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## The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination

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## THE CONTINUED NEED FOR THE VOTING RIGHTS ACT: EXAMINING SECOND-GENERATION DISCRIMINATION

JENIGH J. GARRETT\*

*We have a way in America of wanting to be 'rid' of problems. It is not so much a desire to reach the best and largest solution as it is to clean the board and start a new game . . . . [To] not want to solve it, [to] not want to understand it, [to] want simply to be done with it and hear the last of it. [This is the worst] of all possible attitudes . . . .*<sup>1</sup>

### I. INTRODUCTION

The Voting Rights Act of 1965 dramatically changed America's political process. Racial diversity in Congress has substantially increased and the country elected the first Black President of the United States in 2008. According to some, President Obama's election provides convincing evidence that America is now in a post-racial political era. With discrimination in the area of voting a thing of the past, the argument goes, Section 5 of the Voting Rights Act—which requires federal review of voting changes in certain jurisdictions before they become law—is an antiquated remedy to a nonexistent problem.<sup>2</sup>

The 2006 reauthorization of Section 5 of the Voting Rights Act, however, revealed that “a bleaker side of the picture . . . exists” despite the success of the Voting Rights Act.<sup>3</sup> In over 16,000 pages of evidence supporting the reauthorization of Section 5, Congress learned that minorities in Section 5-covered jurisdictions continue to face voting hurdles enacted with either a discriminatory intent or effect. When the congressional record in support of

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1. W.E.B. DuBois, *The Color Line Belts the World*, COLLIER'S: THE NAT'L WKLY, Oct. 20, 1906, at 30.

2. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., concurring in part & dissenting in part).

3. See *City of Rome v. United States*, 446 U.S. 156, 180 (1980).

the 2006 reauthorization closed, the evidence and testimony showed that Section 5 continues to be not only the heart of the Voting Rights Act, but one of the most effective measures to prevent discrimination in voting.

Notwithstanding the actual evidence of discrimination in the 2006 reauthorization record, the argument that America is post-racial and, therefore, post-Section 5 of the Voting Rights Act was one aspect of Appellant's opening Supreme Court brief in *Northwest Austin Municipal Utility District Number One v. Holder* (hereinafter "NAMUDNO"),<sup>4</sup> the first constitutional challenge to Section 5 of the Voting Rights Act after its 2006 reauthorization. Plaintiff argued, among other things, that the election of President Obama was evidence that discrimination is a thing of the past and the evidence of discrimination in the 2006 Voting Rights Act reauthorization record did not support congressional reauthorization.<sup>5</sup>

NAMUDNO boldly placed Congress's ability to function within its express constitutional authority before the Court and anticipated that the Court would overturn the 2006 reauthorization.

In an 8-1 opinion, however, the Supreme Court avoided the constitutional question by ruling that a political sub-unit could seek exemption from the requirements of Section 5 under the Act's bailout provisions.<sup>6</sup> The ruling was a victory for the Act. But dicta in both the majority and dissenting opinions reiterated constitutional concerns articulated by those who opposed the 2006 reauthorization of the Act.<sup>7</sup>

With little in the opinion preventing future constitutional challenges, covered jurisdictions quickly responded. A little over a year after the Court issued its ruling three separate jurisdictions (Alabama, Georgia, and North Carolina) filed cases challenging Section 5's constitutionality. These cases have relied on some of the same assumptions and arguments raised in NAMUDNO: the evidence of second-generation discrimination in the 2006 record of reauthorization—voting barriers that do not bar minorities from the political process in a wholesale way but prevents the full participation of minorities in the political process—cannot withstand constitutional scrutiny.

The 2006 congressional record in support of reauthorization, however, evidenced the opposite. Section 5 has worked against voting discrimination, including second-generation barriers, in covered jurisdictions since the 1982 reauthorization. Over the course of more than ten hearings Congress analyzed and reviewed evidence of discrimination in voting from 1982-2006. The evidence and testimony in support of reauthorization revealed that

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4. See Appellant's Brief at 1-13, *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. 2504 (No. 08-322).

5. See *id.* at 1.

6. *Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2513, 2516-17.

7. *Id.* at 2512, 2525.

notwithstanding the success of some minority candidates from covered jurisdictions, second-generation barriers continue to prevent the full promise of the Voting Rights Act and Section 5 continues to be the most effective preventative measure against racial discrimination in voting.<sup>8</sup>

This article challenges the assertion that second-generation discrimination does not evidence the continued need for Section 5. Part II examines the mechanics of the Voting Rights Act and Section 5 in particular. Part III examines how second-generation barriers harm minorities. Part IV reviews examples of persistent second-generation discriminatory barriers in the 2006 reauthorization record and previous reauthorization records. Part V concludes that Congress was within its authority when it determined that second-generation barriers continued to persistently harm minority voters in Section 5 covered jurisdictions.

## II. THE MECHANICS OF THE VOTING RIGHTS ACT

The Voting Rights Act is complex legislation with interacting measures for combating discrimination against minority voters.<sup>9</sup> The Section 5 preclearance requirement is a tailored remedy designed to address the persistent nature of voting discrimination in covered jurisdictions. Section 5 requires all or part of sixteen states to submit all proposed changes to any voting practice or procedure to the United States Attorney General or the United States District Court for the District of Columbia for preclearance before the voting change can become law:

Whenever a State or political subdivision . . . shall *enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . .* such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification . . . neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color . . . [or] . . . such qualification, prerequisite, standard, practice or procedure may be enforced without such [court] proceeding if the . . . procedure has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . .<sup>10</sup>

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8. Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(2), 120 Stat. 577.

9. Among other things, the Act bans literacy tests in covered jurisdictions, prohibits discrimination that has the intent or effect of denying or abridging the right to vote nationwide, authorized federal examiners to conduct voter registration, and authorizes the Attorney General to assign persons who may be federal officers to observe how elections are conducted and report their observations to the Attorney General of the United States. Voting Rights Act of 1965, 42 U.S.C. §§ 1973(a)-(b), 1973a(b), 1973b, 1973e (repealed June 27, 2006), 1973f (2006).

10. 42 U.S.C. § 1973(c) (2006) (emphasis added).

The language of the Act is flexible and applies to a broad range of discriminatory mechanisms.<sup>11</sup> The Act is not concerned with a “simple inventory of voting procedures but the reality of changed practices as they affect Black voters” in subtle and obvious ways.<sup>12</sup>

### III. UNDERSTANDING HOW SECOND-GENERATION DISCRIMINATORY BARRIERS HARM MINORITY VOTERS

Section 5 applies to both first and second-generation barriers. First-generation barriers are discriminatory stratagems that result in the wholesale exclusion of minorities from the political process.<sup>13</sup> Second-generation barriers, on the other hand, allow formal access to the franchise but dilute minority voting strength by limiting the effect that minority votes could have on the political process.<sup>14</sup> Second-generation discriminatory barriers are often more sophisticated than the facially discriminatory mechanisms that preceded them.<sup>15</sup> Nonetheless, the minority voting experience in covered jurisdictions

11. The Act reaches a wide range of laws that can subvert the effect of the Voting Rights Act in covered jurisdictions. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). The actions of the Mississippi legislature provide one example of how states were determined to control the impact of federal laws regulating voting as a direct reaction to the registration requirements of the Voting Rights Act. *See* U.S. COMM’N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 21 (1968). In 1966, one year after the Act’s enactment, the Mississippi legislature introduced approximately 30 bills relating to elections or the political process in regular and special sessions of the Mississippi legislature. *Id.* at 22. One statute approved by the legislature allowed voters to decide, by petition, if members of county boards of education would be elected at-large when the 1965 practice was the election of countywide representatives from five districts. *Id.* Another statute provided that members of the county governing body, which were elected from five single member districts, could exercise a local option and elect members of the county governing body at large. *Id.* Most sponsors of the bill were from counties where the majority population of at least one district, or the entire county, was Black. *Id.*; *see also* *Kennedy v. Lynd*, 306 F.2d 222, 227–31 (5th Cir. 1962) (discussing the subversion of federal voting laws before Section 5’s enactment).

12. *See Allen*, 393 U.S. at 565; *Perkins v. Matthews*, 400 U.S. 379, 388 (1971); *Georgia v. United States*, 411 U.S. 526, 531 (1973).

13. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS* 3 (2004); *see also* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 183–84 (1989).

14. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (“[F]irst generation [barriers are] direct impediments to electoral participation [and include] registration and voting barriers. Once [first generation] obstacles were surmounted . . . the focus shifted to second-generation, indirect structural barriers such as at large, vote-diluting elections.”).

15. *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 552–53 (1973). In addition, testimony before Congress during the 1970 reauthorization showed that jurisdictions quickly adopted second-generation barriers once the Voting Rights Act became law. *See Voting Rights Act Extension: Hearing on H.R. 4249 and H.R. 5538 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 255 (1970) (statement of Clarence

shows how both the wholesale exclusion of voters and second-generation barriers achieve the same discriminatory result.<sup>16</sup>

A. *Second Generation Barriers Prevent Minorities from Electing Their Candidates of Choice*

Secondary barriers are discriminatory because minorities are unable to recognize their voting strength even though they are allowed formal access to the political process.<sup>17</sup> What constitutes a second-generation barrier is broad<sup>18</sup>

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Mitchell, Wash. Ass'n of the NAACP) ("Immediately after passage of the 1965 Voting Rights Act the Mississippi Legislature . . . passed twelve bills and resolutions which substantially altered the state's election laws. Alabama, Louisiana, Mississippi and South Carolina have all resorted to various devices to slow down [or] prevent registration, voting and election to public office. These devices include abolishing offices, switching to so-called 'at large elections,' consolidation of counties, 'full slate voting,' barring or intimidating poll watchers and giving misleading information to would-be voters.").

16. The wholesale nature of first-generation discrimination creates an absolute barrier to formal participation at the first stage of the political process. See Karlan, *supra* note 13, at 183–84. Until the enactment of the Voting Rights Act, first-generation barriers were successfully used to bar minority access to the political process, notwithstanding the Civil Rights Act of 1957, 1960, and 1964. *Voting Rights Act: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 14 (1965) (statement of Stanley Katzenbach, Att'y Gen. of the United States) ("In almost any other field, once the basic law is enacted by Congress and its constitutionality is upheld, those subject to it, accept it. In this field, however, the battle must be fought again and again in county after county."). When the Voting Rights Act outlawed first-generation discriminatory barriers to registration by requiring the registration of voters under federal law, second-generation barriers were enacted in response. See *Voting Rights Act Extension: Hearing on H.R. 4249 and H.R. 5538, supra* note 15, at 194 (statement of Vernon Jordan, Director, Voter Education Project, Southern Regional Council to the National Liberties Clearinghouse) (describing voting changes related to residency requirements, registration deadlines, hours for registration, and the location of places for registration); *id.* at 255 (statement of Clarence Mitchell, Wash. Ass'n of the NAACP) (noting in 1967, the Virginia State Conference of the NAACP did a statewide check regarding registration conditions. They found that "[i]nsufficient time to register and inconvenience of the place of registration were the most common complaints. In Lancaster County it was necessary to make an appointment to register. In Southampton County registration was on Thursdays only. In Halifax County the registration dates were set at the 'convenience of the registrar.'" In another county, a registrar left to go play golf). Second-generation barriers continued to hinder the registration of minority voters between 1982 and 2006. See, e.g., *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. 299–301 (2006) (Baldwin County, AL) (purge and reidentification of voters); *id.* at 712–715 (State of Georgia) (reduction of the minimum number of permanent satellite voter registration locations to be established by certain counties and the elimination of satellite registration during 18 months of the state's two year election cycle); *id.* at 1599–1605 (State of Mississippi) (administrative plan for implementation of National Voter Registration Act of 1993 (NVRA)).

17. See Derfner, *supra* note 15, at 524, 553–57 (listing examples of second-generation barriers); see also Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–39 (1992).

and includes straightforward barriers, like moving a polling place,<sup>19</sup> to the complex manipulation of district lines. Whether straightforward or complex, however, second-generation barriers can “render the abstract right to vote meaningless” because the elective structure that should allow for fair participation in the political process prevents it.<sup>20</sup>

During previous reauthorizations, Congress received evidence and testimony revealing that both blatant and subtly effective discriminatory mechanisms impacted the minority voting experience in covered jurisdictions. Changes impacting the adoption or application of aggregate voting structures, for instance, became one of the most frequently used second-generation responses to the requirements of the Voting Rights Act.<sup>21</sup> Aggregate voting structures allow populations to collectively exercise their political power and determine the outcome of an election.<sup>22</sup> Several second-generation barriers, however, serve to limit the collective impact of the choices minority voters make at the voting booth when aggregating their votes. These barriers include the creation of discriminatory electoral districts,<sup>23</sup> adopting a majority vote requirement when elections are held at-large,<sup>24</sup> annexations,<sup>25</sup> and anti-single shot voting laws.<sup>26</sup>

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18. Even changes concerning the eligibility of candidates and ministerial acts such as changes to election schedules and filing periods can prevent minorities from electing a candidate of choice in a discriminatory manner. *See* *Hadnott v. Amos*, 394 U.S. 358, 364 (1969); *NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 174–181 (1985); *see also* WASHINGTON RESEARCH PROJECT, *THE SHAMEFUL BLIGHT: THE SURVIVAL OF DISCRIMINATION IN VOTING IN THE SOUTH* 140 (1972). In 1966, only one year after the enactment of Section 5, the Mississippi legislature proposed a change that increased the requirements for qualifying as an independent candidate. *Id.* Specifically the number of signatures required to qualify for a statewide office increased from 1,000 to 10,000. *Id.* When the change was submitted for preclearance the Attorney General objected. *Id.*

19. *Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (finding that a seemingly innocuous change, such as the location of a polling place, can be used to prevent access to the franchise notwithstanding the registration of voters because “accessibility, prominence, facilities, and prior notice of the polling place’s location” affect a person’s ability to vote on Election Day).

20. *See id.*; STEVEN F. LAWSON, *IN PURSUIT OF POWER: SOUTHERN BLACKS & ELECTORAL POLITICS 1965-1982* at 217 (1985) (finding second-generation barriers render the vote “relatively useless, because of the way the rules of the game are rigged . . .”) (citations omitted).

21. *See* Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1724 n.83 (1992-1993).

22. *Id.* at 1712–13.

23. *See* Stanley A. Haplin Jr. & Richard L. Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act*, 22 J. PUB. L. 37, 42–49 (1973).

24. DAVID HUNTER, *FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT* 38–39 (1974), *reprinted in* *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3427, and H.R. 350 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 1510–1511 (1975); *see also* *Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional*

The record evidence of both the use and impact of second-generation barriers during the 25 years since the 1982 reauthorization led Congress to conclude that racial discrimination in voting continued to prevent the equal participation of minorities in the political process in covered jurisdictions.<sup>27</sup> Moreover, the testimony and evidence during the 2006 reauthorization revealed that minorities in covered jurisdictions were subject to second-generation electoral structures that enhanced discrimination against minority voters at a higher rate than voters in non-covered jurisdictions.<sup>28</sup>

*B. The NAMUDNO Dissent Failed to Recognize Second-Generation Barriers and How They Obstruct Democracy*

The dissenting opinion in *NAMUDNO* argued that the evidence of second-generation discrimination in the 2006 congressional record was insufficient to support the reauthorization of Section 5. According to the dissent, the days of grandfather clauses, discriminatory tests, and systematic campaigns to disfranchise Blacks “are gone.”<sup>29</sup> Covered jurisdictions, the dissent continued, do not make a “concerted effort” to defy the Constitution in an “unremitting and ingenious” manner.<sup>30</sup> As a result, Section 5 is nothing more than “[p]unishment for long past sins . . . [with no] legitimate basis for imposing a forward-looking preventative measure that has already served its purpose.”<sup>31</sup>

The dissent attacked second-generation barriers directly and argued that evidence of “second-generation barriers constructed to prevent minority

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*Rights of the H. Comm. on the Judiciary*, 97th Cong. 594 (1982) (statement of Ed Brown, Dist. Coordinator for the NAACP, Camilla and Mitchell Cntys., Georgia) (noting Americus, Georgia, for instance, changed their voting system for mayoral and council elections from plurality to majority vote without submitting the change for preclearance. The majority vote requirement was implemented in the following two elections and used to exclude African Americans from office).

25. *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3427, and H.R. 350*, *supra* note 24, at 1513–15.

26. *Id.* at 1511.

27. The House Committee Report concluded that “voting changes devised by covered jurisdictions resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member district to at-large voting and implementing majority vote requirements.” H.R. Rep. No. 109-478, at 36 (2006).

28. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 974 (2005); see also Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, 39 U. MICH. J.L. REFORM 643, 655–56 (2006).

29. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., concurring in part & dissenting in part).

30. *Id.*

31. *Id.*

voters from fully participating in the electoral process . . . [was] not probative of the type of purposeful discrimination that prompted Congress to enact §5 in 1965 . . . [,] and is not a problem unique to the South.”<sup>32</sup>

Of importance is how the dissent redefines second-generation barriers as racially polarized voting, Section 5 enforcement actions (which are filed when covered jurisdictions fail to submit a voting change for preclearance), federal examiner and observer coverage, and lawsuits filed under §§ 2 and 4 of the Voting Rights Act.<sup>33</sup> The dissent goes on to state that “such evidence bears no resemblance to the record initially supporting Section 5, and is insufficient to sustain such an extraordinary remedy. In sum, evidence of second-generation barriers cannot compare to the prevalent and pervasive voting discrimination of the 1960s.”<sup>34</sup>

This characterization of the congressional records in support of the enactment and reauthorizations of the Voting Rights Act, however, does not reflect the history of the Voting Rights Act.<sup>35</sup> Covered jurisdictions responded to the enactment of the Voting Rights Act of 1965 by implementing second-generation barriers to voting.<sup>36</sup> While Congress anticipated the use of new measures to curtail minority voting strength after covered jurisdictions were required to register voters under federal law, the frequent use of second-generation discriminatory barriers led to numerous cases and significant testimony before Congress of their impact.<sup>37</sup> Second-generation barriers were, and continue to be, a direct reaction to the promise of the Voting Rights Act.<sup>38</sup>

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32. *Id.* at 2526.

33. *Id.*

34. *Id.*

35. *See supra* notes 15, 16, 18, 24.

36. Congress learned that covered jurisdictions barraged their electoral processes with measures designed to prevent newly registered Black voters from exercising the natural result of their voting strength after the enactment of the Voting Rights Act of 1965. The method of discrimination took “the form of switching to at-large elections where . . . voting strength is concentrated in particular election districts, facilitating the consolidation of . . . counties, and redrawing the lines of districts to divide concentrations of [Black] voting strength.” *Voting Rights Act Extension: Hearing on H.R. 4249 and H.R. 5538, supra* note 15, at 17 (statement of Howard A. Glickstein, Staff Dir., U.S. Comm’n on Civil Rights).

37. *See Perkins v. Matthews*, 400 U.S. 379, 390 n.8 (1971). While facially neutral, these mechanisms interacted with the history of discrimination in the United States and the race of the voter to deny or dilute the right to vote on account of race. *See Derfner, supra* note 15, at 523. During the 1970 extension one Congressman observed,

resistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where Blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed. Section 5 was intended to

#### IV. THE CONTINUED NEED FOR SECTION 5: EXAMINING CONTINUED SECOND-GENERATION DISCRIMINATION

The 2006 Voting Rights Act reauthorization revealed that the work of eliminating discrimination in voting remains undone. This section reviews the details of how actions in covered jurisdictions were discriminatory and how, over the course of three reauthorizations, second-generation discriminatory barriers were consistently used to prevent an equal opportunity for minorities to participate in the political process.

##### A. *Discriminatory Responses to Minority Voting Strength*

When population or registration increases or decreases threaten the racial composition of a governmental or political unit, voting changes can be designed to limit and control the political impact of those changes in a discriminatory manner. During the previous reauthorizations, Congress learned that covered jurisdictions reacted to the registration of Black voters and the impact of their voting strength by enacting second-generation discriminatory barriers. When Congress revisited conduct in covered jurisdictions in 2006, the evidence and testimony in support of reauthorization showed that such discriminatory changes persisted in covered jurisdictions. This section provides a sample of the record evidence of second-generation barriers amassed during the 1970, 1975, 1982, and 2006 reauthorizations of Section 5 and highlights how evidence of modified and familiar second-generation stratagems were boldly implemented and/or repeated.

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prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section . . . .

*Voting Rights Act Extension: Hearing on H.R. 4249 and H.R. 5538, supra* note 15, at 3–4 (statement of Rep. William McCulloch).

38. See generally U.S. COMM'N ON CIVIL RIGHTS, *supra* note 11, at 19–131; James Blacksher, Edward Still, Jon M. Greenbaum, Nick Quinton, Cullen Brown & Royal Dumas, *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008); James Thomas Tucker, Rodolfo Espino, Tara Brite, Shannon Conley, Ben Horowitz, Zak Walter & Shon Zelman, *Voting Rights in Arizona: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 283 (2008); Robert A. Kengle, *Voting Rights in Georgia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 367 (2008); Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 413 (2008); Robert McDuff, *The Voting Rights Act and Mississippi: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 475 (2008); Juan Cartagena, *Voting Rights in New York City: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 501 (2008); Anita S. Earls, Emily Wynes & LeeAnne Quattrucci, *Voting Rights in North Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 577 (2008); John C. Ruoff & Herbert E. Buhl, *Voting Rights in South Carolina: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 643 (2008); Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 713 (2008); Anita S. Earls, Kara Millonzi, Oni Seliski & Torrey Dixon, *Voting Rights in Virginia: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 761 (2008).

### 1. Annexations and Cancelled Elections

The annexation process is one type of second-generation barrier repeatedly used to discriminate against minority voters. During previous reauthorizations, Congress learned that covered jurisdictions would circumvent adjacent concentrated minority populations in favor of adjacent concentrated White populations when annexing areas.<sup>39</sup> The selective annexation process would impact minority voters on the verge of exercising their political strength because White voters would not support the same candidate of choice as Black voters.<sup>40</sup>

Lake Providence, Louisiana, for example, was “substantially evenly divided” along racial lines and elected its governing body at-large in 1972.<sup>41</sup> The Town received annexation requests from two adjacent areas to the town at the same time, one with a predominately Black population and one with a predominately White population.<sup>42</sup> The town annexed the White area but rejected the request from the Black area.<sup>43</sup> Rejecting the annexation request from the Black population had the effect of creating a White majority, which could control the outcome of the at-large elections.<sup>44</sup> The Attorney General objected to the change under Section 5 of the Voting Rights Act.<sup>45</sup>

Another example comes from the Town of McClellanville, South Carolina in 1974. There, town officials told Black residents who resided in a concentrated area adjacent to the town that any formal request for annexation would be rejected because it would dramatically alter the race of the town.<sup>46</sup> When the request for Section 5 preclearance was submitted to the Attorney

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39. See, e.g., *Voting Rights Act Extension: Hearing on H.R. 4249 and H.R. 5538*, supra note 15, at 47 (statement of Howard A. Glickstein, Staff Dir., U.S. Comm’n on Civil Rights) (explaining how annexations and redistricting diluted minority voting strength); see also *City of Richmond v. United States*, 422 U.S. 358 (1975); *Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights*, supra note 24, at 238 (statement of James Clyburn, Comm’r, South Carolina Human Affairs Comm’n) (“Counties with a high percentage of minority voters are invariably grouped with counties that have a high percentage of White voters for purpose of electing our state Senators. Again, the obvious purpose is to dilute the effect of the Black vote. Fairfield is combined with Richland; Williamsburg and Marion with Florence and Horry; Georgetown with Charleston; Dillon with Chesterfield and Marlboro; Clarendon with Sumter; Edgefield and Allendale with Aiken and Lexington; and Calhoun and Orangeburg with Dorchester. To add insult to injury, the Senate representatives are elected by numbered seats within multi-member/multi-county districts, thereby ensuring the continuation of an all-White Senatorial body.”).

40. See *Thornburg v. Gingles*, 478 U.S. 30, 49–50 (1986).

41. Letter from David L. Norman, Assistant Att’y Gen., to George F. Fox, Jr. (Dec. 1, 1972).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

General, the town erroneously represented that the adjacent Black population did not prefer annexation.<sup>47</sup> When the Attorney General learned of the false statements in the submission he found that the town denied annexation for a racial purpose and objected to the change under Section 5 of the Voting Rights Act.<sup>48</sup>

During the 2006 reauthorization Congress learned that these types of discriminatory annexation processes continued in covered jurisdictions.<sup>49</sup> Grenada, Mississippi, for instance, drew an objection when it cancelled its election and carried out a racially selective annexation policy with the “purpose to maintain and strengthen White control of a City on the verge of becoming majority Black.”<sup>50</sup> Similarly, Augusta, Georgia drew an objection to its “annexation policy center[ed] on a racial quota system.”<sup>51</sup> Annexations to the city required corresponding numbers of Black and White populations to “avoid increasing the city’s Black population percentage.”<sup>52</sup> Augusta even went so far as to conduct door-to-door surveys to identify White residential areas for annexation.<sup>53</sup>

## 2. The Abandonment of Electoral Structures that Provide Opportunities to Elect Candidates of Choice

Another way covered jurisdictions responded to foreseeable increases in the electoral strength of minority populations was to abandon plans that offered more opportunities for minority populations to elect candidates of choice. In many cases, single-member districts provide one way for minorities to elect candidates of choice. Changes from single-member districts to at-large or multi-member districts, which can be designed to eliminate opportunities to elect candidates of choice, were common in the first few years following passage of the Act.<sup>54</sup> In 2006, Congress learned that such activity continued.

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47. Letter from David L. Norman, *supra* note 41.

48. See Letter from J. Stanly Pottinger, Assistant Att’y Gen., to Phillip A. Middleton, Attorney (May 6, 1974).

49. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing*, *supra* note 16, at 1781–83, 1915–16, 2505–07 (noting Congress learned jurisdictions continued to implement the same types of discriminatory annexations to control the racial demographics of the population); *id.* at 305–06, 319–20.

50. *Id.* at 1606–12.

51. *Id.* at 642.

52. *Id.*

53. *Id.* The City was also sued under Section 2 of the Voting Rights Act. See *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1516 n.78 (2006). When the settlement in the Section 2 litigation resulted in a new method of election that was nondiscriminatory, the Attorney General withdrew his objection. *Id.*

54. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 11, at 21–24; WASHINGTON RESEARCH PROJECT, *supra* note 18, at 109–121; see, e.g., Letter from David L. Norman, Assistant Att’y

Pointe Coupee Parish, Louisiana, for instance, had ten police jury wards with a Black majority population in six of the wards.<sup>55</sup> When Blacks were able to elect candidates of choice, the ten-ward system created a Black majority on the police jury.<sup>56</sup> The Parish proposed eliminating one of the single-member wards by combining it with two other wards.<sup>57</sup> The resulting multi-member district, however, did not give minorities an equal opportunity to elect candidates of choice and would eliminate the Black majority on the police jury.<sup>58</sup> The Attorney General objected under Section 5 of the Act.<sup>59</sup>

During the 2006 reauthorization Congress learned that the abandonment of fairer electoral structures for discriminatory electoral structures also continued. The City of Freeport, Texas, for instance, proposed the abandonment of single-member districts once “Latinos were able to elect candidates of choice” under a single-member plan.<sup>60</sup> The Attorney General objected under Section 5.<sup>61</sup>

The testimony and evidence in support of reauthorization showed that even when covered jurisdictions adopted fairer electoral structures only after litigation, they would seek to abandon the electoral structure that provided an opportunity to elect. The Haskell Consolidated Independent School District, for instance, sought to revert to at-large elections after Section 2 litigation required single-member districts.<sup>62</sup> The Attorney General objected to the change and explained that the race-neutral reason proffered by the district for the change was pretextual.<sup>63</sup>

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Gen., to Leonard E. Yokum, District Att’y, (May 14, 1971); Letter from David L. Norman, Assistant Att’y Gen., to Leslie Hall, Assistant Att’y Gen. (Mar. 20, 1972). See also *Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights, supra* note 24, at 1779 (statement of Paul Alexander, Acting Gen. Counsel, U.S. Comm’n on Civil Rights) (“In one jurisdiction in Alabama the at-large election system for electing members to the city commission coupled with majority vote and staggered term requirements reportedly have a discriminatory effect on minority voting strength. The city commission in this jurisdiction is composed of three members who are elected at large. One of the commissioners also serves as mayor. Despite the fact that the jurisdiction at one time had a near majority Black population and in 1980 was 33 percent Black, no Black has ever been elected to the city commission. Between 1969 and 1978, four Black candidates ran for places on the commission. All were defeated. Currently all three members of the city commission live in the predominantly White north side of the city.”).

55. Letter from David L. Norman, Assistant Att’y Gen., to Samuel C. Cashio, Dist. Att’y (Aug. 9, 1971).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing, supra* note 16, at 2291–92, 2529.

61. *Id.* at 2290.

62. *Id.* at 2513–14.

63. *Id.* at 2513–15.

And some covered jurisdictions simply refused to adopt fairer electoral structures outright. This occurred in Cleveland, Mississippi, where the school district delayed the adoption of single-member districts and cancelled its 1989 school board election when a state law required the adoption of single member districts.<sup>64</sup> When the Cleveland School District finally submitted a single-member redistricting plan that created five citywide districts, the Attorney General precleared the change with the understanding that a special election would be scheduled in November 1990 under the single-member plan.<sup>65</sup>

Six months later the school district proposed the abandonment of its redistricting plan and the suspension of the November 1990 election until the 1990 Census results were available.<sup>66</sup> When the Attorney General objected to these new changes the school district attempted to circumvent the objection by obtaining a state court order authorizing both the abandonment of the single-member plan and canceling of the November 1990 school board elections.<sup>67</sup> The school district then asked the Attorney General to reconsider and withdraw its objection in light of the state court opinion.<sup>68</sup> Instead, the Attorney General authorized the filing of a lawsuit to enforce Section 5 and hold a special election for school board trustees because the school district chose to obtain a state court order, allegedly authorizing the abandonment of the plan, instead of implementing the new election method required under state law and precleared under Section 5 of the Voting Rights Act.<sup>69</sup>

### 3. Discriminatory Redistricting Plans

The number of redistricting plans designed to prevent minorities from exercising their voting strength is significant.<sup>70</sup> The following examples merely provide some of the details concerning the nature of discrimination when redistricting, another second-generation barrier that manipulates the voting strength of minority voting populations, occurs in covered jurisdictions.<sup>71</sup>

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64. *Id.* at 1395–98.

65. *Id.*

66. *See Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose: Hearing, supra* note 16, at 1395–98.

67. *Id.* at 1405–07.

68. *Id.*

69. *Id.*

70. *See Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights, supra* note 24, at 238 (statement of James Clyburn, Comm'r, South Carolina Human Affairs Comm'n); *Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose: Hearing, supra* note 16, at 310–12, 327–29, 388–90, 397–99, 972–73, 1414–16, 1935–37, 1983–85, 2082–84.

71. *See, e.g., Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights, supra* note 24, at 371–75 (statement of Michael Brown, Field Dir. for

a. Statewide Legislative Plans

Over the course of previous reauthorizations Congress reviewed several incidents of discrimination through redistricting, another second-generation barrier. In some instances discriminatory statewide plans were repeatedly adopted by state legislatures. The redistricting experience in Alabama provides such an example. Over the course of previous reauthorizations the evidence and testimony before Congress revealed that the Alabama legislature failed to redistrict without discrimination after the 1970 Census despite a court order.<sup>72</sup> When a federal court was required to intervene, the state submitted three plans but all of them had population deviations above 24 percent and employed multi-member districts.<sup>73</sup> The District Court rejected the proposed plans and created a plan with single-member districts.<sup>74</sup>

In 1980, Alabama had the second opportunity to draw its districts without discrimination. The redistricting plan created by the legislature, however, reduced the Black population in ten urban districts and eliminated four Black majority districts in rural counties, which significantly altered minority voting strength.<sup>75</sup> The Attorney General found that the actions of the state legislature were unnecessary to satisfy “any legitimate governmental interest.”<sup>76</sup> The Attorney General objected to the 1980 redistricting plan.<sup>77</sup>

In 1990, the Alabama legislature had the opportunity to draw its congressional districts without discrimination. Nonetheless, when the state submitted its congressional redistricting plan for preclearance, the Attorney General had reason to believe that the plan was created with the “predisposition on the part of the state political leadership to limit Black voting potential to a single district.”<sup>78</sup> As a result, the Attorney General objected to the 1990 congressional redistricting plan.<sup>79</sup>

Over the course of several reauthorizations, the evidence and testimony before Congress showed that Alabama did not stand alone in creating statewide redistricting plans that discriminated against minorities.<sup>80</sup>

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Branches, Va. State Conference of NAACP) (explaining how redistricting harmed minority voters in Virginia).

72. See *Sims v. Amos*, 336 F. Supp. 924, 931–32 (M.D. Ala. 1972).

73. *Id.* at 933–34.

74. *Id.* at 934–39.

75. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing, supra* note 16, at 264–66.

76. *Id.*

77. *Id.* at 266.

78. *Id.* at 385–87.

79. *Id.* at 266.

80. Statewide redistricting plans from Louisiana, for instance, incurred an objection shortly after adoption of the Act. One of the first occurred in 1971, when the state created a district where Blacks were packed together until their population reached 91.2 percent of the district.

b. Local Redistricting Plans

Local governments did not fare much better than states when creating redistricting plans over the course of Voting Rights Act coverage. Less than ten years after the Voting Rights Act was enacted, the redistricting plan for the City of Many, Louisiana packed the Black population into a single majority-minority district with a 100 percent Black population.<sup>81</sup> The remaining Black population was divided among several districts so they were unable to elect a candidate of choice.<sup>82</sup> Both cracking—the process of fracturing minorities across several districts—and packing—the process of concentrating minorities in a single district—are second-generation barriers.<sup>83</sup> The Attorney General interposed an objection and the City of Many had to create a new redistricting plan.<sup>84</sup>

In 2006, the evidence and testimony before Congress revealed that local covered jurisdictions continued to redistrict in a discriminatory manner. The City of McDonough, for instance, submitted a redistricting plan that impermissibly packed Black voters, who constituted over 70 percent of the population in an otherwise compact geographic area, into a single district.<sup>85</sup> The City then divided the rest of the Black population between two districts in a way that prevented their opportunity to elect a candidate of choice.<sup>86</sup> The

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WASHINGTON RESEARCH PROJECT, *supra* note 18, at 108. In fact, packing in the district was so significant that the district was overpopulated by more than 5 percent, as compared to other districts. *Id.*; Letter from David L. Norman, Assistant Att’y Gen., to Jack P.F. Gramillion, Att’y Gen. (Aug. 20, 1971); *Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights*, *supra* note 24, at 452 (statement of Charles Cotrell, Professor, St. Mary’s University). In 2006, Congress learned that the majority of Louisiana’s objections since 1982 were to redistricting plans. Adegbile, *supra* note 38, at 436–38. Moreover, not one statewide plan submitted by the Louisiana legislature originally received preclearance. *See id.* at 419. Most recently, the 2000 plan for the Louisiana House of Representatives completely eliminated a majority-minority district and reduced the Black population in several other districts in the New Orleans area even though the 2000 census indicated the Black population remained the same. *See id.* at 446–48. The State submitted the plan for preclearance in the District Court of the District of Columbia and admitted that it eliminated the district in a conscious effort to limit African-American voting strength in the New Orleans area and to increase electoral opportunities for White voters. *See id.* The State withdrew its submission only after evidence revealed that it did not follow its own redistricting guidelines when creating the district. *See id.*; *see also* Earls, Millonzi, Seliski & Dixon, *supra* note 38, at 788–89.

81. Letter from J. Stanley Pottinger, Att’y Gen., to Virginia G. Godfrey, Mayor, City of Many (Apr. 13, 1976).

82. *Id.*

83. *See* Voinovich v. Quilter, 507 U.S. 146, 153–54 (1993); HUNTER, *supra* note 24, at 1505–06.

84. Letter from J. Stanley Pottinger, *supra* note 81.

85. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing*, *supra* note 16, at 2082–84.

86. *Id.* at 582.

Attorney General objected and determined that the 1982 redistricting plan “appeared calculated to carve up the city’s Black voting strength among several districts in an unnatural and wholly unnecessary way.”<sup>87</sup> When the city resubmitted its plan it retained the fragmentation identified in the 1982 plan *and* eliminated the one district that provided an opportunity to elect.<sup>88</sup> The Attorney General determined that the second plan, like the first, was drafted without a nonracial justification “for so facially suspect a redistricting.”<sup>89</sup>

c. Repeated Adoption of Discriminatory Measures

Finally, some covered jurisdictions repeatedly adopted discriminatory structures to control the governance of certain bodies by non-minorities. Sumter County, South Carolina provides just one example of how some covered jurisdictions repeatedly enacted a variety of discriminatory second-generation barriers.<sup>90</sup>

Until 1967 South Carolina’s governor would appoint members to the Sumter County Council based on the legislative delegation’s recommendation.<sup>91</sup> After litigation required that the State create a redistricting plan which would create opportunities for a Black state senator to control recommendations for gubernatorial appointments to the Sumter County governing body, the state legislature created a seven-member Sumter County Council to be elected at large.<sup>92</sup> Sumter County held five elections under this new, unprecleared system before submitting it for preclearance in 1976.<sup>93</sup> In 1984, a court found the at-large method of election to the Sumter County Council violated Section 5.<sup>94</sup> For about 15 years, elections to the Sumter County Council proceeded without objection, but in 1992 Sumter County enacted a redistricting plan drawn with the purpose of eliminating one of the four majority-Black districts on the seven-member council.<sup>95</sup> The Attorney General interposed another objection.<sup>96</sup>

The Sumter County Council, however, was not the only governing body in the Sumter area impacted by discriminatory voting changes.<sup>97</sup> The City of

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87. *Id.* at 612.

88. *Id.* at 613.

89. *Id.*

90. See H.R. REP. NO. 109-478, at 56 (2006).

91. See *Cnty. Council of Sumter Cnty. v. United States*, 596 F. Supp. 35, 37 (D.D.C. 1984).

92. See *id.*

93. *Id.*

94. See *id.* at 39.

95. *Voting Rights Act: Section 5 of the Act-History, Scope, and Purpose: Hearing*, *supra* note 16, at 2082–83.

96. *Id.* at 2084.

97. See *Voting Rights Act: Hearing on S. 53, S. 1761, S. 1975, S. 1992, H.R. 3112 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 97th Cong. 591 (1983).

Sumter (which lies in Sumter County) proposed 57 annexations, 45 of which drew objections from the Attorney General.<sup>98</sup> The Attorney General noted that, despite the city's large Black population, no Black had been elected to city council in recent times because of racially polarized voting and the city's at-large election system.<sup>99</sup> The proposed annexations "seem[ed] calculated to take in only Whites while excluding predominately Black areas," and "enhance[d] the ability of the White majority to exclude Blacks totally from participation in the governing of the city[.]"<sup>100</sup>

*B. The Continuous Nature of Voting Discrimination Through Second-Generation Barriers*

Without a doubt, the immediate response to the requirements of the Voting Rights Act, which required the registration of minority voters after nearly 100 years of disfranchisement, was the enactment of second-generation barriers.<sup>101</sup> Although registration rates increased after the enactment of the Voting Rights Act and overt acts of violence do not occur as frequently as they did in 1965, traditional and new responses to minority voting strength—second-generation barriers—continue to be used to prevent the full participation of minority voters.<sup>102</sup> Moreover, the record before Congress in 2006 showed that second-generation barriers continue to be used with the intent to discriminate.<sup>103</sup>

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(statement of Ed Brown, Dist. Coordinator, NAACP) (discussing voting discrimination by the Sumter County Board of Education).

98. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing*, *supra* note 16, at 1915–16.

99. *Id.*

100. *Id.* at 1916.

101. See, e.g., *supra* notes 15, 16, 18, 24, 39, 54, 55, 70, 71; see also *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1251–55, 1268 (N.D. Miss. 1987) (explaining that Mississippi's dual registration requirement was enacted in the 1890s as part of the "Mississippi Plan" with the intent to deny Blacks the right to vote, along with Mississippi's poll tax and literacy test, shortly after the adoption of the Reconstruction Amendments. The discriminatory consequences of the Mississippi Plan had its intended impact for nearly 100 years but in 1987 Black voters challenged the legality of Mississippi's dual registration system and a federal district court found that the dual registration requirement was enacted for a discriminatory purpose, continued to have a discriminatory effect, and violated Section 2 of the Voting Rights Act); see also *Young v. Fordice*, 520 U.S. 273 (1997) (explaining that four years after the 1987 decision in *Operation Push v. Allain*, Mississippi established its dual registration system again by requiring separate registration for federal and state elections and refused to seek preclearance. Individual voters brought a Section 5 enforcement action, and the Court unanimously held that preclearance was required).

102. Compare *supra* note 38, with *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2525–26 (2009).

103. Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275 (2006), reprinted in

The actual record of second-generation discrimination in the 2006 record of reauthorization, therefore, is much different than the characterization of the record by the dissent in *NAMUDNO*. The dissent's failure to acknowledge the existence of the extensive second-generation barriers in the record, and the use of such barriers since 1965, belies the argument that second-generation barriers are "not probative of the type of purposeful discrimination that prompted Congress to enact Section 5."<sup>104</sup> To the contrary, Congress anticipated second-generation barriers—although it could not contemplate every form—when it created the Voting Rights Act, which covered *all* voting changes.<sup>105</sup>

Arguments that attempt to draw a bright-line between first- and second-generation discriminatory voting barriers move us further away from eliminating discrimination in voting because they ignore the existence of otherwise discriminatory acts. This was not the intent of Congress in passing the Voting Rights Act and it is far from the requirements of the Reconstruction Amendments.<sup>106</sup> Persistent discrimination, like the repetitive use of second-generation barriers in covered jurisdictions, harms both the experience of minorities in the political process and democracy in general.

#### V. SECOND-GENERATION DISCRIMINATION HARMS DEMOCRACY

Congress did not reach its decision to reauthorize Section 5 based on episodic or isolated incidents.<sup>107</sup> Instead, it evaluated the persistence of discriminatory second-generation barriers between 1982 and 2006.<sup>108</sup> And, as explained more fully above, this record of continued discrimination was reviewed against a historical backdrop of both first- and second-generation discrimination.<sup>109</sup>

The encounter at the Edmund Pettus Bridge and the wholesale exclusion of minority voters from the franchise is not the only way discrimination in voting can persist or the only form of voting discrimination Section 5 was designed to address. A careful analysis of the appropriateness of Congress's decision to

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*Voting Rights Act: Section 5 Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 96, 180–81 (2006).

104. *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 621 (1965).

105. See generally *Perkins v. Matthews*, 400 U.S. 379 (1971).

106. See *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966).

107. Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 2(b), 2(4), 120 Stat. 577. *Contra Nw. Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2526.

108. Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 2(b), 2(4), 120 Stat. 577.

109. H.R. REP. NO. 109-478, at 56 (“[D]espite previous reauthorizations, the problem of voting discrimination justified reauthorization. In light of the considerable record before it, the Committee has a duty to maintain the protections afforded by the temporary provisions by reauthorizing these vital provisions.”).

reauthorize Section 5 in 2006, therefore, must not ignore both the historical context of the record in support of the 2006 reauthorization and the evidence of the repeated use of second-generation barriers that the 2006 record reveals. In fact, even the dissent in *NAMUDNO* recognizes that discrimination in voting occurs along a continuum.<sup>110</sup>

Discrimination in voting, whether sophisticated, subtle, or violent, is discrimination.<sup>111</sup> Each form of racial discrimination is a part of the history of voting discrimination in the United States and each form is equally offensive to our democracy. Efforts to render the use of second-generation barriers insignificant because it differs in form from first-generation barriers disregards the fact that both second and first generation barriers prevent the equal opportunity of minorities to participate in the political process.

In fact, Congress learned that over sixty percent of the administrative decisions objecting to voting changes under Section 5 included discriminatory intent as a basis for the objection.<sup>112</sup> Congress concluded that “without the remedies available from the VRA’s temporary provisions, the injury to minority citizens and their right to the electoral franchise will be significant.”<sup>113</sup> The discrimination before Congress during the 2006 reauthorization, therefore, does not evidence the end of discrimination in voting but a part of America’s long struggle toward a voting process free from discrimination.

In reauthorizing Section 5, unlike other cases where the Court has overruled congressional judgment, Congress is acting to protect a fundamental right under authority expressly granted by the Constitution.<sup>114</sup> When Congress acts to protect fundamental rights, courts have deferred to congressional findings of constitutional violations and should continue to do so.<sup>115</sup>

## VI. CONCLUSION

When Congress reauthorized Section 5 in 2006, it met its obligation to protect our democracy from persistent unconstitutional discrimination, an offense that was unresolved for far too long.<sup>116</sup> The record in support of

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110. *See id.* at 2521–23.

111. JOHN LEWIS, *WALKING WITH THE WIND* 315 (1998) (“A large number of White Selma residents were becoming embarrassed and concerned over [Sheriff Clark’s violent] actions. They weren’t eager to give Black people the right to vote, but they were certain there were more ‘civilized’ ways of keeping us off the rolls.”).

112. *Supra* note 103.

113. H.R. REP. NO. 109-478, at 56 (2006).

114. *Compare* Board of Trs. v. Garrett, 531 U.S. 356 (2001), *with* City of Boerne v. Flores, 521 U.S. 507 (1997).

115. *See* Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003); Lopez v. Monterey County, 525 U.S. 266, 284–88 (1999).

116. *See, e.g.,* J. MORGAN KOUSSER, *COLORBLIND INJUSTICE* 37–39 (1999).

reauthorization showed that between 1982 and 2006 second-generation barriers were frequently adopted to prevent minority voters from electing candidates of choice. Moreover, covered jurisdictions continued to enact discriminatory voting changes and electoral structures with discriminatory intent. Congress correctly determined that the task of eliminating repetitive and persistent voting discrimination in covered jurisdictions was incomplete and refused to abandon the promises of our democracy while this work remained undone.