already have received 3,811 submissions (as of October 17<sup>th</sup>), 88 of which have been redistricting plans. Perhaps not surprisingly, the number of section 5 submissions sent to the Department of Justice tends to reach its apex two years after the national Census, the point at which jurisdictions have the demographic data necessary to redraw their political districts. For example, in 2002 we received 5,910 submissions, of which 1,138 were redistricting plans.”

For the period 1982-2005, of the 105,452 submissions reviewed by the Attorney General, only 753, or 0.70 percent received objections. For the period 1996-2005, of the 54,090 submissions reviewed, only 72, or 0.153 percent, drew objections. Objection rates exceeded 4 percent from 1965 to 1970 but by today are insignificant. Moreover, some of Department of Justice’s objections in recent years have been proven to be in error, either because of the Department’s “max-black” requirements, which were struck down by the Supreme Court in *Miller v. Johnson* (515 U.S. 900 (1995)), or because of its denial of preclearance to jurisdictions because it believed them to be violating Section 2 of the Voting Rights Act (*Reno v. Bossier Parish School Board* (95-1455), 520 U.S. 471 (1997)) Thus, no valid argument can be made to extend Section 5 based on the number of objections; the number of objections has reached an all-time low while black voter participation and minority elected officials numbers have soared.

Table 5

<b>Administrative Review of Voting Changes, 1982-2005</b>			
<b>ALL SUBMISSIONS</b>			
<b>Year</b>	<b>Number</b>	<b>Objections</b>	<b>Percent objections</b>
1982	2,848	66	2.32%
1983	3,203	52	1.62%
1984	3,975	49	1.23%
1985	3,847	37	0.96%
1986	4,807	41	0.85%
1987	4,478	29	0.65%
1988	5,155	39	0.76%
1989	3,920	30	0.77%
1990	4,809	37	0.77%
1991	4,592	75	1.63%
1992	5,307	77	1.45%
1993	4,421	69	1.56%
1994	4,661	61	1.31%
1995	3,999	19	0.48%
1996	4,729	7	0.15%
1997	4,047	8	0.20%
1998	4,021	8	0.20%
1999	4,012	5	0.12%
2000	4,638	4	0.09%
2001	4,222	7	0.17%
2002	5,910	21	0.36%
2003	4,829	8	0.17%
2004	5,211	3	0.06%
2005	3,811	1	0.03%
<b>TOTAL</b>	<b>105,452</b>	<b>753</b>	<b>0.71%</b>

Source: Bradley J. Schlozman, “Administrative Review of Voting Changes,” testimony before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, October 25, 2005.

*(2) Section 2 Cases Originating in the Covered Jurisdictions*

Based on a recent study submitted to the U.S. House Subcommittee on the Constitution by the Voting Rights Initiative at the University of Michigan Law School, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, more lawsuits brought under section 2 ending with a determination of liability have occurred in non-covered jurisdictions than in covered ones. For example, since 1990 there are more court findings of section 2 violations in New York or Pennsylvania than in South Carolina.<sup>4</sup>

<sup>4</sup> See Richard H. Pildes: “The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote” (forthcoming Howard Law, p.19)

The University of Michigan study asserts that the “examination of section 2 cases can provide the requisite for Congress’s exercise of its enforcement powers under the Fifteenth Amendment.” If so, the greater prevalence of section 2 liability outside the covered jurisdictions raises the question of why, if section 5 is reauthorized for currently covered jurisdictions, it should not be extended to other areas of the nation in which as many judicial findings of voting discrimination have been found.

According to the study, of the 209 lawsuits that ended with a determination of liability, 98, or 46.9 percent, originated in jurisdictions covered by section 5 of the Voting Rights Act, and 111, or 53.1 percent, were filed in non-covered jurisdictions.

Congress also has in the record an 867-page report from the American Civil Liberties Union, “The Case for Extending and Amending the Voting Rights Act.” This report examines 293 ACLU cases brought in 31 states since June, 1982. Of those 293 cases, the number dealing with constitutional discrimination problems in section 5 states, though, is quite small. 98 of the 293 cases occurred in states covered by section 5. Of the 98 cases in covered jurisdictions, six cases found unconstitutional discrimination against minority voters while another six found unconstitutional discrimination against white voters. Of the cases 195 cases in non-covered jurisdictions, four cases found unconstitutional voting practices against minority voters while two found discrimination against white voters.

An additional 22 cases found a constitutional violation, but these did not involve racial discrimination or any conduct addressed by the Voting Rights Act. As the University of Michigan report notes, the “record of section 2’s ‘results-based’ test goes beyond what the Fifteenth Amendment alone commands. As a consequence, the record of section 2 violations does not necessarily indicate the existence of constitutional violations, and *therefore does not necessarily provide the proper predicate for Congress’s exercise of its enforcement powers under the Fifteenth Amendment*” (italics added). Therefore, the case cannot be made for extending section 5 for another 25 years based upon the number of section 2 cases originating in the covered jurisdictions without applying this test to non-covered jurisdictions. The University of Michigan study notes the following non-covered jurisdictions in which there were judicial findings of intentional discrimination since 1982:

- Thurston County, Nebraska
- Berks County, Pennsylvania
- Montezuma County, Colorado
- Philadelphia, Pennsylvania
- Eastern Shore, Maryland
- Little Rock, Arkansas
- Boston, Massachusetts
- New Rochelle, New York
- Los Angeles County, California
- Chicago, Illinois
- Western Tennessee
- State of Illinois

## Conclusion

In 1965, black electoral participation in South was so low that Congress added an emergency provision to the Voting Rights Act, overstepping its traditional Constitutional bounds in order to establish voting rights for minorities. That provision, section 5, was designed to be temporary—put in place until blacks could register and begin the legacy of voting. The voter registration, voter turnout, and number of elected officials data for 2000 show that the aims of section 5 have been fulfilled. The states covered by section 5 have made fantastic progress since 1965; in fact, the data show that their progress has been so significant that minority voting rights are as strong, if not stronger in section 5 states than for states not bound by such burdensome preclearance restrictions. The second-generation barriers presented in the House and Senate bills as justifications for reauthorizing the section for another 25 years are not compelling. The number of objections interposed by the Department of Justice is statistically insignificant and there are fewer section 2 violations in section 5 jurisdictions than outside.

Unlike Section 5, the most important provisions of the Voting Rights Act are permanent, such as the ban on literacy tests and grandfather clauses. Once these barriers were eliminated in the South, black voter-registration soared. Today, minorities in the states covered by section 5 are full and equal participants in the electoral process. The old roadblocks to minority voting in section 5 states are gone. Forever. It is time to let this temporary section expire.

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The Bullock-Gaddie voting rights studies are available online at the AEI Project for Fair Representation website. To read the studies, visit: [www.aei.org/pofr](http://www.aei.org/pofr).