Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America

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I. INTRODUCTION

Politics and symbolism are responsible for the rapid passage in July 2006 of the Reauthorization of Section 5 of the Voting Rights Act,[1] which was set to expire in August 2007. The new legislation is woefully inadequate to protect voting rights across the nation and to ensure effective representation of racial and ethnic minorities.[2] Any hopes for effective legislation were dashed when proponents of the status quo managed to name the bill in honor of three well-known black civil rights icons: Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. Given the politics of the day and the bill's namesakes, it is difficult to deny the role that symbolism played in the framing of a debate that labeled opponents and would-be reformers of the bill as enemies of racial progress. Fears of being called racist played no small role in defining and constraining the contours of the debate.

President George W. Bush had a special incentive to appease the National Association for the Advancement of Colored People (NAACP) for slights that occurred during his first term, after he publicly snubbed the group. The President offered the NAACP an olive branch in the form of a presidential address the day before the Senate voted on the Reauthorization bill.[3] In his now-historic speech, Bush virtually guaranteed passage of the legislation when he thanked the Senate in advance for passing the bill promptly and with no amendments.[4] The next day, the Senate unanimously passed the bill by a roll call vote of 98 to 0.[5] (In a similar show of bipartisanship, the House had already passed the bill by a vote of 390 to 33.[6]) But unlike their colleagues in the House, the Senate devoted virtually no time to floor deliberation and instead used their time to praise civil rights leaders.[7] In a highly unusual move, the vote occurred before

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1. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

2. Although racial and ethnic minorities have historically been the victims of voter discrimination, a new federal lawsuit accuses blacks in Mississippi of suppressing the white vote. *See* U.S. v. Brown et al, No. 4:05cv33TSL-AGN (S.D. Miss. filed Feb. 17, 2005). *See also* Adam Nossiter, *U.S. Says Blacks in Mississippi Suppress the White Vote*, N.Y. TIMES, Oct. 11, 2006, at A18.

3. Michael M. Grynbaum, *Bush Moves To "Heal Old Wounds,"* BOSTON GLOBE, July 21, 2006, at A2.

4. President George W. Bush, Address at the NAACP Convention (July 20, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/07/20060720.html.

5. H.R. 9, 109th Cong. (as passed by Senate, July 20, 2006).

6. H.R. 9, 109th Cong. (as passed by House, July 13, 2006).

7. Charles Babington, *Voting Rights Act Extension Passes In Senate, 98 to 0*, WASH. POST, July 21, 2006, at A01.

the Senate had completed its final report.[8]

The renewal of Section 5 fell into the category of legislation that needed to be affirmed if the nation wished to maintain its progress with race relations. Much of the public viewed the issue as being about whether blacks and other minorities would continue to *retain* their right to cast an unfettered ballot, rather than about the more complex issues that surrounded renewal.

Three provisions formed the core of the original 1965 Voting Rights Act: the triggering formula, the suspension of tests and devices, and the preclearance provision. The issues at stake during the 2006 reauthorization included (1) whether covered jurisdictions needed continued oversight;[9] (2) whether the bailout process should be made easier for covered jurisdictions where evidence of discrimination no longer existed; (3) whether Congress should legislatively overturn key Supreme Court decisions; and (4) lastly, whether the nation should continue to provide bilingual ballots for language minorities.

In this article, I focus on two of the above-mentioned issues. First, I argue that the unmodified preclearance provisions are not adequate to protect the voting rights of Americans who confront discrimination at the polls. Congress should have taken a different route by focusing only on the jurisdictions that discriminate while releasing previously covered areas of the country that have established records of compliance.

Second, Congress should not have passed legislation[10] effectively nullifying the Supreme Court's holding in *Georgia v. Ashcroft*,[11] which allowed the unpacking of some majority-minority districts that did not dilute the electoral influence of minority voters.[12] Unfortunately, at the behest of interest groups and minority activists, Congress treated the *Georgia v. Ashcroft* decision as if it were as egregious as *Reno v. Bossier Parish School Board II*,[13] which requires the Department of Justice to approve proposed voting changes that have a clear discriminatory purpose. Congress could have addressed the problems with the latter decision by clarifying and imposing restrictions only on electoral configu-

8. The Senate approved the Reauthorization bill on July 20, 2006 before the Senate Judiciary Committee released its Committee Report on July 26, 2006. *See* S. REP. No. 109-295, at 2 (2006) (Conf. Rep.). According to Rule XVII.5 of the Standing Rules of the Senate, any measure reported to the Senate by any standing committee cannot be taken up on the floor "unless the report of that committee upon that measure or matter has been available to Members for at least two calendar days." Standing Rules of the Senate, Rule XVII.5, *available at* http://www.senate.gov/legislative/common/briefing/Standing_Rules_Senate.htm. This requirement may only be waived by joint agreement of the Majority and Minority Leaders. *Id.*

9. Section 5 requires covered jurisdictions to get preclearance from the Attorney General's Office or the United States District Court for the District of Columbia. The covered jurisdictions include nine states, fifty-four counties, and twelve municipalities or townships. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965).

10. *See* Pub. L. No. 109-246, § 2, 120 Stat. 577 (2006).

11. 539 U.S. 461 (2003).

12. A majority-minority district is a compact, geographical political unit where one or more minority racial or ethnic groups constitute the majority of the voting-age population.

13. 528 U.S. 320 (1999).

rations designed with a discriminatory purpose.

II. THE BILL WAS FLAWED IN ITS HANDLING OF THE "PRECLEARANCE" PROVISION

The preclearance provision of the Voting Rights Act requires "covered" jurisdictions to get prior approval for every voting-related change—no matter how minor—from the U.S. Attorney General or the U.S. District Court for the District of Columbia before action is taken.[14] It was a missed opportunity that the Reauthorization bill failed to modify the preclearance provision to make "bailout" easier for covered jurisdictions where violations have ceased or have dramatically decreased. An easier bailout procedure would have rewarded states and localities that have established histories of compliance and sensitivity to the needs of voters. Moreover, the bill did not extend protections to voters in non-covered jurisdictions where some of the most flagrant violations have taken place and where such violations are likely to continue in the absence of national uniform voting rights.[15] Only a small fraction of covered jurisdictions have been found guilty of unconstitutional voter discrimination, and in about half of these cases, white voters were among the victims.[16] In fact, a study conducted by the American Civil Liberties Union (ACLU) that examined 293 cases brought since 1982 found only six cases in which jurisdictions were found to have committed unconstitutional discrimination against minority voters.[17] Another six cases ended in a finding that a covered jurisdiction had committed unconstitutional discrimination against white voters.[18] Four cases in non-covered jurisdictions found unconstitutional voting practices against minority voters and one against white or majority voters.[19] Currently, uncovered jurisdictions are capable of committing unconstitutional voting rights violations without the kinds of protections offered to voters in areas covered by Section 5.

Edward Blum has argued that:

> If the [discrimination] problems that remain are national in scope, then the focus on only particular jurisdictions makes no policy sense and aggravates federalism concerns. If the problems remain regional or remain only in even

14. 42 U.S.C.S. § 1973c(a) (LexisNexis 2006).

15. For more information, please see Ellen Katz et al., *Documenting Discrimination In Voting: Judicial Findings Under Section 2 of The Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643 (2006), which includes an analysis of 331 lawsuits brought under Section 2 since the Voting Rights Act. See also the ACLU's 867 page report, *The Case for Extending and Amending the Voting Rights Act, available at* http://renewthevra.civilrights.org/resources/details.cfm?id=41190, which examines 293 ACLU cases brought in 31 states since June 1982.

16. *Reauthorization of the Voting Rights Act: Policy Perspectives and Views from the Field: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Sen. Comm. on the Judiciary*, 109th Cong. __ (2006) [hereinafter *Hearings*] (testimony of Carol Swain, Professor of Political Science and Law, Vanderbilt University).

17. *Id.*

18. *Id.*

19. *Id.*; *see also* 152 CONG. REC. S. 7949, S. 7952 (daily ed. July 20, 2006).

> more widely scattered jurisdictions, then applying the statute's preclearance provisions where they are no longer justified also aggravates federalism concerns.[20]

Unconstitutional violations of voting rights have occurred in uncovered jurisdictions that include parts of California,[21] Florida,[22] Hawaii,[23] Tennessee,[24] and Pennsylvania.[25] Section 5 does not address a number of recent issues, including hanging chads in Florida,[26] long voter lines in Ohio,[27] an inadequate number of polling stations in Wisconsin,[28] and outmoded voting equipment in minority sections of various communities.[29] One obvious solution to the aforementioned problems would have been to modify the legislation and find a constitutional way to extend the preclearance provision to the areas of the nation where discrimination occurs. At the same time, bailout should be easier for covered jurisdictions where minorities have high rates of voter participation and there is no documented evidence of recent voter discrimination.

According to Richard Pildes, the pattern of voting rights violations suggests a need for national uniform voting legislation, like the 2002 Help America Vote Act (HAVA)[30] and the 1993 National Voter Registration Act (NVRA),[31] both of which operate under a philosophy different from the current voting rights

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20. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 38 (2005) (statement of Edward Blum, Visiting Fellow, American Enterprise Institute).

21. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990); Ellen Katz et al., *supra* note 15, at 690.

22. McMillan v. Escambia County, 748 F.2d 1037 (11th Cir. 1984).

23. Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002).

24. Brown v. Chattanooga Bd. of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989).

25. Marks v. Stinson, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994).

26. Richard H. Pildes, The *Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. (forthcoming 2006) (manuscript at 13, on file with the Georgetown Journal of Law and Public Policy); *see* Bush v. Gore, 531 U.S. 98 (2000); Dana Milbank, *2 Systems, 1 Punch Problem: "Chads" Likelier in Democratic Areas*, WASH. POST, November 17, 2000, at A27; *The California Recall: Excerpts From Ruling by Three-Judge Panel on California's Recall Election*, N.Y. TIMES, September 16, 2003, at A20.

27. Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO .WASH. L. REV. 1206, 1220-39 (2005); Adam Liptak, *In Making His Decision on Ohio, Kerry Did the Math*, N.Y. TIMES, November 4, 2004, at § P10.

28. Election Protection 2004, *Wisconsin: Lines and Late Openings Hinder Voting*, Nov. 2, 2004, http://www.google.com/search?q=cache:JNZNqC4CF0EJ:www.electionprotection2004.org/archives/cat_polling_place_problems.html+Inadequate+Polling+Stations+%2BWisconsin&hl=en&gl=us&ct=clnk&cd=4.

29. Richard Morin, *The Voting Technology Gap*, WASH. POST, January 28, 2001, at B05, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A54449-2001Jan27; David Paul Kuhn, *Skepticism at the Polls*, CBS NEWS, November 1, 2004, http://www.cbsnews.com/stories/2004/11/01/politics/main652748.shtml.

30. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amendments to 42 U.S.C. § 15301 et seq. (2002)).

31. Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg (2000)).

model.[32] Both Acts offer a paradigm shift from the traditional voting rights legislation by protecting the act of voting itself.[33] Congress enacted HAVA in the aftermath of the 2000 presidential election.[34] Applied uniformly nationwide, the Act ensures voters the right to cast a provisional ballot, requires statewide registration databases, and offers financial incentives for jurisdictions with improved voting technology.[35] Similarly, the NVRA was enacted to protect voter registration practices nationwide, as opposed to targeting selective geographic regions.[36] By working with scholars and activists, members of Congress could have modified the VRA to address a number of real voting rights restrictions that operate nationally.

The enactment of national voting rights legislation and a more streamlined bailout provision would also address concerns about the Reauthorization bill's constitutionality. Professor Samuel Issacharoff and others question whether it could survive Supreme Court scrutiny, especially the "congruence and proportionality" test applied in *City of Boerne v. Flores*,[37] which demands a relationship between where violations occur and the reach of legislation designed to address the problem.[38]

The decision to renew the bill without making the necessary modifications came as a result of the Senate's desire to act quickly.[39] The Senate undoubtedly felt the pressure exerted by outspoken black members of Congress and various interest groups who rallied for the renewal of the Act. Mel Watt (D-NC), Chairman of the Congressional Black Caucus (CBC), negotiated with the Republican leadership on numerous occasions for a bill with no amendments.[40] Additionally, the executive director of the NAACP Washington Bureau played a significant role in the drafting and lobbying of the bill.[41] Black civil rights leaders ensured that the passage of the bill remained a top priority for the Bush Administration. Minister Louis Farrakhan sought to organize another Million

32. Pildes, *supra* note 26, at 2.

33. *Id.*

34. *Id.* at 4.

35. *Id.* at 5.

36. *Id.*

37. 521 U.S. 507 (1997).

38. For more detail, *see TIME CHANGE: An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Samuel Issacharoff, New York University School of Law); Richard L. Hansen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177 (2005) (offering a slightly different perspective).

39. Adam Nagourney, *National Briefing Washington: Bush Plans to Speak To N.A.A.C.P.*, N.Y. TIMES, July 15, 2006, at A5; Mike Allen, *A Push to Extend Voting Rights Act: Rep. Sensenbrenner Tells NAACP He Will Work to Renew Provisions of Law*, WASH. POST, July 10, 2005, at A05; Hazel Trice Edney, *Black Leaders forced Congress to Act on Voting Rights Law*, NEW PITTSBURGH COURIER Jul. 26-Aug. 1, 2006, Vol. 97, Iss. 30, A1, A5 (Civil rights leaders and black members of Congress organized letter-writing campaigns, visits to Capitol Hill, and challenged the Republican leadership in the House not to cave into the demands of their conservative colleagues).

40. Edney, *supra* note 39.

41. *Id.*

Man March, and Reverend Jesse Jackson led a march in Atlanta for the reauthorization and protection of voters' rights.[42] In fact, in an unusual show of bi-partisanship, Republican and Democratic leaders held a press conference vowing to extend expiring sections of the Voting Rights Act.[43]

More comprehensive legislation might have resulted from the collective efforts of concerned scholars, activists, and lawmakers working together diligently for the greater good. There is no justification, other than politics and symbolism, for the rush to renew the legislation more than a year in advance of Section 5's expiration.

III. THE REAUTHORIZATION BILL UNWISELY OVERTURNS *GEORGIA V. ASHCROFT*

As I stated earlier, I believe that *Georgia v. Ashcroft*[44] was a good decision that would have benefited minority voters by making it easier for them to elect a slate of politicians who shared their policy views. *Ashcroft* gave legislators an opportunity to craft districts that enhanced the electoral prospects of Democrats rather than focusing on the reelection prospects of minority incumbents,[45] and it empowered minority voters by acknowledging the changes that had taken place in race relations across the South and particularly in Georgia.[46]

In *Black Faces, Black Interests: The Representation of African Americans in Congress*,[47] I argued that the interests of politicians are not always congruent with the interests of their constituents. Simply put, what serves the reelection needs of black Democrats and white Republicans does not necessarily advance the interest of the public. Black Democrats desire safe, non-competitive seats in majority-minority districts, whereas white Republicans prefer districts where voters are more amenable to conservative appeals—in other words, mostly white districts, as blacks vote overwhelmingly Democratic. *Ashcroft* threatens to create a measure of uncertainty for politicians in both parties. Indeed, Professor David Mayhew has argued that politicians are single-minded seekers of reelection.[48] As such, they have a vested interest in creating systems and structures that facilitate the predictable attainment of their reelection goals.

Of course, politicians can rise above narrow self-interest. The black Democrats in Georgia who testified in favor of unpacking majority-minority districts placed the interests of their party and their constituents above their own desire

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42. Maudlyne Ihejirika, *Jackson, Farrakhan to lead voting rights marches*, CHI. SUN-TIMES, Apr. 3, 2005, at 15.

43. *Id.*

44. 539 U.S. 461 (2003).

45. *Id.* at 465, 498 n.1 (citing Beer v. United States, 425 U.S. 130, 141 (1976) (defining a voting procedure change with a discriminatory purpose as one that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.")); *see also* 42 U.S.C.S. § 1973c (LexisNexis 2006).

46. *Ashcroft*, 539 U.S. at 472.

47. CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF BLACKS IN CONGRESS (reprint ed. University Press of America 2006).

48. DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

to have safe, non-competitive districts.[49] Politicians are often self-interested. Allowing incumbents to demand and retain secure sinecures for as long as they wish to remain in office does not make for effective representation. Unfortunately, some of the black politicians who supported the unpacking of the majority-minority districts—Georgia Representative John Lewis, for example—later changed their minds.[50] Lewis became part of the CBC coalition lobbying for the Congress to overturn *Ashcroft*.[51]

Ashcroft is especially important because the Supreme Court seemingly applied a Section 2 "totality of circumstances" test to a set of factors that in the past seemed straightforward.[52] The Court ruled in favor of allowing politicians greater latitude to create influence and coalitional districts by unpacking and dispersing minority voters in what had been relatively safe majority districts.[53] By doing so, the Court changed the non-retrogression standard developed and applied in *Beer v. United States* [54] and other voting rights cases.[55] That standard had been interpreted to mean that localities and states had to protect existing minority electoral gains and could not take actions that would decrease the percentage of minority voters in majority-minority districts. Their aim was to increase the number of Democrats in office.

The core issue in *Ashcroft* was a plan devised by Georgia state legislators that reallocated black voters away from districts with either especially high or especially low levels of black voting-age population (BVAP) in order to create more "influence districts" (districts in the 25-50% BVAP range).[56] In upholding the plan, the Supreme Court allowed states to pursue substantive representation, even if it came at a cost to descriptive representation.[57] *Ashcroft* was a good decision because it allowed for the creation of more opportunities for minorities to form coalitions and exert influence on politicians outside their own racial and ethnic groups. Most importantly, the unpacking of majority-minority districts in traditionally Democratic districts does not bar the election of qualified minority

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49. *Ashcroft*, 539 U.S. at 469, 471.

50. *See* Jonathan Tilove, *Politics of voting in South reshaped; 1965 law: The debate over minority voting districts has put members of both parties in unusual and difficult positions*, BALTIMORE SUN, August 7, 2005, at 1C.

51. *See id.*

52. *See Ashcroft*, 539 U.S. at 463, 480; *see also*, Thornburg v. Gingles, 478 U.S. 30, 47 (1986); Johnson v. DeGrandy, 512 U.S. 997 (1994). For the list of factors, see S. REP. NO. 97-417, at 28-29 (1982).

53. For more information, see *Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard: Hearing Before the H. Comm. on the Judiciary*, 109th Cong. __ (2006) (testimony of Laughlin McDonald, Director of the Voting Rights Project and Director of the American Civil Liberties Union); Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265 (2005).

54. 425 U.S. 130 (1976).

55. *See Ashcroft*, 539 U.S. at 482; *see also Gingles*, 478 U.S. 30 (1986); *Modern Enforcement of the Voting Rights Act: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. __ (2006) (testimony of Frank B. Strickland, Esq., Partner, Strickland, Brockington Lewis).

56. 539 U.S. at 470.

57. *Id.* at 481.

politicians, who have proven again and again their abilities to garner white crossover votes.[58]

Some scholars suggest that the renewal of the Voting Rights Act ensures that minority voters will be better represented in the political process by members of their own groups.[59] But this does not guarantee better representation. In fact, there is a real trade-off between descriptive representation (more black faces in office) and substantive representation (more people in legislatures to form coalitions and vote for their preferred political agendas).[60] For the latter, political party is far more important than the race of the representative. As long as blacks hold the views they do, they will best be represented by the election of more Democrats to office. This might change, however, if blacks are disbursed strategically so that they can affect more legislators. Packing minority voters in 50-plus-1-percent voting-age districts can waste black votes and black influence. All voters are better off when they have more people in office who support their legislative agendas. In *Black Faces, Black Interests*, I highlighted the trade-off between descriptive and substantive representation.[61]

As of 2001, forty African Americans held a statewide elective office.[62] This increase is a reflection of black officials' ability to campaign successfully in non-majority-minority districts.[63] Examples of African Americans who have been elected in majority white districts can be found at many levels of government. In the U.S. House, for example, Julia Carson (D-IN), won an open seat in a district that was 69% white.[64] Emmanuel Cleaver (D-MO) was elected in a district that was 66% white.[65] Similarly, black representatives like Barbara Lee (D-CA) and Maxine Waters (D-CA) have been elected into office from districts where the black voting-age population was less than 30%.[66] There are many other successes, including former Virginia Governor Douglas Wilder, Senators Carol Moseley Braun (D-IL), and Barack Obama (D-IL). Their victories lend support to the argument that race is no longer an insurmountable barrier to the election of qualified candidates running in statewide elections. Today it seems that the high cost of elections and the inability to raise campaign funds may be a

58. SWAIN, supra note 47; Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress*?, 90 AM. POL. SCI. REV. 794, 808-810 (1996).

59. SWAIN, *supra* note 47, at 179 n.29.

60. SWAIN, *supra* note 47.

61. *Id.*

62. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY (2001). For more details, see THE NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 38 (February 2006).

63. *See* BOSITIS, *supra* note 62, at 13. Table 1 shows an increase of 61, or 0.7 percent, over the 2000 data.

64. *Hearings, supra* note 16 (testimony of Prof. David Canon, Dept. of Political Science, University of Wisconsin, Madison). For additional examples, see SWAIN, *supra* note 47, at 117, Table 6.1 (featuring black representatives of majority-white districts).

65. *See Hearings, supra* note 16.

66. BOSITIS, supra note 62, at Table 9.

major factor in keeping qualified black candidates out of office.[67]

Further supporting evidence comes from the state of Georgia, where the number of black elected officials continues to rise.[68] Georgia congressional races over the last fifteen years show African American candidates pulling 30% or more of the white vote and 90% or more of the black vote.[69] Georgia has thirty-four statewide elected officials,[70] nine of whom are African American and who each won their elections with substantial white support.[71] It is not far-fetched to conclude that the white southerners who remain in the Democratic Party of the New South have resolved their issues with blacks.[72]

The 2006 elections provide reason for optimism. Some people have argued that the defeat of Harold Ford, Jr. in his quest to become the first black senator from the South since Reconstruction is evidence of the inability of a black candidate to win votes from white voters.[73] It is evidence of no such thing. The final vote in the Ford/Corker race was 51 to 48 percent.[74] What is remarkable is that Ford lost his bid by a mere three points in the Republican-leaning state of Tennessee. Despite the subtle injection of race into some of the campaign advertisements, Ford did well despite his youth and his singleness.[75] The closeness of the Ford/Corker race called into question whether the so-called Bradley effect, in which white voters overstate their support for black candidates in biracial contests was operative in the Tennessee race.[76] The final outcome was very similar to what the pollsters registered among white voters who said that they intended to vote for Harold Ford.[77]

Critics who challenge the notion that white voters will continue to support African American candidates call the successes of Senator Obama and others

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67. GARY J. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 42-47 (Pearson and Longman eds., 6th ed. 2004).

68. *Id.* at 6; *see* CHARLES BULLOCK, III & RONALD GADDIE, AN ASSESSMENT OF VOTING RIGHTS PROGRESS IN GEORGIA (2005). This report was prepared for the American Enterprise Institute.

69. For more detail, see *Oversight Hearing on the Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearings before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Edward Blum, Visiting Fellow at the American Enterprise Institute).

70. *See* Georgia Gov't Page, http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-1379; BOSITIS, *supra* note 62, at 5 (In 2001, Georgia was one of ten states with the highest number of black elected officials with 611.).

71. White support for black candidates in Georgia today is higher than black support for white office-seekers. *See* BULLOCK & GADDIE, *supra* note 68, at 26. In the four most recent elections, black candidates running statewide had a success rate of 71%, while the white rate was only 41%. *Id.* at 30.

72. *See generally* THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (2d ed. 1992) (discussing racial issues with regard to party identification).

73. *See* Steve Kornacki, *Harold Ford*, THE POLITICKER, *available at* http://thepoliticker.observer.com/2006/11/harold-ford.html (last visited November 14, 2006).

74. Brian DeBose, *Corker defeats Ford, wins Senate seat*, WASH. TIMES, November 8, 2006, at A13.

75. *See* Bob Herbert, *Ms. Speaker And Other Trends*, N.Y. TIMES, November 8, 2006, at A6.

76. *See id.*

77. *See id.*

anomalies that resulted from unusual circumstances.[78] For example, David Canon reports that "in the 8,047 House elections in white-majority districts between 1966 and 2004 (including special elections), only 49 (0.61%) were won by blacks."[79] Conversely, Canon notes that "85.6% of elections in black-majority House districts between 1966 and 2004 have produced black representatives—including all elections since 2002."[80] However, factors other than race could account for these numbers. For example, the number of African Americans who actually have run in majority white districts is small.[81] Furthermore, the cost of campaigns and the fact that most black Democrats are more liberal than white voters may also contribute to the statistical disparity.[82]

The changing social fabric of the United States has produced many ethnically and racially diverse districts. These advances make the creation of new majority-minority districts very difficult. These districts are usually drawn to guarantee the election of a politician from a particular racial or ethnic background. In past decades, majority-minority districts were instrumental in the increase of black elected officials across the nation. Now, however, there are a very limited number of geographical areas where *new* districts with black majorities can be drawn. If blacks are going to continue to grow in legislative bodies, they will have to be elected in majority-minority and majority-white districts.

The packing of minority voters into majority-minority districts often comes with a cost: minority voters' influence is significantly diluted as a result of the creation of these districts. Majority-minority districts can insulate minority elected officials from electoral competition without necessarily increasing the substantive representation of their constituents. Minority voters are best served when there are more members of their preferred party in office to support their policy agendas.

IV. CONCLUSION

In passing a watered-down piece of legislation, the Senate missed a critical opportunity to truly strengthen Section 5 of the Voting Rights Act and protect voters against voting rights violations on a national scale. Had the Senate been less concerned with interest group pressure and political symbolism and more concerned with addressing voting violations, it would have been able to act as a deliberative body and create legislation more in line with the needs of the people. Instead, Congress failed to modify and strengthen the bill to ensure that its twenty-five-year extension protected all voters facing discrimination and inadequate representation.

78. *Hearings, supra* note 16 (statement of Prof. David Canon, Political Science, University of Wisconsin, Madison).

79. *Id.*

80. *Id.*

81. *See generally* SWAIN, *supra* note 47.

82. *See generally* EDSALL & EDSALL, *supra* note 72.

The Reauthorization bill does not serve national interests, the interests of minority voters, or the legacy of the civil rights leaders for whom the legislation is so aptly named. The proper response would have been for the Senate to withstand the interest group pressure and delay action until Congress had sufficient time to draft legislation adequate for the task at hand—protecting the rights of all Americans while providing states and localities with incentives to comply with a national law.