

## **The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote**

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### *Abstract*

Congress is now considering whether to renew the Voting Rights Act. This essay suggests that Congress will seek to avoid any of the difficult issues inevitably presented concerning how federal law should regulate voting rights in today's context. Though critical issues concerning American democracy are at stake, and the renewal process is the moment at which the nation should focus on voting rights, there is no constituency, inside Congress or outside, to raise the serious policy issues that should be addressed. Instead, Congress appears to prefer to re-new the relevant provisions largely in their current form, as quietly as possible, while avoiding any hard questions. Doing so not only abdicates policymaking responsibility, it increases the likelihood that the Supreme Court will later find the renewed Act to be unconstitutional.

This essay raises the questions that Congress should address. There are two distinct models for national legislation to protect voting rights. The model of the VRA selectively targets certain areas of the country (9 states, several counties and towns), for a unique form of unusually intensive federal oversight. In essence, these areas are put into a form of federal receivership regarding any changes they might make in anything related to voting, ranging from the design of their congressional districts to the hours these areas keep their polls open. Congress might tinker at the margins with this model, but the more fundamental question is

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whether this selective-targeting approach continues to be the best way to protect voting rights, including minority voting rights, in today's context. An alternative model for doing so would directly protect the right to vote as such, through uniform, national legislation, rather than singling out particular areas of the country for unique protections. This alternative is reflected in laws that post-date the Voting Rights Act, such as the Help America Vote Act and the National Motor Voter Registration Act. This essay suggests that this alternative model -- national, uniform laws to protect the right to vote as such -- is better suited to the problems of voting rights today than the model of Section 5 of the Voting Rights Act, which was well designed for the era in which it was created but is less well suited to the problems of today. Yet Congress will likely simply renew the Act, perhaps with modifications at the margins, but essentially in its present form. Difficult questions will be hushed over. The voting rights community will proclaim victory, but this victory will be largely symbolic - the preservation of a past that is increasingly irrelevant and tangential to the main issues. Possibly, that is the only sort of victory available. But the policymaking process will generate no serious discussion of whether the philosophy of Section 5 of the VRA continues to make sense today, with no adjustment at all from 1982, when Congress last considered the Act, or, even more importantly, of what philosophy and approach to voting rights might now be more effective.

## INTRODUCTION

To many Americans, it comes as a surprise to learn how little national legislation exists to regulate and protect the election process, including even elections for national offices, such as the Presidency, Senate, and House. If there are any doubts about that, recall that resolution of the disputed presidential election of 2000 turned primarily, in the first instance, on matters of Florida law and decisions of the Florida courts, and ultimately, on the United States Supreme Court's interpretation of the vague generalities of the Equal Protection Clause of the Constitution.<sup>2</sup> With the most powerful elective office in the world at stake, observers in other democracies watched in stunned disbelief as American lawyers and commentators went scurrying to the statute books of Florida – even to the election administration regulations of individual counties – to understand the laws and processes for the design of ballots, the standards for what counted as a valid vote, and the institutional mechanisms by which election disputes involving such issues were to be resolved. We are still in the early stages of reverse engineering ourselves out of the pathological decentralization of American elections, even national elections, that is a path-dependent product of America's unique political history – including, ironically, the fact that American democracy was established over 200 years ago and has endured since.

The most significant legislative initiatives to bring national consistency and uniformity to American elections, since the short-lived post-Civil War era of Reconstruction, have been the 1965 Voting Rights Act (VRA) and its amendments,<sup>3</sup> the 1993 National Voter Registration Act

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<sup>2</sup> See *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>3</sup> Enacted as Pub. L. 89-110, 79 Stat. 437. Codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000).

(NVRA),<sup>4</sup> and, in response to the 2000 election, the 2002 Help America Vote Act (HAVA).<sup>5</sup> But, though not widely appreciated, these statutes embody radically different philosophies about when and why national oversight of elections is needed. The original VRA, enacted in 1965, reflected an anti-discrimination approach to national protection of voting rights. The VRA did not protect the right to vote as such; instead, it protected voting rights in two more selective and narrowly targeted ways.

First, the Act was limited to prohibiting racially-discriminatory voting practices. The few other moments in American history at which Congress had also acted to protect voting rights, during Reconstruction, all had a similar structure, as does the Fifteenth Amendment to the Constitution, which was the source of authority under which Congress acted when it legislated on voting rights.<sup>6</sup> Thus, the statutes Congress enacted did not protect the right to vote as such, but instead were largely limited to one potential reason the votes of some Americans might be denied or abridged: race. Second, the Act selectively singled out particular jurisdictions for

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<sup>4</sup> 42 U.S.C. § 1973gg (2000).

<sup>5</sup> HAVA was enacted as Pub. L. No. 107-252, 116 Stat. 1666. In 1994, Congress also enacted the Uniformed and Overseas Citizens Absentee Voting Act, which required states to permit certain voters to participate in national elections by absentee ballots. 42 U.S.C. §§ 1973ff to 1973ff-6 (1994). This statute affects fewer voters than the NVRA or HAVA.

<sup>6</sup> U.S. CONST. amend. XV, § 1. In several momentous cases during Reconstruction, the Supreme Court construed recently enacted national voting-rights laws as applying only to racially-based denials of the vote, on the grounds that to read the statutes more broadly would call into question whether Congress had legislated beyond the limited authority that the Fifteenth Amendment grants to Congress. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876). In the last decade of the 19<sup>th</sup> century and the first of the 20<sup>th</sup>, Congress repealed approximately 94% of the voting laws it had enacted during Reconstruction. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* ix (2004).

uniquely aggressive federal oversight – jurisdictions that had a long history of racially-discriminatory voting practices.<sup>7</sup> Thus, the philosophy that animated national legislation in the VRA, and in those few federal statutes that protected the right to vote before the 1990s, was that federal oversight was uniquely justified not to secure the right to vote itself, but to protect against racially-discriminatory manipulation of the vote.

The legislation of more recent years, NVRA and HAVA, embody an entirely distinct philosophy and approach (for simplicity, I will call this alternative model the “HAVA model,” but the same points could be made about the NVRA). In the wake of the 2000 election nightmare, Congress enacted the first piece of major national legislation structured to provide general protection for the act of voting itself.<sup>8</sup> HAVA’s right to cast a provisional ballot, its requirement of statewide registration databases, and its financial incentives for improved voting technology, apply uniformly nationwide and are not selectively targeted to protect only against racial discrimination in voting. HAVA, Congress’ most recent enactment in this arena, like the NVRA a decade earlier, reflects a shift in national voting-rights legislation from an anti-discrimination to a substantive right-to-vote model. The question I want to focus on is whether HAVA or the VRA should be the model for the future of national voting-rights legislation.

That question is particularly urgent because Congress will soon re-consider the VRA itself. Portions of the VRA automatically expire in 2007, unless Congress re-authorizes them.<sup>9</sup>

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<sup>7</sup> For elaboration on the structure of Section 5, see *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the principal decision upholding the constitutionality of the 1965 Act.

<sup>8</sup> Congress did pass the Voting Accessibility for Elderly and Handicapped Act, 42 U.S.C. Sec. 1973, but this law addresses a discrete issue in voting regulation.

<sup>9</sup> More specifically, in addition to Section 5, the provisions due to expire in 2007, absent

An important part of the future of voting rights is therefore now: this sunset provision has put voting rights on the national policymaking and public agenda again, with Congress now debating the renewal of Section 5. Congress last revisited the VRA in 1982, nearly 25 years ago. In this essay, my primary aim is to suggest that, when Congress revisits the VRA now, it should not remain conceptually locked within the VRA model of voting-rights protection but instead consider building on the more recent model, in expanded and more aggressive forms, of statutes like HAVA and the NVRA. The coming renewal debate over the VRA thus provides an ideal opportunity for the future of voting-rights policy to become organized around a model that better fits the voting-rights problems of today. I then want to explain why that will not, in fact, happen.

#### THE PAST

The Voting Rights Act (VRA) is a sacred symbol of American democracy. The Act, the most effective civil rights statute enacted in the United States,<sup>10</sup> was the last significant stage in the nearly universal formal inclusion of all adult citizens in American democracy. Yet precisely because the VRA is an icon of American democracy, discussion over whether to renew or modify, let alone to move away from the model of the VRA for enforcing voting rights, will not

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congressional reauthorization, include Section 4, which contains the formula for determining which jurisdictions must comply with the geographically-targeted provisions of the Act; Sections 6-9 and 13, which permit the Department of Justice to send federal examiners and observers to polling places in certain circumstances; and Section 203, which requires certain jurisdictions to provide language assistance to speakers of Spanish, Native American and Alaskan, and Asian languages. For simplicity, I will refer to all of these provisions as “Section 5,” except where more specific distinctions between these expiring provisions requires greater specificity. The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, renewed Section 5 and these other provisions for 25 years, which is why they are due to expire in 2007 unless re-authorized.

<sup>10</sup> For a summary of studies on the effectiveness of the Act, see Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359 (1995) (book review).

be easy or unfeigned. Given the status and practical effects of the Act, discussion of changes in the Act will create understandable anxieties that hard-fought rights will be whittled away. That risk is all the greater for the VRA, for “The Voting Rights Act” represents and means dramatically different things to different audiences; when discussion of “the Act” takes place, different minds conjure up distinct features of “the Act.” Yet, like many major laws, “the Act” is comprised of varied provisions, some enacted at different times than others, some justified by distinct policy aims from others.

It is important to begin, therefore, with clarity about what is – and what is not – at stake in discussion over renewing or modifying “the VRA.” As noted above, the philosophy of the Act involves narrow and selective targeting of voting practices in two ways: first, by geographically singling out particular states and local governments for unique federal oversight;<sup>11</sup> second, by singling out minority voting rights, as opposed to voting rights in general, for unique federal protection.<sup>12</sup> These two different targeting approaches were built into the original VRA in 1965 and continue in the basic structure of the Act today.

The original Act was the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction. The 1965 Act enabled the Attorney General to send federal examiners to take over the voter-registration process in areas that had resisted recognizing the voting rights of black citizens for the entire 20<sup>th</sup> century.<sup>13</sup> In addition, for states

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<sup>11</sup> 42 U.S.C. § 1973c (2000).

<sup>12</sup> *Id.* § 1973.

<sup>13</sup> For discussion of this provision and empirical analysis of its effects, see James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990*, at 351,

and local governments that had a history of racially-discriminatory voting practices, the Act directly suspended the use of various “tests and devices” as prerequisites to registration and voting.<sup>14</sup> And in the central provision of the 1965 Act – a provision that is the focus of the coming public debate – the Act directly put (and continues to put) the election systems in certain parts of the country under what is, essentially, a form of federal receivership.<sup>15</sup> The part of the Act that does so is known as Section 5.

Section 5, initially enacted for five years, was designed to be limited in time and geographic scope. These limitations reflected the law’s extraordinary structure and justification, a structure unique in the arsenal of federal civil rights policy. Congress banned areas of the country that had used racially-discriminatory voting practices from putting into effect any new provision or change that affects voting, no matter how large (re-designing election districts) or small (keeping polls open 1 hour later), until the town, county, or state seeking to make the change secures permission from the federal government to do so.<sup>16</sup> The structure of Section 5 thus expresses an exceptionally pro-active regulatory philosophy: it puts the burden on the local jurisdiction to submit its proposed change to the federal government and to demonstrate to federal officials or judges that the change will not violate the VRA. Until precleared, no change

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365-69 (Chandler Davidson and Bernard Grofman eds., 1994).

<sup>14</sup> 42 U.S.C. § 1973a(b) (2000).

<sup>15</sup> *Id.* § 1973.

<sup>16</sup> For detailed discussion of the structure and justification of Section 5, see *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), which upheld the constitutionality of this provision, and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), which defined the scope of voting practices that Section 5 covers.

in voting practices can be made. Section 5 thus embodies strong skepticism about the parts of the country which it singles out. In areas under this special “coverage” framework, any change in voting is, in essence, presumed to be suspect until the jurisdiction convinces the federal government the change will not impair minority voting rights.

This unique structure of Section 5 directly reflects its historical justification. In 1965, Congress confronted a long experience of Southern jurisdictions that had continually crafted new devices to restrict minority voting whenever courts had declared illegal some barrier to voting. Fearing that this cat-and-mouse game would continue, Congress created the targeted structure of Section 5: certain states and localities were put under special “coverage;”<sup>17</sup> they could not implement any change with respect to voting until the federal government had pre-cleared the change (either through the United States Department of Justice (DOJ) or a specially designated three-judge federal court in Washington, D.C);<sup>18</sup> and, reflecting Congress’ suspicion, the jurisdictions would bear the burden of proving that their proposed changes were consistent with the VRA.<sup>19</sup> Section 5 and its “preclearance review” process applied, and continues to apply today, only to selected areas of the country (nine states as a whole and selected counties in five others).<sup>20</sup>

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<sup>17</sup> 42 U.S.C § 1973c (2000).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Coverage is determined by a formula specified in Section 4. 42 U.S.C. § 1973b(b) (2000). States currently covered as a whole are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In addition, selected counties in California, Florida, New York, North Carolina, and South Dakota are covered, as well as certain townships in various states. *See* App. to 28 C.F.R. Pt. 51; *see also* Department of Justice Website, Section

The Act's other central provision, Section 2,<sup>21</sup> applies nationwide without geographic distinction. The selective targeting feature of this part of the Act is that it singles out minority voting rights for uniform national protection. Section 2 is a permanent, nationwide ban on voting practices that deny or abridge minority voting rights.<sup>22</sup> In the early years of the Act, this provision was of limited importance, but after Congress substantially strengthened it in 1982, when Congress last re-visited the VRA, Section 2 became a major tool in race-based legal challenges to election structures.<sup>23</sup> The VRA thus reflects Congress's position that there are two distinct voting-rights problems that require distinct solutions: pro-active federal oversight for certain regions, based on their history, and a more general nationwide set of rules selectively targeted at election structures and voting practices that disadvantage minority voters.<sup>24</sup>

The part of "the Act" due to expire in 2007 unless renewed is the geographical targeting embodied in Section 5 (as well as certain provisions affecting ballot materials for language

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5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited April 26, 2006).

<sup>21</sup> 42 U.S.C. § 1973 (2000).

<sup>22</sup> *Id.*

<sup>23</sup> For discussion of the 1982 Amendments to Section 2, see the most important Supreme Court decision giving content to Section 2, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>24</sup> The difference between these two features of the Act is that the nationwide rule of Section 2 operates through the ordinary legal system, rather than the unusual "preclearance review" process; a voter must bring a lawsuit to challenge a voting practice, the practice can go into effect immediately unless a court enjoins it, and the voter bears the burden of proving that a law violates the Act (outside the areas reached by Section 5, there is no general legal skepticism that state officials are using voting regulation to diminish minority political participation). Section 2 is therefore more costly, more time consuming, and substantively more difficult for those challenging a voting practice than is Section 5.

minorities, though none of my comments in this essay, for reasons explained later, apply to these language-assistance provisions in “Section 203”). Though frequently said in short-hand form that “the Voting Rights Act” will expire unless reauthorized, this short-hand is misleading, creates unjustified fears, and hinders appropriate policy discussion. The VRA itself does not expire, nor do the crucial provisions in Section 2. These are permanent: they will continue to impose uniform, nationwide bans on discriminatory voting practices. In contrast, the Congresses that enacted and amended the VRA over the last 40 years recognized that Section 5 and its unique elements should remain responsive to ever-changing circumstances. Thus, when first enacted in 1965, Section 5 was designed to last 5 years; Congress extended this for another 5 years in 1970; then for another 7 years; and in 1982, for another 25 years, until 2007 (Congress did re-visit the language-assistance provisions, but only those, in 1992).. That brings us to the question of the moment, which is whether the selective targeting approach of Section 5 remains appropriate today. I want to raise questions about that and suggest instead that an approach modeled on statutes like HAVA and the NVRA might be more appropriate for the voting-rights problems of today – and more effective for minority voters themselves.

#### THE PRESENT

In singling out certain areas for unique federal oversight, Section 5 of the VRA rests on the philosophy that national policy can identify, in advance, areas of the country in which voting rights problems (that is, minority voting rights problems) are considerably more likely to arise systematically than in other areas. In addition, Section 5 locates the threat in *changes* to existing voting rules and practices; it is only these changes, rather than the status quo baseline practices,

that the federal government must approve in advance in certain areas.<sup>25</sup> At the time of the 1965 Act, these narrow targeting features made sense and were exceedingly easy to apply: the Act was aimed centrally at the states of the Old Confederacy, which had systematically denied black citizens (and poor whites) the vote for decades, in part through changing voting rules and practices to frustrate federal oversight.<sup>26</sup>

But consider the kinds of voting issues that we face today. First, because policy no longer confronts the virtually complete, decades-long exclusion of black voters from political participation in certain states and counties, the voting-rights issues of the present are not as obviously unique or confined to any particular region of the country as when the VRA was first enacted.<sup>27</sup> Nor is it as easy to predict in advance of actual elections, through national legislation, where such problems are likely to emerge in elections over the coming years. Thus, continued reliance on a model that requires statutory identification in advance of where those problems are likely to arise is increasingly problematic. In addition, such a model will underenforce minority voting rights, for similar reasons. In the 2004 presidential election, for example, the most significant voting rights issues arose in the battleground state of Ohio.<sup>28</sup> Had the election turned

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<sup>25</sup> I am indebted to comments from Richard Briffault for emphasizing this point.

<sup>26</sup> See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson and Bernard Grofman eds., 1994) (presenting the history of the original Voting Rights Act and detailed, empirical analysis of its effects).

<sup>27</sup> With the exception of Native American voters, who face exclusionary barriers to voting resembling those of the pre-VRA world. See NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (Jennifer Robinson et. al., forthcoming, Cambridge University Press, 2006).

<sup>28</sup> See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220-39

instead on any other single state, issues similar to those in Ohio would likely have surfaced there as well. Yet in 1982, when Congress last addressed the structure of Section 5, there would have been no way to anticipate that these would be the states in which the voting rights controversies of today would arise. Similarly, in the 2000 presidential election, the voting controversies centered on Florida. Unlike Ohio, Florida was a state that the VRA did, to some extent, anticipate as a potential problem area based on the state's past history. Nonetheless Section 5 was of no relevance during the 2000 post-election legal disputes; indeed, Section 5 had not been able to anticipate that voting-rights conflicts would arise in the particular areas of Florida that they did. Section 5 reached only five counties in Florida<sup>29</sup> – not including those that spawned the major conflicts in 2000.<sup>30</sup> In the 2004 election cycle, the most intense post-election litigation over state and local elections took place over the governorships of Washington and Puerto Rico and the mayor's office in San Diego<sup>31</sup> – none of them places which the VRA's geographic targeting approach reaches.

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(2005). I have also learned a great deal about these issues from Nate Persily's work, including his contribution to this Symposium.

<sup>29</sup> The five covered Florida counties were Collier, Hardee, Hendry, Hillsborough, and Monroe. *See* Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited April 26, 2006).

<sup>30</sup> *Bush v. Gore* arose from controversy surrounding recounts in Palm Beach, Miami-Dade, Broward, Volusia, and Nassau counties, none of which are covered by Section 5. *See* 531 U.S. 98 (2000).

<sup>31</sup> For details of these election disputes, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, AND RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 199-205 (rev. 2d ed. Supp. 2005).

Ohio, Florida, Washington, Puerto Rico, and San Diego do, however, share one feature – all had exceptionally competitive elections with small margins of victory in the relevant election. This reveals part of the problem with trying to tailor modern voting-rights protection to specific areas picked out by federal law in advance: the incentive to manipulate voting rights will be greatest today where elections are extremely competitive and small margins will determine winners and losers. Similarly, complaints and perceptions of large-scale deprivations of voting rights, including minority voting rights, are most likely to emerge in elections that turn out to be closely contested. But there is little way to base national regulation on *ex ante* predictions regarding where races for electoral votes, the Senate, the House, or state and local races are likely to be determined by small margins over the next generation. When the geographic targeting approach of Section 5 was adopted, there were distinct areas that systematically, election after election, denied minority voting rights, whether or not elections were competitive.

Second, the *nature* of voting-rights issues today also is less geographically concentrated in a distinct way than in the past. Consider the kinds of problems that have received the greatest attention in recent years. These include concerns about voting technology; lack of clear standards for what counts as a valid vote; ballot-design confusions; corrections to the provisional balloting system established in HAVA; long lines at polling places; partisan administration of election laws; sheer incompetence in election administration at the precinct level; burdensome voter-registration requirements, such as the need to re-register upon moving; and felon-disfranchisement laws.<sup>32</sup> These problems arise in many different parts of the country, sometimes

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<sup>32</sup> For excellent general discussion of these diverse issues, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

only in some elections. It is difficult to conclude that they systematically and uniquely arise in particular areas that federal law can accurately pre-identify, particularly if federal law is focused on large political units, such as states.

Take one of the largest emerging controversies today, whether voter identification should be required to combat so-called fraud, and if so, what forms of identification should be required – particularly whether photo identification should be required.<sup>33</sup> The most visible photo-identification law so far was enacted in Georgia. The federal district court eventually enjoined that law as a violation of the fundamental right to vote under the Constitution (after the DOJ had pre-cleared the law through the Section 5 process).<sup>34</sup> To some, that might confirm the need for continuing the geographical targeting approach of Section 5. Georgia was one of the states initially designed to be put under Section 5's federal receivership regime; it remains a specially targeted state today. But voter ID requirements are being adopted and considered in other states as well. Like Georgia, Indiana, for example, has recently adopted such a law.<sup>35</sup> Bills to impose such requirements are also pending in 29 states.<sup>36</sup> And the national, bipartisan Carter-Baker Commission recommended a national voting ID requirement (over the vigorous dissent of some

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<sup>33</sup> For a detailed analysis of this issue, see Spencer Overton, *Voter Identification*, \_\_\_ Mich. L. Rev. \_\_\_ (forthcoming, 2006).

<sup>34</sup> *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The court issued a preliminary injunction, after which Georgia withdrew the law and enacted a modified version of it, which is now being challenged in litigation.

<sup>35</sup> IND. CODE 3-5-2-40.5 (Supp. 2005). A federal district court upheld Indiana's new law against federal constitutional and voting rights challenges. *See Ind. Democratic Party v. Rokita*, No.1:05-cv-00634-SEB-VVS (S.D. Ind. filed Apr. 14, 2006).

<sup>36</sup> Overton, *supra* note 34, at 5.

members).<sup>37</sup> To be sure, debates now taking place over voter ID requirements in several state legislatures have an overwhelming *partisan* dimension. But there is not an obvious *geographic* dimension to the issue, particularly not one that easily correlates with other voting-rights issues to suggest that certain states or areas are systematically infringing on voting rights.

Third, recall that current Section 5 selectively targets only *changes* in voting rules and practices. Yet here too, the problems of today differ, in critical ways, from those that generated this statutory structure over 40 years ago. Felon-disfranchisement laws, for example, are among the most significant barriers today to African-American suffrage, in terms of the number of otherwise eligible voters affected. But most of these laws are not recent enactments, nor do they reflect a recent change in state law. Issues arise with respect to these laws today precisely because many of them were enacted long ago, in eras of much lower incarceration rates, and have remained unchanged even as their effect has mushroomed with soaring felony-conviction rates. Yet because these are not recent “changes in state law,” they are completely beyond the reach of Section 5. Nor could such laws be brought within the scope of Section 5 through modest amendments. For recall that the entire approach of Section 5 is premised on the assumption that federal oversight should be targeted most aggressively on *changes* in voting practices and rules.<sup>38</sup>

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<sup>37</sup> CARTER-BAKER COMMISSION, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 21 (2005).

<sup>38</sup>The race-based structure of the VRA creates significant hurdles of its own to felon disfranchisement laws even under the nationwide provisions of Section 2. *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (en banc) (holding that Section 2 of the VRA does not apply to felon-disenfranchisement laws at all, in the context of a challenge to a Florida constitutional provision that had been most recently re-enacted in 1968), *cert. denied*, 126 S. Ct. 650 (U.S. 2005). A panel of the Second Circuit similarly rejected a Section 2 challenge to New

Similarly, when it comes to problems with voting technology, such as pre-scored punch-card ballots, or partisan election administration or incompetence, the problem is not that these are recent changes. Indeed, the problem is the opposite: it is preservation of the status quo – the failure to update old voting technology, the failure to create non-partisan election administration structures, the failure to train election officials properly – that is the problem. Far from being suspicious, change is precisely what we ought to want in these areas.

For these three reasons at least, the narrow targeting model of Section 5 – its effort to single out particular *areas* and *changes* in voting rules – is less well suited to the voting rights problems of today than was the original Section 5 to the voting-rights problems of its day. Meanwhile, voting rights activists and scholars are busily scrambling to find ways to establish that certain jurisdictions remain systematically guilty of infringing minority voting rights in ways that justify continuing Section 5 in essentially its current form.<sup>39</sup> Some of these efforts focus on the pattern of DOJ objections and related actions under Section 5; some focus on the pattern of court findings of VRA violations over the last 25 years under the general, nationwide anti-

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York's felon disfranchisement law, though the Second Circuit is currently reviewing en banc the panel's decision. *Muntaqim v. Coombe*, 366 F.3d 102 (2d. Cir. 2004), rehearing en banc granted, 396 F.3d 95 (2d. Cir. 2004). The Ninth Circuit has permitted a Section 2 challenge to Washington's felon disfranchisement law to proceed to trial, *Farrakhan v. Washington*, 338 F.3d 1009 (9<sup>th</sup> Cir. 2003), where the case remains pending.

<sup>39</sup> *See, e.g.*, LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005 (Feb. 2006). It is noteworthy that this report provides extensive factual information on voting issues, but does not suggest what that information should be interpreted to mean for any of the concrete policy issues concerning renewal of Section 5, such as which areas of the country should be under Section 5 today, for how long Section 5 ought to be renewed, and the like. This absence of any policy recommendation is itself telling evidence that supports the central themes of this essay.

discrimination provisions of the Act; some efforts seek to combine, somewhat arbitrarily, a number of different proxies for identifying minority voting problems unique to certain states or localities. But these efforts to adapt Section 5 to today's circumstances reveal, ironically, the greater difficulties today in the project of singling out particular areas for unique federal oversight. Some major studies, for example, correctly note that racially-polarized voting continues to be documented in court cases; yet these same studies point out that, of the states for which this is true, half are covered and half are not under the current Section 5.<sup>40</sup> Similarly, studies identify over 100 cases since 1982 in which courts have found violations of the nationwide ban in Section 2 against discriminatory election structures and voting rules; yet, once again, these violations are not overwhelmingly concentrated in areas specially covered under Section 5, but instead occur throughout the nation.<sup>41</sup> In other words, there is less dramatic difference than in the past between those areas currently covered under Section 5 and other areas of the country with substantial minority populations (particularly when coverage focuses at the level of states rather than counties or towns).

That is partly because the *type* of problem central to the VRA today is different than in the past. Earlier, the primary issue was exclusion of minority voters from the polls; today, the vast majority of VRA cases and violations instead focus on the issue of vote dilution.<sup>42</sup> And to the extent vote dilution is a problem and the issue of the era, that issue arises in many (perhaps

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<sup>40</sup> See *id.*, at 95 and *id.*, at 95 n.308. This information applies to statewide redistricting plans, for which there are judicial findings of racially-polarized voting since 1982 in 16 states.

<sup>41</sup> *Id.* at 81-84.

<sup>42</sup> *Id.* at 82-83.

most) areas with significant minority populations, rather than overwhelmingly in any one discrete part of the country. Since 1990, for example, there are more court findings of Section 2 violations in New York or Pennsylvania than in South Carolina.<sup>43</sup>

This is not to say that it is impossible to identify jurisdictions that continue today to generate unique and recurring minority voting-rights problems. The *more narrowly* targeted the geographic focus of Section 5 becomes, the more likely that is to be true. By any measure, for example, the state of Mississippi continues to generate more of these problems than any other state. Similarly, if the focus of a renewed Section 5 shifts more from the state level to the county level, other than for a few states, such as Mississippi, it might become easier to selectively target in advance areas that systematically generate threats that support singling them out from other areas for the unique federal oversight of Section 5.<sup>44</sup> Some former enforcement lawyers in the DOJ, for example, suggest that Section 5 is most needed, and has had most effect, at the level of local governments in the South.<sup>45</sup> Moreover, the obstacles to voting that Native Americans, in

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<sup>43</sup> Ellen Katz and the Voting Rights Initiative, *Documenting Discrimination in Voting Under Section 2 of the Voting Rights Act*, Voting Rights Initiative Database (2005), [www.votingreport.org](http://www.votingreport.org). Of course, much more information would have to be assessed before knowing what this fact reveals about race and politics in these states. I offer this finding only suggestively, as an illustration of the complexity in documenting state differences that were obvious on these issues in the past.

<sup>44</sup> For the suggestion that an amended Section 5 should be targeted at counties rather than states, see Bernard Grofman and Thomas Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction between Law and Politics*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 1.

<sup>45</sup> See Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 Neb. L. Rev. 605 (2005) (noting that 36 of the 39 DOJ objection letters since 2000 under Section 5 have addressed local, not state, voting changes).

particular face, resemble those that confronted African Americans in the pre-VRA South, and legislation focused on that problem is easily justified.<sup>46</sup> The more narrowly and precisely targeted Section 5 becomes, the more credibly national policy would be able to identify specific areas of unique and systematic minority voting-rights problems. But if the geographic scope of a renewed Section 5 remains more or less as is, it will become increasingly difficult to account for the differences between areas covered and areas not. There are also serious questions about the constitutionality of a renewed Section 5 that cannot tie its geographic coverage to areas that have unique race-based voting-rights problems.<sup>47</sup> At the same time, a smaller geographic scope for national voting-rights legislation will not address the central voting problems of today; nor will it help us bring the greater centralization to national election processes that we would almost certainly adopt if we were creating our national elections today, rather than working within the structures inherited from so long ago.

The challenge is more fundamental than whether we can craft a new Section 5 with a more accurate formula for identifying “bad” jurisdictions, a formula that both makes policy sense and will support the statute’s constitutionality. The real question is whether the model and philosophical basis of Section 5 continues to make policy sense today, in any but a limited number of jurisdictions. Should national voting-rights legislation continue to be based on the principle that we should or can figure out how to selectively target specific places that warrant

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<sup>46</sup> For comprehensive documentation of these issues, see *NATIVE VOTE*, *supra* note 28.

<sup>47</sup> There are serious constitutional issues as well. The Supreme Court might hold a renewed Section 5 unconstitutional absent a close fit between the areas singled out and actual evidence of discriminatory voting practices that justify unique federal oversight of those areas. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 756 (2003) (Kennedy, J., dissenting); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

unique federal oversight? I wonder, as a matter of policy, whether that is the best approach today (though as a matter of politics, I expect that to be the approach to which Congress adheres).

Based on what I have said thus far, some might conclude that the right answer is simply to expand Section 5 to apply nationwide. Such an expansion would recognize the futility of trying to specify *ex ante* through national law particular places that demand particularly aggressive federal oversight. But I do not believe that is a plausible or sensible policy response. Recall that Section 5 is a form of federal receivership; any change affecting voting cannot go into effect until examined and cleared by a federal actor. This unique, pro-active form of exceptionally intensive federal oversight cannot, realistically, be extended to the entire country. The entire voting system of the United States cannot be put under federal receivership, absent a massive expansion in the federal bureaucracy that is not imaginable. And even if it could, doing so would still not address some of the critical problems mentioned above. In particular, it would not address the problem of federal voting-rights law being limited to *changes* – in local and state voting rules – a limit essential to the structure of Section 5 review remaining in its current form. Nationwide extension of Section 5 is neither wise policy nor a politically serious proposal. It might be unconstitutional as well.<sup>48</sup>

#### THE FUTURE

That the philosophy of the VRA's Section 5 structure might not be as well suited to the nature and geographic distribution of voting problems today as in the past has led some

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<sup>48</sup> For the cases suggesting this problem, see *supra* note 48.

commentators to conclude that Section 5 should be allowed to expire.<sup>49</sup> But I reach a different conclusion. We should not remain so locked into the Section 5 method of protecting voting rights as to fail to think beyond that model today. Instead, we might consider shifting the focus of policy debate from selective federal oversight of specific areas, tied to changes in voting practices, to greater emphasis on the need for additional federal legislation modeled on the form of the statutes of more recent years, such as HAVA and the NVRA. That is, federal oversight should, perhaps, move from attempting to be selectively targeted on specific jurisdictions to being of uniform national scope. At the same time, the focus should shift from a federal prophylactic against changes in voting rules to a direct, first-order focus on defining the appropriate baseline itself of proper election practices – precisely as HAVA does with respect to provisional ballots and the NVRA does with respect to voter registration. Because the concept of preclearance review itself was fundamentally tied to suspicion of changes to voting practices in particular jurisdictions, the preclearance process might be “traded,” conceptually and or politically, for greater first-order protection of the right to vote itself through national legislation establishing uniform voting standards. The preclearance process actually plays a relatively minor role these days in any event, even with the broad geographic scope of the current Section 5. In the 1996-2002 period, for example, the DOJ refused preclearance in about only 0.05% of the cases it reviewed.<sup>50</sup> Although the first years after a new Census and redistricting typically

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<sup>49</sup> See, e.g., Abigail Thernstrom & Edward Blum, *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10; Abigail Thernstrom, *Emergency Exit*, N.Y. SUN, July 29-31, 2005, at 10.

<sup>50</sup> Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 Ohio St. L. J. 177, 192 (2005). This reflects a dramatic decrease from comparable periods in earlier decades, such as the first four years after a new census and re-districting cycle. This sharp decline might be explained by jurisdictions

generate the greater number of DOJ objections, the number of these objections in the post-2000 years has been “by far” fewer than in comparable earlier periods.<sup>51</sup>

Despite the limited practical role of preclearance review, an enormous defense of it has been mounted already and will continue to be marshaled as the renewal process reaches center stage in Congress. But the renewal process presents an opportunity for re-thinking what the model for federal voting-rights protection ought to be. Rather than mechanically re-affirming a model from earlier decades that is increasingly irrelevant and not designed for the voting problems of today, the renewal process could be used as a vehicle for moving voting-rights policy forward, not just in the details, but in the essential philosophy and structure of national policy. HAVA and the NVRA already represent major breakthroughs of this sort, though the NVRA is limited to registration issues and HAVA’s mandatory requirements are focused on voting technology and provisional ballots. But HAVA constitutes a major recognition, in the wake of the 2000 election, that we need uniform, nationwide laws to structure at least certain

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having internalized the requirements of Section 5 and complying with them; jurisdictions complying because the shadow of the Section 5 process hangs over them; Supreme Court decisions during the 1990s that restricted the scope of the Act; less aggressive DOJ enforcement of the Act; and/or the fact that most of the “safe” African-American majority election districts that could be created in the country were created in the 1990s, often after DOJ objections to proposed plans, which left few new “safe” districts to be created in the 2000s and hence few DOJ objections to the failure to create such districts. Determining the precise causal role of any of these factors in isolation, or in combination, to the limited role of Section 5 in recent years requires more sophisticated analysis than has been available to date.

<sup>51</sup> *See supra* note 40, LAWYER COMMITTEE’S REPORT, at 80. This report notes that, in addition to formal DOJ objections under Section 5 to proposed changes, DOJ sometimes requests more information, after which jurisdictions then sometimes withdraw the proposed change. Of course, a withdrawn and/or revised submission need not mean the jurisdiction’s initial proposed change would have violated the VRA. The federal court in Washington, D.C., also supervises the preclearance process, though its role is much less significant than that of the DOJ; the report notes that, in addition to DOJ objections under Section 5, this court has denied preclearance a number of times since 1982. *Id.*, at 57-58.

aspects of the democratic electoral process. This is not to say that HAVA itself is perfect in all its details (indeed, far from it); but it is to say that statutes like HAVA and the NVRA provide a distinct *model* or *form* that national voting-rights legislation has taken in the last 15 years and might, in principle, best take in coming years.

Not all aspects of elections, of course, require national standards. National standards are most justified in the context of national elections. And certain administrative matters are best handled, at least for the foreseeable future, at the state level (though not at the level of individual counties). Voter registration databases are one example. Even when national oversight is justified, that oversight need not take the form of old-style, command-and-control legislation, in which the national government imposes one mandatory substantive standard throughout the nation. National oversight can involve establishing goals and targets, while leaving states a great deal of flexibility in determining how best, in their circumstances, to reach those goals and targets. HAVA, in fact, works precisely this way with respect to voting technologies. HAVA sets standards that all voting systems must meet and offers financial incentives for states to replace certain types of voting equipment, but does not mandate that states adopt one or another specific voting technology.

Issues like the forms of identification necessary and justified to protect against voter fraud, however, might best be resolved as a matter of national policy. There seems little need or justification for state variation in this area. Under the VRA (and the general model it embodies), the legality of different state ID requirements will turn on fortuities that have little to do with whether such requirements are needed and justified and in what circumstances. Under Section 5, the same ID requirement might be illegal in states covered by Section 5 but legal in others.

Under the provision of the VRA that applies nationwide, Section 2, the same ID requirement could be illegal in states with significant minority populations but legal in others, even if in the latter such requirements unjustifiably disenfranchised the elderly, the poor, or others (as long as the ID did not do so on the basis of race or minority-language status). Through constitutional litigation, the federal courts might conclude that certain ID requirements violate the Constitution, as the district court recently concluded in the Georgia case. At the same time, another federal district court recently upheld Indiana's new photo-identification requirements.<sup>52</sup> The fact that constitutional rights and limits are implicated only confirms that this is one area in which national uniformity is appropriate. The uniformity should come through national legislation,<sup>53</sup> rather than awaiting years of constitutional litigation in which individual state ID requirements are challenged one-by-one.

Though a more controversial example, the same might be thought true of whether felons and ex-felons should be eligible to vote or not. As the Supreme Court has recognized for 40 years, the right to vote is a fundamental constitutional right. The judgment of who is legally entitled to the right to vote (or who has disintitled themselves) therefore is similarly a matter of fundamental rights that should, in principle, be resolved uniformly throughout the nation, certainly for national elections. Given that these judgments have traditionally been made at the state level, state officials would surely resist strongly if Congress sought to legislate on the

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<sup>52</sup> See supra note 36.

<sup>53</sup> HAVA does speak to voter identification issues through a narrow requirement that applies only to a small subset of newly registered voters. But HAVA does not prevent the states from imposing more demanding identification requirements and thus does little to further national uniformity in this area.

subject. And Congress, of course, would almost certainly like nothing to do with the issue. But none of that changes the fact that, as a matter of basic principle, the question of who is eligible to vote in the United States is a matter of fundamental constitutional status that, in national elections at least, ought to have a general, nationwide answer.

Moreover, one of the vastly underappreciated consequences of *Bush v. Gore*<sup>54</sup> is its recognition that the Constitution protects the right to vote from being arbitrarily infringed, for any reason at all, whether or not race is involved. For many years, the Court has recognized the right to vote as a fundamental constitutional right in all general elections, whether national, state, or local.<sup>55</sup> Whatever else *Bush v. Gore* does, it unquestionably indicates that, because the right to vote is a fundamental right, state laws can infringe this right unconstitutionally when those laws impose arbitrary, manipulable, or unjustified obstacles to a fair voting system.<sup>56</sup> Congress therefore has concomitant power, under the same Fourteenth Amendment substantive standards *Bush v. Gore* recognizes, to legislate to protect the right to vote as such. But the opportunity to use the VRA's renewal process as a moment to focus national policy debates on these issues, including national legislation to protect the right to vote as a general matter, requires a willingness to move discussion from the geographic focus of Section 5 – debates over which areas ought and ought not to be covered – to a more general approach to voting rights.

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<sup>54</sup> 531 U.S. 98 (2000).

<sup>55</sup> See, e.g., *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (local elections); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (state elections).

<sup>56</sup> For further development of this aspect of *Bush v. Gore*, see Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 48-50.

At the outset, I noted that the VRA is narrowly and selectively targeted in two respects. The first is the geographic targeting central to Section 5, which is the main focus of this article and the focus of the congressional renewal process. The second is the minority-voting rights targeting central to the entire Act itself and to Section 2 in particular. I now want to raise some analogous questions for Section 2 that I have discussed at length for Section 5. I can only offer suggestive observations here, designed not to be definitive to be stimulate fresh thought on how best to protect voting rights going forward.

The main question is whether the selective focus of Section 2 on only minority voting rights – as opposed to voting rights per se – is the right or exclusive model for the future. Recall that just as HAVA and the NVRA are not geographically selective, they are not selective in this way as well. HAVA, for example, protects the right to cast a provisional ballot of all citizens in all jurisdictions.<sup>57</sup> Similarly, HAVA's measures on statewide registration databases and its financial incentives for improved voting technology apply nationwide without regard to determinations about whether approaches to registration and technology are racially discriminatory or not.<sup>58</sup> The question, then, is whether HAVA's redefinition of the problem from protection of minority voting rights to protection of voting rights as such represents the future of voting rights – and whether it should.

I will offer three brief reasons that the protection of voting rights – including minority voting rights – would be enhanced, at least in some respects, by such a shift. First, it is important to bear in mind that Congress had historically limited national voting-rights protections to the

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<sup>57</sup> See Help America Vote Act, Pub. L. No. 107-252 § 302(a), 116 Stat. 1666 (2002).

<sup>58</sup> *Id.* §§ 101-102, 303.

context of race (and later, other than minority groups) not only because the problems were most severe in these areas, but partly because constitutional understandings and doctrine were thought to limit Congress' power over voting issues to the prevention of racially discriminatory voting practices.<sup>59</sup> But since 1965, it has become much clearer that Congress has constitutional power to directly protect the right to vote itself. HAVA and the NVRA are manifestations of this. As noted above, *Bush v. Gore* confirms that Congress today, if not in the past, has constitutional power to protect the right to vote as such. Simply because earlier Congresses might have believed themselves constitutionally limited to protecting voting rights in the context of racial discrimination is not a reason to remain locked into that model today. Indeed, the Supreme Court of today might well be *more* accepting of (and deferential to) congressional power to protect the right to vote as such than of congressional power to single out regions of the country or voting practices that disadvantage minorities, without a discriminatory animus, for unique voting-rights protection.

Second, in the context of modern politics, it is often difficult to attempt to separate racial considerations from partisan ones when voting rights are at stake. In the voter ID controversies of the moment, for example, Republican legislators are the initiators of efforts to adopt ID requirements; Democratic legislators typically resist. Some charge that these requirements are adopted for racial reasons. But to those who believe these requirements unjustified, are they being adopted for partisan or racial reasons? And should it matter, assuming we could answer the question? The same is true of national legislation that might, for example, ban the

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<sup>59</sup> See *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876).

intimidation of voters. Would it be better (for minority voters, as well as others) for such legislation to target intimidation “based on race” or simply illegal intimidation per se?

The VRA model of selectively focusing on racially-discriminatory voting practices requires courts to determine whether race or partisan politics is the cause (or the predominant cause or, perhaps, a cause) for the adoption of certain voting practices. But such an inquiry is often intractable, for courts or other actors. As long as black voters remain overwhelmingly Democratic, race and partisanship will remain intertwined, perhaps inextricably so. National legislation based on separating the two elements will always, therefore, be problematic, at the least. This problem can lead to underprotection of minority voting rights themselves. The more difficult it is for courts to separate racial from partisan or other considerations, the greater the risk that courts will reject voting-rights challenges on the ground that partisan considerations, not racial ones, account for the practice at issue. Perhaps paradoxically, the more general the form of voting-rights protection, the more minority voting rights will be effectively protected.

Third, and related, national legislation that differentially provides greater protection to minority voting rights than to voting rights per se creates unavoidable incentives to racialize conflicts over voting policies. Challenges and objections to voting policies based on national law must, in this model, be cast in racial terms, if those are the only terms national law recognizes as legally cognizable. Under the VRA model, voter ID requirements can only be challenged on the grounds that they are racially discriminatory. They cannot be challenged under the Act as unnecessary and unjustified restrictions on the right to vote itself (such provisions can be challenged in this form under the Constitution, which does provide general protection for the right to vote as a fundamental right). It is not clear that legislation which forces voting-rights

claims to be cast in racial terms is desirable, just as it is not clear that doing so always provides the most effective protection for minority voters themselves.

Thus, there is some reason to believe that both the selective targeting features of the VRA model of voting rights – the singling out of certain places and of certain subcategories of voting rights for federal oversight and protection – represent the past of voting rights, but not the future. This is not to say that racially-discriminatory voting practices are no longer a problem. But racially discriminatory voting practices are a subset of a more sweeping set of challenges to full and fair political participation in American democracy. The most effective way of providing legal protection for voting rights, including minority voting rights, might increasingly be less through an anti-discrimination vision than through a vision focused directly on the substantive right to vote itself. To be sure, there are some voting-rights issues, that cannot be addressed through universal legislation that protects the right to vote, but only through legislation that singles out minority voting rights. The most prominent example is vote dilution; to the extent policy views this as a problem, it is unintelligible for law to attempt to protect all “groups” from having their voting power “diluted.” Vote dilution can be regulated only if law singles out particular groups for such protective regulation. In addition, nothing I have said about “targeted” voting-rights legislation applies to the language assistance provisions of Section 203, also currently up for renewal. Those provisions address an issue that, by definition, is only relevant to voters with unique language assistance needs; these provisions ensure universal access to the ability to participate in voting at all.

Perhaps, to some extent then, national policy will need to reflect both visions: uniform national voting-rights protections as well as protections selectively targeted both geographically

and on certain groups of voters. But at the least, voting-rights policy should not remain so embedded within the model of the past as to preclude looking beyond that model to consider whether different visions, such as those reflected in the NVRA and HAVA, ought to become more dominant as we move forward.

#### CONCLUSION

I have attempted to illuminate two distinct models of national voting-rights legislation. My aim is to provoke more self-conscious recognition that we have these two distinct models to choose from in defining the future of voting-rights policy, and that public discussion ought to grapple seriously with that choice at those few, exceptional moments at which national attention becomes focused on voting rights. Now I will explain why that will not happen.

In theory, the VRA itself, through Section 5, should provide an ideal mechanism for catalyzing a contemporary approach to voting rights legislation that reflects the current context in which these issues arise. Section 5, with its automatic sunset provision, was designed for exactly this purpose. As Section 5 expires, it forces Congress and the country to consider the changing circumstances in which voting rights issues arise and affords the opportunity to tailor voting-rights law to these circumstances. But I do not expect Congress to engage virtually any of the kinds of questions raised here. There is simply no constituency to press these issues or to ask hard questions about what the future of voting rights ought to look like. Instead, there is every incentive for the critical actors to avoid these questions altogether.

Partisan politics, sometimes an effective vehicle for generating robust public debate, is unlikely to do so here. Republicans fear that raising any questions about the “the Voting Rights Act” will alienate Hispanic voters, a critical and up-for-grabs constituency for the Republican

future.<sup>60</sup> Moreover, it is now generally recognized that Republicans benefit politically in the arena in which the VRA most significantly affects partisan power: political control of representative bodies.<sup>61</sup> The VRA's mandate to create safe minority election districts (when certain factors are present) has benefitted the Republican Party at the expense of the Democratic Party, even as that mandate has also led to the election of many more minority legislators. For both reasons, Republicans have little political incentive to change the current status quo and much reason to endorse it. And for Democrats, this reality creates what might be viewed as a tragic choice; fewer safe minority districts might enhance the prospects of the Democratic Party, including its prospects to control political bodies such as the U.S. House, but at the cost of reducing the number of minority officeholders elected. Thus, there is too great a risk that raising questions about whether Section 5 of the VRA should continue in the form it has had since 1982 will be seen as an attack on a statute that is viewed as sacred by important constituencies in the Democratic Party.

Absent some side in Congress being willing to take the lead on this issue, one might look to outside leadership. The most likely candidate is the voting rights community: the organizations, activists, scholars, community leaders and others most actively involved in these issues over many years. If they were to suggest that the time is right to discuss "trading" some of the protections of the VRA for more aggressive, uniform national legislation, along the model of HAVA and the NVRA, the political and moral authority they wield would enable serious

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<sup>60</sup> See DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* (2004).

<sup>61</sup> *Id.*

discussion of the future of voting rights. But this, too, is unlikely. Even were these groups to suggest such a trade, there is not likely to be any one with whom to trade. More concretely, those in control of Congress and the White House would have to indicate a willingness to consider more HAVA-like legislation in exchange for a more narrowly focused Section 5 of the VRA. But there is no indication that the political leadership in control of both Congress and the White House would be receptive to such a deal. In addition, the voting rights community, like many groups who have fought long and hard for political success, continues to operate largely within the ideological framework that dominated and succeeded in the past. Viewing themselves as on the defensive, voting rights advocates define victory as preservation of as much of the Section 5 structure and scope as possible.

Thus, a conspiracy of silence is likely to prevail among the critical actors. The likeliest result is that Congress will simply reauthorize Section 5, perhaps with modifications at the margins, but essentially in its present form. Difficult questions will be hushed over. The voting rights community will proclaim victory, but this victory will be largely symbolic – the preservation of a past that is increasingly irrelevant and tangential to the main issues. Possibly, that is the only sort of victory available. The profound questions avoided, however, will surface only when the courts, to which Congress will likely abdicate these questions, are forced to judge whether Congress's silence compromises the constitutionality of a renewed Section 5. But the policymaking process will generate no serious discussion of whether the philosophy of Section 5 of the VRA continues to make sense today, more than 40 years after the Act's original creation, or, even more importantly, of what philosophy and approach to voting rights might now be more effective. And the day will be still further postponed at which the United States works itself out

of a voting regime that remains excessively dependent, even for national elections, on the rules and institutions, not to mention the competence and whims of election officials, of the more than 3,000 counties in the oldest and one of the largest democracies in the world.