

SENATOR EDWARD KENNEDY: A LION FOR VOTING RIGHTS

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INTRODUCTION

*“The work begins anew. The hope rises again. And the dream lives on.”*¹

Senator Edward Kennedy was considered the Lion of the United States Senate.² He was also a Lion for civil rights, fighting for justice and equality.³ Senator Kennedy approached legislation with passion, patience, and perseverance. He crossed the political and ideological aisle to further civil and human rights.⁴ His political drive was never

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1. Sen. Edward M. Kennedy, *And the Dream Lives On*, Speech at the 2008 Democratic National Convention (Aug. 25, 2008), available at http://tedkennedy.org/ownwords/event/2008_convention.

2. Martin F. Nolan, *Kennedy Dead at 77*, BOSTON GLOBE, Aug. 26, 2009, at B1.

3. *Id.*

4. See, e.g., Press Release, Wade Henderson, President & CEO of the Leadership Conference on Civil Rights, Statement on the Passing of Senator Ted Kennedy (Aug. 27, 2009), <http://www.civilrights.org/archives/2009/06/statement-on-the-passing-of.html> (declaring that “Senator Edward M. Kennedy was the field general in the fight

darkened by shadows of personal benefit; instead, he legislated from the position that best benefitted his constituents and America.⁵

Senator Kennedy was first elected in 1962 in a special election for the seat that his brother, John F. Kennedy, had resigned after winning the presidency.⁶ Then, Senator Kennedy was elected to a full six-year Senate term in November 1964.⁷ Early in his tenure in the Senate, he carved an impressive niche for himself by adopting controversial causes like racial equality. Senator Kennedy's near five-decade legacy as a champion for those who have little or no voice remains unmatched.

Only four months after President John F. Kennedy's assassination, Senator Kennedy spoke passionately on behalf of the Civil Rights Act of 1964.⁸ While Kennedy could have used his first speech on the Senate floor to advocate for local issues germane to his Massachusetts constituency, he found the Civil Rights Act compelling. He stated:

My brother was the first President of the United States to state publicly that segregation was morally wrong. His heart and his soul are in this bill. If his life and death had a meaning, it was that we should not hate but love one another; we should use our powers not to create conditions of oppression that lead to violence, but conditions of freedom that lead to peace. It is in that spirit that I hope the Senate will pass this bill.⁹

for civil rights. An eloquent advocate, a skilled strategist, and an unequalled coalition-builder, Edward M. Kennedy was the most effective senator of his generation and a leader in achieving every major legislative advance during his service in the Senate. From the Civil Rights Act of 1964 through the Lilly Ledbetter Fair Pay Act of 2009, the cause of civil and human rights had no better friend than Senator Edward M. Kennedy.”).

5. See e.g., Marc Morial, *To Be Equal #35—Edward M. Kennedy: The Lion of the Senate*, NAT'L URBAN LEAGUE (Sept. 2, 2009), <http://www.nul.org/content/tbe35-edward-m-kennedy-lion-senate> (espousing that “he saw politics not as a game of self-interest and personal gain, but as an opportunity to improve the lives of those who are too often locked out and left behind, including workers, women, people of color, the poor and dispossessed, immigrants, children, and people with disabilities”).

6. *Kennedy, Edward Moore (Ted)*, (1932–2009), BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000105> (last visited Jan. 30, 2010).

7. *Id.*

8. SEN. EDWARD M. KENNEDY, TRUE COMPASS 216 (2009) (“[I]t was something of a break with tradition when I decided to make my maiden speech on April 9, 1964, and use it to advocate for the passage of the Civil Rights Act. But it seemed to me that civil rights was *the* issue and this was *the* time.”).

9. 110 CONG. REC. 7380 (1964) (statement of Sen. Edward M. Kennedy).

The events of the 1960s encouraged Senator Kennedy to champion his brother's causes of seeking equality for persons of all races, creeds, and economic backgrounds.

Additionally, in Senator Kennedy's endorsement of the Civil Rights Act, he expressed his respect for voting rights and his hope that voting would become accessible to every American:

The purpose of . . . the voting section [of the civil rights bill], is to accomplish the aims of the voting rights sections of the civil rights bill of 1957 and 1960. Had Congress known then the weaknesses in those sections, I believe these provisions would have been added at that time. We learn by experience. . . . The right to vote in Federal elections must be enforceable at the time of the election to have any meaning.¹⁰

On August 6, 1965, the Senate passed the Civil Rights Act of 1964, which included provisions addressing voting rights, housing segregation, public accommodations, and education.¹¹ The Civil Rights Act provisions were groundbreaking for the time, and many Southerners questioned the act as overreaching and punitive. Senator Kennedy, on the other hand, characterized the provisions as "mild,"¹² indicating that his work on civil rights had only begun. With his first floor speech, Senator Kennedy launched his stellar legislative career and positioned himself to be an outspoken and unwavering advocate for civil rights and voting rights legislation.

Throughout his career, Senator Kennedy championed civil rights issues, including voting, education,¹³ housing,¹⁴ and disability

10. 110 CONG. REC. 7379 (1964) (statement of Sen. Edward M. Kennedy).

11. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (addressing disparities in housing, education, and voting; requiring desegregation in public accommodations).

12. 110 CONG. REC. 7380 (1964) (statement of Sen. Edward M. Kennedy). Senator Kennedy noted that the act did not include any criminal penalties and stressed that the voting rights provisions only addressed federal elections. Additionally, he noted that the legislation relied "primarily on the decency and the tolerance and the conscience of the American people to secure these rights for Negro citizens." *Id.*

13. Senator Kennedy was an advocate of the Elementary and Secondary Education Act in 1967, the first major act granting federal aid to public schools. *Political Timeline for Sen. Ted Kennedy*, WPRI.COM (Aug. 26, 2009, 4:26 AM), http://www.wpri.com/dpp/news/ted_kennedy/local_wpri_kennedy_political_timeline_20090826. He also played a key role in the passage of the Bilingual Education Act in 1968. *Edward M. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jfklibrary.org/Historical+Resources/Biographies+and+Profiles/Biographies/Biography+of+Sen.+Edward+M.+Kennedy.htm> (last visited Jan. 30, 2010). Additionally, Senator Kennedy was actively involved in the passage of Title IX and the No Child Left Behind Act. Kelly Field, *Sen. Edward Kennedy, Longtime Champion of Higher Education, Dies at 77*, THE CHRONICLE OF HIGHER EDUC. (Aug. 26, 2009), <http://chronicle.com/article/Sen-Edward-Kennedy-Longti/48175/>. Senator Kennedy's final act in

rights.¹⁵ During his nearly fifty years serving in the United States Senate, he seized many opportunities to highlight and forward the cause of civil rights. When questioning potential Supreme Court justices, he made it a point to examine nominees' positions on civil rights issues. For example, during Senate confirmation hearings for Chief Justice John Roberts, Senator Kennedy took the opportunity to highlight the judiciary's important role in the protection of civil rights:

[T]he *Brown* decision was just the beginning of the historic march for progress toward equal rights for all of our citizens. In the 1960s and 1970s, we came together as a Congress, Republicans and Democrats alike, and passed the historic civil rights legislation that [was] signed by the President to guarantee equality for all citizens on the basis of race, then on gender, then on disability. We passed legislation to eliminate the barriers to voting that so many minorities had faced in too many states in the country. We passed legislation that prevented racial discrimination in housing. . . . Every one of the new laws was tested in court, all the way to the Supreme Court.¹⁶

This statement is just one example of how Senator Kennedy continually advocated for full and fair political participation for all citizens.¹⁷ Whether he was questioning potential Supreme Court justices about their views on civil rights or championing voting rights of the District of Columbia,¹⁸ Senator Kennedy was a zealous proponent of

the education arena was his collaboration with other senators in 2008 on the Higher Education Opportunity Act. *Political Timeline for Sen. Ted Kennedy, supra*.

14. Senator Kennedy was involved in the passage of the Fair Housing Act of 1968, which prohibits discrimination in the sale, rental, or financing of homes based on race, religion, sex, handicap, or familial status. 42 U.S.C. §§ 3601–3619 (2006); *History of Fair Housing*, U.S. DEP'T OF HOUS. AND URBAN DEV., <http://www.hud.gov/offices/fheo/aboutfheo/history.cfm> (last visited Jan. 30, 2010).

15. Senator Kennedy was instrumental in passing the Americans with Disabilities Act in 1990. Andrew J. Imparato, *Commentary: Kennedy a Champion for Disability Rights*, CNNPOLITICS.COM (Aug. 29, 2009, 10:53 AM), <http://www.cnn.com/2009/POLITICS/08/29/kennedy.disabilities/index.html>.

16. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158, 168–69 (2005) (statement of Sen. Edward M. Kennedy, Member, S. Comm. on the Judiciary).

17. Senator Kennedy voted to strike a provision criminalizing voting by legal aliens in the Immigration Control and Financial Responsibility Act of 1996. ORRIN HATCH, S. COMM. ON THE JUDICIARY, IMMIGRATION CONTROL AND FINANCIAL RESPONSIBILITY ACT OF 1996, S. REP. NO. 104-249, at 27 (1996).

18. Senator Kennedy was a strong supporter of voting rights for the District of Columbia. He sponsored the No Taxation Without Representation Act of 2002, a bill to provide full voting representation in Congress for the residents of the District of Columbia, entitling them to elect two U.S. senators and as many U.S. representatives

voting rights legislation and an opponent to those who took any steps to inhibit the growth of voter participation.

This Article will discuss Senator Kennedy's devotion to the democratic process and will particularly emphasize his role in the initial passage and subsequent reauthorizations of the Voting Rights Act of 1965 (VRA). Part I discusses the importance of the Voting Rights Act and Senator Kennedy's monumental contributions to the passage and reauthorizations of the Act. Part II describes contemporary challenges to the Voting Rights Act and new mechanisms that disenfranchise minority voters. Part III provides direction on ways to conquer present day challenges and to continue the legacy of Senator Edward Kennedy.¹⁹

I.

THE VOTING RIGHTS ACT OF 1965

It took almost one hundred years after the passage of the Fifteenth Amendment for Congress to eliminate barriers to voting in a meaningful way.²⁰ Despite the passage of the Fourteenth and Fifteenth Amendments,²¹ which provided the right to vote and prohibited denial

as the population apportionment allowed. COMM. ON GOVERNMENTAL AFFAIRS, NO TAXATION WITHOUT REPRESENTATION ACT OF 2002, S. REP. NO. 107-343 (2002).

19. I have discussed these issues in greater depth. See generally Gilda R. Daniels, *A Vote Delayed Is A Vote Denied: A Proactive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57 (2008) (discussing new techniques to disenfranchise "unwanted voters" and providing proposals to stop this continued disenfranchisement); Gilda R. Daniels, *Outsourcing Democracy: Redefining the Public Private Partnership in Election Administration*, 88 DENV. U. L. REV. ____ (forthcoming 2011) (describing how private, partisan election activities, such as voter challenges and vote caging, usurp public governmental authority and effectively deny the right to vote to affected minorities and other voters) (on file with author); Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343 (2010) (discussing the deficiencies of state law governing voter deceptive practices and intimidation and providing possible remedies for this disenfranchisement).

20. In 1957, Congress passed the Civil Rights Act of 1957 which created the United States Commission on Civil Rights, transferred the Civil Rights Section to a division with an assistant attorney general, and proposed that civil rights cases, including voting cases, be removed from state courts to federal courts. Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101-11, 71 Stat. 634, 634-37 (1957).

21. The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment of the United States Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. . . . The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV.

of that right based on race, color, or former condition of servitude,²² African Americans continued to face many obstacles to their suffrage. In the 1960s, the number of registered African American voters in parts of the Deep South was abysmally low due to the Jim Crow laws that obstructed access to registration and voter participation.²³ Congress, in passing the VRA of 1965, recognized the need for further legislation to demolish race-based obstacles that frustrated African Americans' attempts to participate equally in the electoral process.²⁴

During the congressional hearings on the VRA, Attorney General Katzenbach pleaded with Congress and President Lyndon B. Johnson to give the Department of Justice greater authority to combat the racial disparities in voter registration, voter intimidation, and to address the horrific means used to prevent black voter participation.²⁵ In an event

22. The manner of widespread disenfranchisement that former slaves faced after the Civil War and during the era of Reconstruction is well documented. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 64–93 (rev. ed. 2009) (discussing the widespread use of poll taxes, literacy tests, and all-white primaries in an effort to disenfranchise newly empowered African American voters); see also Danielle Boaz, *Introducing Religious Reparations: Repairing the Perceptions of African Religion Through Education*, 26 J.L. & RELIGION 214, 214 n.8 (2010–2011) (stating that “‘Jim Crow’ laws in the United States prohibited African Americans from voting, through poll taxes and literacy tests”); Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 910–18 (2008) (describing the disenfranchising mechanisms used prior to the passage of the VRA).

23. For example, as of March 1965 in Alabama only 19.3% of blacks were registered, compared with 69.2% of whites, evidencing an almost 50% gap in registration. Other southern states also had substantial gaps between black and white voter registrations. In Georgia the gap was 35.2%, in Louisiana 48.9%, in North Carolina 50%, in South Carolina 38.4%, in Virginia 22.8%, and the most egregious gap was in Mississippi at 63.2%. Only 6.7% of Mississippi's eligible African American voting age population was registered. BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 23 (Cambridge 1992).

24. See BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* 166 (2007) (“The statistics from counties in which these numerous [Department of Justice] lawsuits were brought uniformly support the conclusion we have reached that low registration and voting has been the result of racially discriminatory use of tests and devices.”).

25. In *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) the court noted:

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. . . . [T]he Civil Rights Act of 1960 permitted the joinder of States as defendants, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

named “Bloody Sunday,” law enforcement officers violently assaulted civil rights protestors attempting to march from Selma to Montgomery, Alabama to bring awareness to the problems with voter registration.²⁶ These events finally prompted President Johnson²⁷ and Congress to give the federal government the legal weapons needed to combat the conniving methods²⁸ of the South. President Johnson signed the VRA of 1965 into law on August 6, 1965.²⁹

While Senator Kennedy felt that the VRA was a good beginning in the fight for equal voting rights, he did not believe that it went far enough in protecting voting rights of minorities. He believed that the legislation needed an amendment prohibiting the poll tax.³⁰ Some

26. On March 7, 1965 more than six hundred marchers embarked on a journey to walk from Selma to Montgomery, Alabama to protect the voting rights of African Americans in Alabama. The marchers only got as far as the Edmund Pettus Bridge before they were beaten and subjected to tear gas. Less than five months after the Edmund Pettus altercation, President Lyndon B. Johnson signed the Voting Rights Act of 1965. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2521 n.3 (2009) (citing media accounts of the event) (“State troopers and mounted deputies bombarded 600 praying Negroes with tear gas today and then waded into them with clubs, whips and ropes, injuring scores.”) (internal quotations omitted).

27. On March 15, 1965, one week after *Bloody Sunday*, President Johnson stated: There is no cause for pride in what has happened in Selma. There is no cause for self-satisfaction in the long denial of equal rights of millions of Americans. . . . But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.

Yet the harsh fact is that in many places in this country, men and women are kept from voting simply because they are Negroes. . . . For the fact is that the only way to pass these barriers is to show a white skin. . . . We have all sworn an oath before God to support and to defend that Constitution. We must now act in obedience to that oath.

President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), in 1 *PUB. PAPERS* 281, 281–83 (1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650315.asp>.

28. Dr. Martin Luther King, Jr. referred to the disenfranchising methods used in the late 1950s as “conniving methods.” Dr. Martin Luther King, Jr., Give Us the Ballot, Address at the Prayer Pilgrimage for Freedom (May 17, 1957), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 47 (Claybourne Carson & Kris Shepard eds., 2001) (“[A]ll types of conniving methods are still being used to prevent Negroes from becoming registered voters. The denial of this sacred right is a tragic betrayal of the highest mandates of our democratic tradition.”).

29. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. At the signing of the VRA of 1965, President Johnson called its passage a “triumph for freedom.” See President Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), in 2 *PUB. PAPERS* 840, 840 (1965), available at <http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/650806.asp>.

30. See KENNEDY, *supra* note 8, at 231–32 (“Some Judiciary members, myself included, believed that the [VRA of 1965] did not go far enough, and that liberal

states required citizens to pay a “tax” or fee in order to vote in an election.³¹ Prior to the passage of the VRA, Senator Kennedy had made the elimination of the poll tax his personal crusade. He individually approached many of his colleagues in the Senate and asked them to support a poll tax prohibition.³² Although his amendment lost in the Senate 49–45, his goal was not lost.³³ A year later the Supreme Court held poll taxes unconstitutional in *Harper v. Virginia State Board of Elections*.³⁴

The VRA of 1965 has been heralded as one of the most effective pieces of legislation in this country’s history.³⁵ The act demolished barriers to voter participation and created an environment in which minority citizens could envision an equal opportunity to participate in the electoral process. The VRA outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the attorney general the power to litigate violations of the act in the federal courts, instead of the practice of bringing cases before biased Southern state court judges and juries.³⁶ As a result, in approxi-

lawmakers had not been adequately consulted. We felt that it ignored one of the most onerous tools of disenfranchisement against impoverished black voters, the poll tax. In 1964, a constitutional amendment devoted exclusively to outlawing the poll tax had been ratified—the Twenty-fourth. But this amendment covered only voting in federal elections. In Texas, Alabama, Virginia, and Mississippi, along with stubbornly (and virtually all-white) Vermont, the tax was still imposed on state and local balloting.”)

31. *Id.*

32. *Championing Civil Rights & Promoting Fairness and Equal Opportunities for All*, COMM. FOR A DEMOCRATIC MAJORITY, http://www.tedkennedy.org/service/item/civil_rights (last visited Oct. 29, 2010) (“Senators ordinarily leave the work on canvassing their colleagues to the lobbyists for organizations backing their views, but Kennedy had personally talked with every Senator who he had any reason to believe might support his amendment. He succeeded in obtaining 38 co-sponsors.”) (internal quotations omitted).

33. *Id.*

34. 383 U.S. 663 (1966).

35. President Lyndon B. Johnson called the VRA of 1965, “one of the most monumental laws in the entire history of American freedom.” Johnson, *supra* note 29, at 841. In 2007, there were forty-five black elected officials in statewide offices. *Black Officials Holding State Offices Nationwide*, JOINT CTR. FOR POL. & ECON. STUDIES, http://www.jointcenter.org/index.php/current_research_and_policy_activities/political_participation/black_elected_officials_roster_introduction_and_overview/table_2f_black_officials_holding_elected_statewide_offices_2007 (last visited Feb. 10, 2011). In 2008, African American turnout was at 65.3% for the presidential election. *A Startling Fact About the Black Electorate*, THE POLITICAL BLOG (July 20, 2010), <http://mypolitikal.com/2010/07/30/a-startling-fact-about-the-black-electorate/>. Surprisingly, most of these voters came from the South where historically turnout for African American voters has been very low. *Id.*

36. See LANDSBERG, *supra* note 24, at 4–7 (discussing the Department of Justice’s efforts to bring litigation prior to the passage of the VRA and its subsequent impact); see also KEYSAR, *supra* note 22, at 202, 223, 268 (describing the different move-

mately thirty years, the wide disparities between blacks and whites in voter registration rates narrowed considerably throughout the South and the number of African American elected officials greatly increased.³⁷

The VRA contains two primary enforcement provisions: Section 2 prohibits discrimination in voting based on race, color, or language minority status,³⁸ and Section 5 requires specified jurisdictions to submit all voting administration changes to the attorney general or the United States District Court for the District of Columbia prior to implementation.³⁹

Congress included a nationwide prohibition against discrimination in voting in Section 2 of the VRA.⁴⁰ This provision imposes a ban on racial discrimination in any voting standard, practice, or procedure, including redistricting plans. In order to bring a claim under Section 2, “[p]laintiffs must demonstrate that . . . the devices result in unequal access to the electoral process.”⁴¹ Both vote dilution and vote denial

ments by various groups in the United States, including women and African Americans, and how they each won their right to vote at different times and through small victories which led to eventually winning the right to vote).

37. From 1970 to 1998, the number of black elected officials increased from 1,469 to 8,868. However by the end of the twentieth century, African Americans constituted only two percent of elected officials nationwide. THEODORE CAPLOW ET AL., *THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000* 186 (The AEI Press 2001).

38. 42 U.S.C. § 1973 (2006). Section 2 reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. § 1973(a)–(b).

39. *Id.* § 1973c.

40. See *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993) (“Congress enacted § 2 of the Voting Rights Act of 1965 to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall ‘be denied or abridged . . . on account of race, color, or previous condition of servitude.’”) (citations omitted).

41. *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

cases can be brought under this section.⁴² Vote dilution occurs when a person is allowed to cast a ballot but that ballot is not counted equally. Vote dilution occurs when minorities are packed into districts, thereby diminishing the group's ability to participate equally in the election process.⁴³ Vote denial occurs when an individual is not allowed to cast a ballot due to a voting practice, procedure, or voting mechanism, such as a literacy test or felon disenfranchisement.

Section 5 of the VRA also addresses discrimination, but attempts to do so preemptively.⁴⁴ After hearing a plethora of testimony regarding the discriminatory practices implemented throughout the South, Congress included Section 5, which requires specific jurisdictions, referred to as "covered jurisdictions,"⁴⁵ to submit all proposed voting changes to either the attorney general of the United States or the United States District Court for the District of Columbia. A covered jurisdiction's submission is reviewed for retrogression (i.e., to determine if the new plan places minority voters in a worse position than before the redistricting).⁴⁶ Regardless of whether the jurisdiction chooses to submit the change to the attorney general or the District Court for the District of Columbia, the jurisdiction must demonstrate that the submitted change has neither "the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority group]."⁴⁷ Section 5's preclearance requirement is preemptive because it mandates that "covered jurisdictions" demonstrate *prior* to the enactment of legislation that their proposed changes are free from a discriminatory purpose or effect.⁴⁸

42. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 689–93 (2006) (describing vote dilution and vote denial, a dichotomy often attributed to Professor Tokaji).

43. See, e.g., James Greiner, *Re-solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L. J. 447, 448 (2011).

44. See Daniels, *A Vote Delayed Is A Vote Denied*, *supra* note 19, at 69–70 (discussing the preemptive powers of Section 5).

45. 42 U.S.C. § 1973b(b) (defining "covered jurisdictions" as those jurisdictions that on November 1, 1964 utilized a "test or device" that restricted the right to vote and where less than fifty percent of the voting age population were registered to vote on November 1, 1964, or less than fifty percent of registered voters actually voted in the 1964 presidential election). In 1965, the entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered. Additionally, parts of Arizona, Hawaii, Idaho, and North Carolina were covered. David Collins, Note, *The Precarious State of the Voting Rights Act's Preclearance Requirement in the Wake of Northwest Austin Municipal Utility District Number One v. Holder*, 32 U. LA. VERNE L. REV. 87, 93 (2010).

46. *Beer v. United States*, 425 U.S. 130, 141 (1976).

47. 42 U.S.C. § 1973c(a); *Beer*, 425 U.S. at 133.

48. 42 U.S.C. § 1973c(a). Pursuant to Section 5, "covered jurisdictions" can receive preclearance of voting changes through the attorney general or a declaratory judgment

Since 1965, the VRA has been subject to periodic reauthorizations. The VRA of 1965 contained several temporary provisions designed to expire after a certain time period. One such provision was Section 4, which authorized federal observers to register voters in covered jurisdictions and prohibited literacy tests and other discriminatory devices.⁴⁹ Another temporary provision is Section 5, the administrative review portion of the VRA explained above.⁵⁰ Congress has examined the effectiveness of and continued need for these and other provisions in 1970,⁵¹ 1975,⁵² 1982,⁵³ and 2006.⁵⁴

In its first examination of the VRA in 1970, Congress placed a five-year ban on literacy tests, and in 1975, after the Supreme Court decision in *Oregon v. Mitchell*,⁵⁵ made the ban permanent.⁵⁶ In 1975, Congress addressed the needs of language minority groups and added, *inter alia*, Section 203, which requires jurisdictions, which meet a certain numeric formula established in the VRA and determined by the Department of the Census, to provide all election materials in the relevant language and in English.⁵⁷ In 2006, Congress again extended the

in the United States District Court of the District of Columbia. Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?* 81 DENV. U. L. REV. 225, 231–38 (2003).

49. 42 U.S.C. § 1973b (banning literacy tests for five years).

50. Congress has recognized the need for Section 5 and extended its coverage in 1970, 1975, 1982, and 2006. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a) (2006)); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, Title II, §§ 203, 206–07, 89 Stat. 400, 401–02 (codified as amended in scattered sections of 42 U.S.C. § 1973 (2006)); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2–5, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b (2006)).

51. Voting Rights Act Amendments of 1970.

52. Voting Rights Act Amendments of 1975.

53. Voting Rights Act Amendments of 1982.

54. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (codified as amended in scattered sections of 42 U.S.C. (2006)) [hereinafter Voting Rights Act Amendments of 2006].

55. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld the ban on literacy tests in the 1965 VRA. The Court found “[I]n enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. . . . In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious national dilemma that touches every corner of our land. In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country.” *Id.* at 132–34.

56. The literacy test ban was made permanent in the 1975 VRA reauthorization. *See* 42 U.S.C. § 1973a(b) (2006).

57. *See* 42 U.S.C. § 1973b(f); *see also* PEW CHARITABLE TRUSTS: ELECTION REFORM INFORMATION PROJECT, TRANSLATING THE VOTE: THE IMPACT OF THE LANGUAGE MINORITY PROVISION OF THE VOTING RIGHTS ACT 3 (Oct. 2006), <http://www.pewcharitabletrusts.org>.

temporary provisions and addressed the controversial Supreme Court decisions, *Reno v. Bossier*⁵⁸ and *Georgia v. Ashcroft*⁵⁹, both involving redistricting issues and the application of Section 5 of the VRA. In each of these reauthorizations, Senator Kennedy remained an active and vocal supporter of the VRA.

Prior to the scheduled 1982 reauthorization, the Supreme Court decided *Mobile v. Bolden*,⁶⁰ which held that in order to prove a violation of Section 2 of the VRA, a petitioner had to show discriminatory intent, rather than discriminatory effect,⁶¹ a much more difficult standard for plaintiffs to meet.⁶² Congress, after some debate, decided to address this obstacle during the 1982 reauthorization. In addition to extending the temporary provisions, it effectively overruled *Mobile* by amending the Section 2 standard to prohibit discriminatory results negating the need to show intent. Senator Kennedy, in conjunction with Senator Charles Mathias, introduced the 1982 amendment to the VRA.⁶³ Congress amended Section 2 of the VRA to underscore that this portion of the legislation prohibited voting laws or practices that denied minority voters an equal opportunity “to participate in the political process and to elect representatives of their choice.”⁶⁴ The Senate Judiciary Committee endorsed a Dole-Kennedy-Mathias compromise that recognized voting laws “could be discriminatory on

pewcenteronthestates.org/uploadedFiles/EB14.pdf (“When Congress amended the Voting Rights Act in 1975 to include the Minority Language Provision (sections 203 and 4(f)(4)), the political process became much more accessible for millions of Americans, who might have only a rudimentary grasp of the English language. . . . section 203 has opened up the electoral process to more than half a million new citizens each year.”).

58. 520 U.S. 471, 480–81 (1997) (holding preclearance under Section 5 could not be denied solely on the basis that the new standard, practice, or procedure would dilute minority voting power).

59. 539 U.S. 461, 485–86 (2003) (holding the district court failed to consider all of the relevant factors by focusing too narrowly on the plan’s effect on certain districts).

60. 446 U.S. 55 (1980).

61. *Id.* at 65.

62. *See, e.g., Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977). In *Arlington Heights*, a nonprofit developer brought suit challenging the Village’s decision not to rezone a tract of land from single family to multifamily to allow the building of low income multifamily units. The builder charged that the decision violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court found that although the decision had a disproportionate effect on racial minorities the builder had not proven discriminatory intent. The Court ruled that racially discriminatory intent alone was not enough but could be considered as one of many factors. *Id.*

63. VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, at 3 (1982) (statement of Sen. Edward M. Kennedy).

64. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. 1971, §§ 1973–1973aa-6 (2000)).

the basis of their effects rather than their intent.”⁶⁵ Kennedy’s mastery of the art of compromise is clear in his work in passing the 1982 reauthorization. He addressed conservative claims that the reauthorization changes could lead to “racial quotas” and acknowledged liberal concerns by recognizing the difficulty in proving intent.⁶⁶ Senator Kennedy assured his peers and constituents that “(t)he horror stories we have heard about racial quotas have been laid to rest in the hearing.”⁶⁷

In addition to the compromise language in Section 2 of the VRA, another important development in 1982 was the extension of the language minority provisions contained in Section 203 that specifically addressed language discrimination in elections.⁶⁸ The Senate committee documented gains that Spanish-speaking citizens had made since the implementation of the language minority provisions and challenges that remained to ensure that all citizens enjoyed equal access to the political process.⁶⁹

In 2006, forty years after the passage of the VRA, Congress once again addressed the need to continue the temporary provisions in the

65. *Mending Fences on Social Issues*, TIME, May 17, 1982, at 43, available at <http://www.time.com/time/magazine/article/0,9171,921211,00.html>.

66. *Id.*

67. VOTING RIGHTS ACT EXTENSION, S. REP. NO. 97-417, at 233 (1982) (statement of Sen. Edward M. Kennedy).

68. Voting Rights Act Amendments of 1982 § 4. In passing this original portion of the VRA in 1975, Congress recognized and attempted to correct the level of disenfranchisement that occurred amongst language minority citizens. VOTING RIGHTS ACT LANGUAGE ASSISTANCE AMENDMENTS OF 1992, S. REP. NO. 102-315, at 4 (1992).

69. In 1982, the Senate committee believed that Section 203 was successful since its enactment in 1975 stating:

Another indication of the success of the Voting Rights Act in enfranchising language minority citizens is the closing of the gap between Hispanic and Anglo voter registration in areas where language assistance is provided. In the State of New Mexico, which has had Spanish-English bilingual elections since it gained statehood in 1912, the Hispanic voter registration rate is 85 percent of the Anglo rate. Similarly, in Texas, which has enjoyed statewide section 203 coverage since 1975, the Hispanic voter registration rate is 65 percent of the Anglo rate. By contrast, in places where section 203 does not apply, the Hispanic voter registration rate is far lower than that of other voters. In the State of Illinois, the Hispanic voter registration rate is less than half of the Anglo rate. In the State of New Jersey, the same is true. In California, where the largest cities—Los Angeles, San Diego, San Francisco, San Jose, Oakland—have large Hispanic populations, but are not now covered by section 203, the Hispanic voter registration rate is also less than half of the Anglo rate.

VOTING RIGHTS ACT LANGUAGE ASSISTANCE AMENDMENTS OF 1992, at 11–12.

act and evaluate whether the act was still needed to address voting rights discrimination.⁷⁰ The Senate Judiciary Committee determined:

[W]ithout the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.⁷¹

During the 2006 reauthorization process, Chairman James Sensenbrenner and Representative Steven Chabot co-sponsored a resolution that Representative John Lewis introduced, which stated in part that Congress “will advance the legacy of the Voting Rights Act of 1965 by ensuring the continued effectiveness of the Act to protect the voting rights of all Americans.”⁷² Senator Kennedy introduced a similar statement in the Senate.⁷³

The House Committee discussed the importance of the VRA and its protections, finding:

Substantial progress has been made over the last 40 years. Racial and language minority citizens register to vote, cast ballots, and elect candidates of their choice at levels that well exceed those in 1965 and 1982. The success of the VRA is also reflected in the diversity of our Nation’s local, State, and Federal Governments. These successes are the direct result of the extraordinary steps that

70. For a comprehensive review of the 2006 reauthorization, see James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007).

71. Voting Rights Act Amendments of 2006, Pub. L. No. 109-246 § 2, 120 Stat. 577 (2006) (codified as amended in scattered sections of 42 U.S.C. (2006)). The Senate Judiciary Committee discussed the continuing importance of the VRA:

The Voting Rights Act of 1965 . . . was enacted to remedy 95 years of pervasive racial discrimination in voting, which resulted in the almost complete disenfranchisement of minorities in certain areas of the country. The Act is rightly lauded as the crown jewel of our civil rights laws because it has enabled racial minorities to participate in the political life of the nation. We recognize the great strides that have been made in the treatment of racial minorities over the last forty years, but extending the expiring provisions of the Voting Rights Act is still necessary to continue to fulfill its purpose.

ARLEN SPECTER, FANNIE LOU HAMER, ROSA PARKS, CORETTA SCOTT KING, AND CESAR E. CHAVEZ VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006, S. REP. NO. 109-295, at 2 (2006).

72. H.R. Con. Res. 216, 109th Cong. 1 (2005). See H.R. REP. NO. 109-195 (2005) (accompanying committee report explaining the provisions of the resolution).

73. See S. Res. 232, 109th Cong., 151 CONG. REC. 19288–89 (2005) (statement of Sen. Edward M. Kennedy).

Congress took in 1965 to enact the VRA and in reauthorizing the temporary provisions in 1970, 1975, 1982, and 1992.⁷⁴

The 2006 amendments extended the protections provided in Section 5's preclearance requirements, Section 203's language minority requirements, and Sections 6 through 9, which authorize the dispatch of federal examiners and observers.⁷⁵

Senator Kennedy remained an emphatic supporter of the VRA and was very active in defending it against other politicians who opposed full reauthorization. In 2006, a small group of Republican senators argued that Section 5's provisions were no longer needed due to the electoral gains that African Americans had made and the diminishing gaps in voter registration and turnout. Senator Kennedy and a bipartisan group of senators responded, fervently addressing the need for Section 5 and other components of the VRA.⁷⁶ He pointed to the failed Georgia voter identification bill and the highly criticized Texas redistricting as evidence of the continuing need to halt discriminatory practices preemptively.⁷⁷ The Senate voted 98–0 for passage of the VRA.⁷⁸

Post-enactment, however, a small group of Republicans, led by Senator Arlen Specter, sought to amend the record in the Senate Judiciary Committee Report to include remarks he made on the Senate floor attempting to undermine the reauthorization.⁷⁹ Senator Kennedy objected to the inclusion of the report and expressed his discontent in the final committee report.⁸⁰ In 2006, all of the temporary

74. JAMES SENSENBRENNER, FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006, H.R. REP. NO. 109-478, at 6 (2006).

75. 42 U.S.C. § 1973aa–1a(b)(1)(2006).

76. See Tucker, *supra* note 70, at 205.

77. *Id.* at 217.

78. Carl Hulse, *By a Vote of 98–0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES, July 21, 2006, at A16.

79. See Tucker, *supra* note 70, at 265–66 (citing S. REP. NO. 109-295, at 1 (2006)).

80. S. REP. NO. 109-295, at 54–55 (2006). The senators that opposed the final Judiciary Committee report, including Senator Kennedy, wrote:

We object and do not subscribe to this Committee Report on S. 2703, the Voting Rights Act Reauthorization and Amendments Act (VRARA), which by including Additional Views signed by the Chairman, has become a very different document than the draft Report circulated by the Chairman on July 24, 2006. As sponsors of the Senate legislation who have supported it, pressed for its enactment and voted for it, we must register our disappointment that this Report does not reflect our views or those of scores of other co-sponsors, does not properly describe the record supporting our bill, and does not fully endorse the bill we introduced and sponsored and that we and all Members of the Committee voted to report favorably to the Senate.

provisions of the VRA were extended an additional twenty-five years.⁸¹

II.

CONTEMPORARY CHALLENGES

Senator Kennedy recognized the significance that the VRA has had on the American system, providing an electoral process that is equally accessible to all citizens despite race or ethnicity, and physical or language ability. During his questioning of Chief Justice Roberts, Senator Kennedy declared that the “Voting Rights Act . . . moved the whole democratic process forward, result[ing] in the elections of hundreds and thousands of local leaders of color in all parts of the country, and Representatives in the House of Representatives.”⁸²

The VRA greatly affected African Americans’ ability to register to vote and seek public office.⁸³ The disparities between white and non-white voters closed in a number of jurisdictions within ten years of passage of the act.⁸⁴ The number of black elected officials also increased tremendously.⁸⁵ In 1965, when Congress passed and Presi-

Id.

81. Voting Rights Act Amendments of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577, 581 (codified as amended in scattered sections of 42 U.S.C. (2006)). These amendments renewed several important provisions, including provisions for language assistance, Election Day monitors, and Justice Department pre-approval of voting changes. *Id.* §§ 2, 7, 577, 581.

82. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158, 315 (2005) (questioning by Sen. Edward M. Kennedy).

83. See DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY: 2000, at 5 (2002), <http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/BEO-00.pdf> (“Growth . . . is especially impressive at the state level. . . . In five southern states—Georgia, Louisiana, Mississippi, South Carolina, and Texas—the total increase between 1970 and 2000 was over tenfold. In 2000, Mississippi and Alabama together had more black elected officials (1,628) than the entire nation had in 1970. In 1970, the 10 states with the highest number of [black elected officials] collectively had 821, while in 2000 the top 10 states had 5,887.”).

84. *Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2008*, U.S. CENSUS BUREAU, <http://www.census.gov/population/socdemo/voting/tabA-1.xls> (last visited Feb. 9, 2011) (showing that in 1964 just over 58% of African Americans voted but over 70% of white Americans voted, while in 2008 60% of African Americans voted and 59% of white Americans voted).

85. See Lisa Handley & Bernard Grofman, *The Impact of The Voting Rights Act on Minority Representation*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 335, 345 tbl.11.1 (Chandler Davidson & Bernard Grofman eds., 1994) (providing data on the percentage of black elected officials from 1970 to 1985); Charles E. Jones, *African American State Legislative Politics*, 30 J. BLACK STUD. 741, 741 (2000) (discussing the increase of African American state legislators following the passage of the VRA); BOSITIS, *supra* note 83, at 5 (providing

dent Johnson signed the VRA, less than one hundred African Americans held any public office across the country.⁸⁶ In 2007, there were approximately 9,000 African American, 5,000 Latino, and considerably less Asian and Native American elected officials across the country.⁸⁷ These gains can be attributed, in large part, to the passage and implementation of the VRA.⁸⁸ Unfortunately, these significant gains are now confronted with new obstacles that challenge the continued effectiveness of the VRA.

A. *Supreme Court Challenges to the Voting Rights Act*

Although we recently celebrated the forty-fifth anniversary of the VRA, contemporary challenges are presenting themselves. First, the constitutionality of Section 5 was questioned in *Northwest Austin Municipal Utility District v. Holder (NAMUDNO)*⁸⁹ and more recently in two cases presently in the United States District Court for the District of Columbia.⁹⁰ In *NAMUDNO*, the Supreme Court refused to hold Section 5 unconstitutional, but called into question its continued viability.⁹¹ These challenges question the constitutionality of Section 5 and seek to thwart its effectiveness. Second, the Supreme Court weakened the VRA's ability to maintain majority-minority districts and in-

statistics on the number of black elected officials from 1970 to 2000); see also MILDRED L. AMER, CONG. RESEARCH SERV., RL 30378, BLACK MEMBERS OF THE UNITED STATES CONGRESS 1870–2007 (2010) (providing statistics on the number of black elected officials from 1870 to 2009); *Black Elected Officials Increased Six-Fold Since 1970: Study*, BNET (Apr. 15, 2002), http://findarticles.com/p/articles/mi_m1355/is_17_101/ai_84971343/ (“When the first roster was published in 1970, Shirley Chisholm was the only Black female in Congress and there were only two Black mayors of major cities. Today, there are 15 Black female congressional representatives and 47 big-city Black mayors.”).

86. *Voting Rights Act*, THE HISTORY CHANNEL, <http://www.history.com/topics/voting-rights-act> (last visited Feb. 10, 2011).

87. See *Distribution of Elected Officials of Color*, THE GENDER AND MULTI-CULTURAL LEADERSHIP PROJECT, <http://www.gmcl.org/maps/national/federal.htm> (last visited Feb. 25, 2011).

88. See BOSITIS, *supra* note 83 at 12 (“Much of the growth in [African American elected officials] during the 1990s can be attributed to the Voting Rights Act and redistricting following the 1990 Census.”).

89. 129 S. Ct. 2504 (2009) (challenging the constitutionality of Section 5 of the Voting Rights Act).

90. *Complaint, Shelby County, Ala. v. Holder*, No. 1:10-cv-0065 (D.D.C. Apr. 27, 2010), ECF No. 1; *Complaint, Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. June 22, 2010), ECF No. 1.

91. *NAMUDNO*, 129 S. Ct. at 2516.

fluence districts in its *Georgia v. Ashcroft*⁹² and *Bartlett v. Strickland*⁹³ decisions.

The Supreme Court's *Bartlett v. Strickland* decision is extremely important in light of the 2011 redistricting cycle and the Court's announcement that less than majority-minority districts do not enjoy Section 2 protections.⁹⁴ In *Bartlett*, a North Carolina county argued that Section 2 of the VRA required it to split counties in order to maintain a majority-minority district that had fallen below fifty percent minority.⁹⁵ County officials attempted to maintain the district despite the fact that state law prohibited splitting counties because the officials believed that the VRA required the county to draw a district which provided an opportunity for minorities to elect their candidate of choice.⁹⁶ The Supreme Court found that Section 2 does not require a jurisdiction to maintain majority-minority districts in districts in which minorities constitute less than a majority.⁹⁷ Specifically, the Court in *Bartlett* found that the North Carolina County could not draw a district that created a majority-minority district and as such, the reconstituted district did not meet the first prong of *Thornburg v. Gingles*,⁹⁸ which requires the minority group to be geographically compact enough to constitute a majority within the district.⁹⁹

The Supreme Court's opinions in these recent cases exemplify the vulnerability of the once almost invincible VRA. In *Bartlett*, the

92. In *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003), the Supreme Court appeared to give legislators permission to reduce minority ability to elect through "unpacking" majority-minority districts and creating "influence" districts.

93. 129 S. Ct. 1231, 1249 (2009) (holding that the VRA did not require states to draw districts less than majority-minority absent meeting the Section 2 requirements).

94. See generally Roger Clegg, *The Future of the Voting Rights Act after Bartlett and NAMUDNO*, CATO SUP. CT. REV. 35 (2008–2009) (discussing the impact of *Bartlett* and *NAMUDNO* on the Voting Rights Act and the Fifteenth Amendment); Joshua Douglas, *The Voting Rights Act Through the Justices' Eyes: NAMUDNO and Beyond*, 88 TEX. L. REV. 1 (2009) (discussing *NAMUDNO* and *Bartlett* in the context of the emerging trends of election law jurisprudence).

95. *Bartlett*, 129 S. Ct. at 1239–40.

96. *Id.*

97. *Id.* at 1243–45.

98. *Id.* at 1249.

99. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986), established certain preconditions before a plaintiff could establish a violation of Section 2 of the VRA:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate.

Court appears to embrace the view that race is now less of a factor in the electoral process.¹⁰⁰ While there has been considerable progress, consideration of a candidate's race is still a part of the electoral process. Proponents of post-racial notions consider Barack Obama's election the seminal event that altered the racial paradigm in America.¹⁰¹ These assertions ignore the political and racial realities that exist in our country and as such, are premature.¹⁰² Moreover, these types of assertions fail to recognize the role the VRA and other remedial race conscious legislation continue to play in the elimination of electoral barriers.¹⁰³ From the passage of the 1965 Voting Rights Act to the 2006 reauthorization, Senator Kennedy recognized the need for legislation that would eliminate obstacles to exercising the franchise.

B. Contemporary Barriers to Voter Participation

Senator Kennedy passionately pursued an end to the poll tax. The resurgence of disenfranchising methods, similar in effect to the poll tax, is creating a troubling trend. These new millennium methods disenfranchise primarily minority voters. While they are not as illustrative as "Bull" Connor in the courthouse door prohibiting minority voters from casting ballots, modern methods are just as effective in thwarting equal access to the polls.¹⁰⁴ New millennium methods of disenfranchisement include the discriminatory use of voter challenges, voter caging, voter deception, and voter intimidation.¹⁰⁵

100. *Bartlett*, 129 S. Ct. at 1249 ("Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation.").

101. *See, e.g.*, Michael Crowley, *Post-Racial*, THE NEW REPUBLIC, Mar. 12, 2008, at 7 (contending that "Obama is largely delivering on his promise as a post-racial candidate"); Abigail Thernstrom & Stephan Thernstrom, *Op-Ed., Taking Race Out of the Race*, L.A. TIMES, Mar. 2, 2008, at M5 (arguing the high number of whites who voted for Obama indicates "race has become less of a factor in voting").

102. *See infra* Part III.A.

103. *See* BOSITIS, *supra* note 83, at 12 ("Much of the growth in [black elected officials] during the 1990s can be attributed to the Voting Rights Act and redistricting following the 1990 Census. The 1993 [black elected official] total represented the largest one-year percentage increase during the past 10 years (1990–2000), and reflected gains from the 1992 election, the first election after the 1990 Census redistricting.").

104. Theophilus Eugene "Bull" Connor was a commissioner of public safety in Birmingham, Alabama from the late 1930s through the early 1960s. In 1963, Connor famously ordered the use of fire hoses and police dogs to quell pro-civil rights demonstrations in Birmingham, attracting national attention and making him a symbol of racial bigotry. WILLIAM A. NUNNELLY, *BULL CONNOR* 4–8 (Univ. of Ala. Press 1991).

105. Felon disenfranchisement, another area deserving of congressional attention, is beyond the scope of this article. Currently, a 'crazy-quilt' of laws from state to state governs a former felon's right to vote. Senator Russell Feingold (D-WI) and Repre-

Challenges to methods of disenfranchisement provide a unique nexus between civil rights and election law. Efforts to temper minority voter participation are a throwback to the Jim Crow days when angry white mobs of citizens and sometimes white police officers stood between African American voters and voter registration or the ballot box. Now, tactics such as voter deception aim to stop the voter from going to the polls, while tactics such as voter challenges and voter caging seek to stop minorities from casting a ballot. While the tactics today differ from the Jim Crow days, the effect is similar: racial, ethnic, language minority, and elderly votes are lost.

The Supreme Court has agreed with Senator Kennedy by consistently holding that voting is a fundamental right deserving of protection.¹⁰⁶ When racial and language minorities' voting rights are targeted, their ability to participate freely in the democratic process is fundamentally affected. The group's ability to elect the candidate of their choice is thwarted when deceptive practices are allowed to continue without penalty. Congress can and should use its constitutional authority to address the current lack of enforcement against disenfranchising methods. Congressional legislation is necessary to remove contemporary barriers to political participation and possibly to combat the Supreme Court's potential removal of protections of minority electoral gains.

1. *Voter Challenges*

An area ripe for federal legislation is voter challenges.¹⁰⁷ States have enacted laws that allow individuals, representing a candidate or

sentative John Conyers (D-MI) introduced the Democracy Restoration Act of 2009 on July 24, 2009. This legislation would restore the franchise to nearly four million former felons by permitting felons no longer incarcerated to vote in federal elections. See H.R. 3335, 111th Cong. (2009); S. 1516, 111th Cong. (2009); see also Michal Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459–64, 470–71, 489–94 (2010) (discussing voting restrictions among other collateral consequences of criminal convictions).

106. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

107. CHANDLER DAVIDSON ET AL., *REPUBLICAN BALLOT SECURITY PROGRAMS: VOTE PROTECTION OR MINORITY VOTE SUPPRESSION—OR BOTH?* 15–18 (2004). Such “ballot security programs” came to national attention during confirmation hearings for William Rehnquist’s nomination to the Supreme Court in 1971. *Id.* at 15, 19–24; see JOHN W. DEAN, *THE REHNQUIST CHOICE* 270–73 (2001) (describing the recurring controversy—in Rehnquist’s 1971 and 1986 confirmation hearings—over whether he had challenged black voters in Arizona). In the mid-1960s, the Republican National

political party, to observe access to the polls. Most states call these individuals “poll watchers” or “challengers” and allow them to observe the casting of ballots, the counting of absentee ballots, and in some instances, allow them to challenge the poll workers’ handling of the process.¹⁰⁸ The basis for voter challenges varies widely. Since no federal law governs voter challenges, laws governing the authority given to poll watchers and who may make voter challenges vary from state to state.¹⁰⁹

In reported instances, poll watchers have used voter challenges to discriminate against racial and language minorities. For example, in *Spencer v. Blackwell*, African American voters sought and obtained a preliminary injunction against Ohio’s Secretary of State Kenneth Blackwell and the Hamilton County Board of Elections, preventing the officials from implementing a statute that would have permitted potentially overwhelming numbers of vote challengers into the polling places during the 2004 elections.¹¹⁰ The abusive and intimidating use of voter challenges has prompted legislation altering the practice.¹¹¹

Committee expanded this approach and engaged in a national ballot security campaign named “Operation Eagle Eye,” which was repeatedly challenged for targeting minority voters in urban areas in battleground states. DAVIDSON ET AL., *supra*, at 35–38. For example, in 1964 in Chicago the Republican National Committee recruited 10,000 poll-watchers for 3,552 voting precincts. *Id.* at 26 n.5.

108. *See, e.g.*, ARK. CODE ANN. § 7-5-312(a) (2009) (addressing poll watchers or representatives); CAL. ELEC. CODE § 19362 (West 2003) (addressing poll watchers).

109. *See* Dale Smith, *Preserving Rights or Perpetuating Chaos: An Analysis of Ohio’s Private Challengers of Voters Act and the Sixth Circuit’s in Summit County Democratic Central and Executive Committee v. Blackwell*, 74 U. CIN. L. REV. 719, 723 (2005) (discussing Ohio state law on voter challenges and reviewing several federal statutes that could play a role in prosecuting invalid voter challenges but do not).

110. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 529–33 (S.D. Ohio 2004). The plaintiffs, African American registered voters, alleged that “the Hamilton County Board of Elections and the Hamilton County Republican Party [had] combined to implement a voter challenge system at the polls on Election Day that discriminate[d] against African American voters.” *Id.* at 529. They were granted a preliminary injunction of the implementation of an Ohio statute that would have authorized private parties to serve as poll watchers. *Id.* at 538. Under the aegis of that statute, the County GOP had filed to have 251 vote challengers admitted to monitor the polls; the Democratic Party counter-filed to admit hundreds of their own challengers. *Id.* at 530. In the court’s view, the implementation of the statute therefore posed “an enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and in the lines out the door.” *Id.* at 535.

111. In 2006, the governor of Washington signed a bill designed to clarify the procedures for challenging voter registration. S.B. 6263, 59th Leg., Reg. Sess. (Wash. 2006). Its sponsor, Washington State Senator Jeanne Kohl-Welles, expressed hope that “these changes . . . have eliminated opportunities for the voter challenge process to be subverted.” Press Release, Washington State Senator Jeanne Kohl-Welles, Bill Clarifying Process to Challenge Voter Registration Signed by Governor (Mar. 29, 2006). The bill was motivated by the controversy surrounding nearly 2,000 voter chal-

During Justice Rehnquist's confirmation hearings, Senator Kennedy was very active in questioning Rehnquist's alleged voter challenging involvement in Arizona. Kennedy co-authored with several other Democrats on the Judiciary Committee "a separate report that outlined the voter-challenging charges, along with other problems they had with the nomination."¹¹²

2. *Vote Caging*

Another area worthy of legislative guidance is vote caging. Although gaining recent prominence, caging is not new. Voter caging or vote caging¹¹³ occurs in the following way. A political party sends registered mail to addresses of registered voters. If the mail is returned as undeliverable—because, for example, the voter refuses to sign for it, the voter is not present for delivery, or the voter is homeless—the party uses that fact to develop a "caging list" and challenge that individual's voter registration, arguing that because the voter could not be reached at the address, the registration is fraudulent.¹¹⁴ In order to

lenges filed in Washington's King County before the fall 2005 elections. *Id.* Similarly, the New York State Legislature has sought to penalize voter suppression tactics, including the abuse of voter challenges. *See, e.g.,* Assemb. 6711, 2007–2008 Reg. Sess. (N.Y. 2007); S. 2554B, 2009–2010 Reg. Sess. (N.Y. 2009). In support of the 2007 version of this bill, sponsoring Assemblyman George Latimer cited "documented efforts to suppress minority voters" including both "repeated blanket challenges to minority voters at a particular polling location" and "people blocking the entryways to select polling sites in heavily populated minority areas." Assemb. George Latimer, Memorandum in Support of Assemb. 6711 (2007 Legis. Bill Hist. N.Y. Assemb. 6711).

112. *See* DEAN, *supra* note 107, at 271.

113. Caging seems to have originated in the direct mail business. One theory of the origin of the term is that it refers to "old postal 'cages,' the hundreds of cubby holes that fronted postal desks for sorting" during the processing of returns from a mailing. Ed Brayton, *GOP Has a History of Voter 'Caging,' According to Democrats' Lawsuit*, MICH. MESSENGER (Sept. 17, 2008, 8:10 PM), <http://michiganmessenger.com/4479/gop-has-a-history-of-voter-caging-according-to-democrats>. Another theory is that 'caging' refers by analogy to the carefully controlled activities conducted within a 'teller's cage.' *See Vote Caging*, SOURCEWATCH (last modified Jan. 29, 2009, 4:23 PM), http://www.sourcewatch.org/index.php?title=vote_caging. Still others believe the term "refers to the place where letters go when they have no address, all batched up in a separate room," or that it describes the act of "blocking voters out." *Id.*

114. Jo Becker, *GOP Challenging Voter Registration*, WASH. POST, Oct. 29, 2004, at A05. In 1981, the Republican National Committee (RNC) sent letters to predominantly African American neighborhoods in New Jersey. When 45,000 of those letters were returned as undeliverable, the RNC attempted to challenge the legitimacy of the voter registrations of those people. *Id.* The RNC also attempted to have those voters' names removed from voter rolls. *Id.* In 1986, the RNC attempted to do the same to 31,000 people in Louisiana—again, mostly African Americans. *Id.* And in 2004, the RNC used similar tactics to challenge voters in Ohio and in predominantly black and

have her ballot counted, the voter must prove her eligibility.¹¹⁵ Voter caging often goes hand in hand with voter intimidation¹¹⁶ and deception tactics.¹¹⁷

3. Voter Deception

Voter deception is a third issue in need of legislative action. An often reported occurrence of voter deception involves the distribution of misleading flyers stating that Republicans (whites) vote on Tuesday and Democrats (blacks) vote on Wednesday, suggesting that the whites should vote on election day but the proper day for Democrats, who are more often Black, to vote is the day after the scheduled election. This serves as only one example of the ways the electoral process is manipulated through deceptive ads and organized campaigns to limit minority political participation.¹¹⁸ A growing concern in the mi-

Democratic Philadelphia neighborhoods. *Id.* According to Becker, Republicans said their actions in 2004 had “nothing to do with race.” *Id.*

115. In 1986, Kris Wolfe, a regional director for the Republican National Committee, sent a memorandum to her counterpart in the Southern Region, Lanny Griffith, seemingly confirming the RNC’s racially motivated use of voter caging in its ‘ballot integrity’ program. Martin Tolchin, *G.O.P. Memo Tells of Black Vote Cut*, N.Y. TIMES, Oct. 25, 1986, at A7. Wolfe wrote, “I know this race is really important to you. I would guess that this program will eliminate at least 60–80,000 folks from the rolls. . . . [T]his could keep the black vote down considerably.” Thomas B. Edsall, ‘Ballot Security’ Effects Calculated, WASH. POST, Oct. 25, 1986, at A1.

116. *See, e.g.*, Democratic Nat’l Comm. v. Republican Nat’l Comm., 671 F. Supp. 2d. 575, 578–79 (D.N.J. 2009) (finding that “[v]oter intimidation presents an ongoing threat to the participation of minority individuals in the political process, and continues to pose a far greater danger to the integrity of that process than the type of voter fraud the RNC is prevented from addressing by the [Consent] Decree [entered into by the parties in 1982 to place restrictions on any RNC or N.J. Republican State Committee ‘ballot security’ initiatives]”).

117. *See* DAVIDSON ET AL., *supra* note 107, at 6 (“There are several noteworthy characteristics of these [vote caging] programs. They focus on minority precincts almost exclusively. There is often only the flimsiest evidence that vote fraud is likely to be perpetrated in such precincts. In addition to encouraging the presence of sometimes intimidating Republican poll watchers or challengers who may slow down voting lines and embarrass potential voters by asking those humiliating questions, these programs have sometimes posted people in official-looking uniforms with badges and side arms who question voters about their citizenship or their registration. In addition, warning signs may be posted near the polls, or radio ads may be targeted to minority listeners containing dire threats of prison terms for people who are not properly registered—messages that seem designed to put minority voters on the defensive.”); Tolchin, *supra* note 115 (quoting Democratic accusations that RNC ‘ballot integrity’ programs were designed “to ‘harass, intimidate and improperly challenge’ black voters”); *see also* Daniels, *Voter Deception*, *supra* note 19 (discussing deficiencies in the current state of the law regarding voter intimidation and other deceptive practices).

118. Prior to the 2008 federal election in Virginia, an anonymous flyer with the state seal, distributed in minority areas in Hampton Roads, Virginia, indicated that Republicans would vote on Tuesday and Democrats on Wednesday. *See* Julian Walker, *Offi-*

nority community is the onslaught of voter intimidation and voter deception activities around elections. Voter deception, however, in most states, is not considered a crime.¹¹⁹ Often those guilty of committing voter intimidation or deception remain unpunished.

Nonetheless, Congress has the power to act. The Supreme Court has held that the government may “regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.”¹²⁰ Discriminatory voter challenges, vote caging, and deceptive practices thwart and negate those freedoms through connivery and falsehoods. These methods should receive legislative attention.

III.

WHERE DO WE GO FROM HERE?

The voting rights field is faced with many challenges, some of which stem from its success. The VRA has eliminated many barriers to the electoral process. Its impact has been far-reaching. Opponents of the 2006 reauthorization and those generally opposed to the VRA have continued to call for its end. Some opponents point to Barack Obama’s election as president of the United States as an indication that the VRA is no longer needed.¹²¹ Some opponents of the VRA have declared the United States officially *post-racial*, an era in which

cials Find Source of Fake Election Flier, Won’t Press Charges, VIRGINIAN-PILOT (Nov. 3, 2008), <http://hamptonroads.com/2008/11/officials-find-source-fake-election-flier-wont-press-charges>. Virginia is one of the few states that actually has a statute outlawing deceptive practices in voting. *Id.* It is classified as a Class 1 misdemeanor. *See* VA. CODE ANN. § 24.2-1005 (2006); Julian Walker, *State Police Investigate Source of Phony Election Flier*, VIRGINIAN-PILOT, Oct. 30, 2008, at A11, available at <http://hamptonroads.com/2008/10/state-police-investigate-source-phony-election-flier>. Police investigated the source of the flier and instead of filing charges decided that it was “a joke gone awry.” *Id.*

119. Only four state intimidation statutes contain language that also penalizes voter deception. *See, e.g.*, FLA. STAT. ANN. § 104.0615(3) (West 2008) (penalizing false information to induce or compel an individual to vote or refrain from voting); 10 ILL. COMP. STAT. ANN. 5/29-4 (West 1993) (penalizing “[a]ny person who by . . . deception . . . knowingly prevents” a person from voting); KAN. STAT. ANN. § 25-2415 (2000) (penalizing the mailing or publishing of false information); MINN. STAT. § 204C.035 (2009) (penalizing anyone know[] “knowingly deceive[s]”).

120. *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)).

121. Abigail Thernstrom & Stephan Thernstrom, Op-Ed., *Racial Gerrymandering Is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15 (“American voters have turned a racial corner. The law should follow in their footsteps.”); *see* Thernstrom & Thernstrom, *supra* note 101, at M5.

race bears little significance or consequence.¹²² Other opponents have filed lawsuits to call into question the constitutionality of the VRA and have renewed other efforts to disenfranchise eligible voters.¹²³

A. *Post-Racial Politics*

While President Obama's election was certainly historic, that event alone does not serve as an indication that we have reached the post-racial Promised Land.¹²⁴ If Hillary Clinton¹²⁵ had won the Democratic primary and the presidency, would we be post-gender? Would that single event indicate the elimination of sexism in our society? The answer is obviously no. Neither does a single election of an African American to the presidency mark the end of racism or a lessened need for the VRA.

Senator Kennedy was one of President Obama's strongest supporters.¹²⁶ However, he saw America's choice to elect Barack Obama as a sign of progress and hope, not the end of the need to push for racial and economic equality.¹²⁷ On January 28, 2008, Senator Kennedy wrote, "[Barack Obama] will turn the page on the old politics of misrepresentation and distortion and bridge the divisions of race, gen-

122. See Shelby Steele, *Obama's Post-Racial Promise: Obama Seduced Whites with a Vision of Their Racial Innocence Precisely to Coerce Them into Acting Out of a Racial Motivation*, L.A. TIMES, Nov. 5, 2008, at A31 (discussing the phenomenon known as Post-Racial America yet concluding Obama will not "lead America into true post-racialism"); see also Thernstrom & Thernstrom, *Racial Gerrymandering is Unnecessary*, *supra* note 121, at A15 (questioning the use of race in the redistricting process required by the VRA).

123. *E.g.*, Complaint, *Shelby County, Ala. v. Holder*, No. 1:10-cv-0065 (D.D.C. Apr. 27, 2010), ECF No. 1; Complaint, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. June 22, 2010), ECF No. 1.

124. See Thomas J. Sugrue, *The Myth of Post-Racial America*, WASH. POST (June 10, 2010), http://voices.washingtonpost.com/political-bookworm/2010/06/the_myth_of_post-racial_amer.html (stating we have not attained a post-racial America).

125. See Kate Snow, *Hillary Clinton Launching Presidential Run*, ABC NEWS (Jan. 20, 2007), <http://abcnews.go.com/Politics/story?id=2810072&page=1> (discussing the announcement of Hillary Clinton as a presidential candidate for the 2008 election).

126. See, *e.g.*, Jeff Zeleny & Carl Hulse, *Kennedy Chooses Obama, Spurns Pleas by Clintons*, N.Y. TIMES, Jan. 28, 2008, at A1 (covering Senator Kennedy's endorsement of Obama in the 2008 election).

127. See Kennedy, *supra* note 1 ("For me this is a season of hope—new hope for a justice and fair prosperity for the many, and not just for the few—new hope . . . if we set our compass true, we will reach our destination—not merely victory for our party, but renewal for our nation. And this November, the torch will be passed again to a new generation of Americans, so with Obama and for you and for me, our country will be committed to his cause.").

der, ethnicity and sexual orientation that plague our country.”¹²⁸ Senator Kennedy thus believed that we have not achieved equality by virtue of Obama’s election, but rather that there is more work to do.¹²⁹

Senator Kennedy’s work in promoting civil rights is reflected in his speech at the 1980 Democratic Convention.¹³⁰ He stated, “Circumstances may change, but the work of compassion must continue. . . . For all those whose cares have been our concern, the work goes on, the cause endures, the hope still lives, and the dream shall never die.”¹³¹ Senator Kennedy’s remarks encourage us to move forward. Unfortunately, Senator Kennedy’s death left a vacancy in leadership on civil rights issues in the Senate at a time when some are calling for the end of civil rights remedies like the VRA. Although President Obama’s election serves as a symbol of progress, it also demonstrates the role that race continues to play in elections.¹³²

Although historic and certainly an advance, Obama’s election by no means suggests an end to the pursuit of racial, ethnic, and language equality in the United States of America. President Obama’s election serves as a mere symbol of America’s progress, not the destruction of

128. Sen. Edward M. Kennedy, *Barack Obama*, HUFFINGTON POST (Jan. 28, 2008, 4:51 PM), http://www.huffingtonpost.com/sen-edward-m-kennedy-/barack-obama_b_83668.html.

129. Post-racial proponents ignore the fact that Obama did not win a single state in the Deep South, where racially polarized voting continues to predominate. Race remains a strong consideration in elections. See Johnathon Tilove, *Obama Made Inroads with White Voters Except in Deep South*, NOLA.COM (Nov. 8, 2008, 10:20 PM), http://www.nola.com/news/index.ssf/2008/11/obama_made_inroads_with_white.html (citing deeply engrained racism as a reason for Obama’s lack of popularity in the Deep South); see also Greg Bobrinsky, *The GOP’s Growing Latino Problem*, REAL-CLEARPOLITICS (Nov. 12, 2008), http://www.realclearpolitics.com/printpage/?url=http://www.realclearpolitics.com/cross_tabs/2008/11/the_gops_growing_latino_proble.html (discussing demographical similarities and contrasts between Kerry’s and Obama’s supporters).

130. Sen. Edward M. Kennedy, *The Cause Endures*, Speech at the 1980 Democratic Convention (Aug. 12, 1980), available at http://www.historyplace.com/speeches/ed_kennedy.htm (last visited July 8, 2010).

131. *Id.*

132. Regression analysis can be used to measure the level race plays in elections. This analysis can measure the level of racially polarized voting in any jurisdiction where there is a significant minority population and minority candidates running for office. See Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL’Y REV. 59, 66 (2009) (discussing the use of regression analysis in the 2008 presidential election); see also Stephen Ansolabehere et al., *Race, Region and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1395–96 (2010) (discussing regression analysis conclusions of elections in which there is a minority candidate).

all racial barriers.¹³³ We have not yet reached the post-racial Promised Land. However, we are closer than we were forty-five years ago when the VRA was passed. The 1965 VRA has maintained equality as its aim and primary purpose.¹³⁴ Its continued existence is crucial to ensuring equal access at the polls.

B. Supreme Discontent

During the 1982 and 2006 reauthorizations of the VRA, Congress intervened to overrule adverse Supreme Court rulings.¹³⁵ It is debated whether Congress should similarly intervene now. On previous occasions, Congress has waited to respond to “changed circumstances” during or near a scheduled VRA reauthorization.¹³⁶ Congress may not need to act swiftly in response to the Supreme Court’s decision in *NAMUDNO*, since in its decision the Supreme Court avoided the constitutional issue and interpreted Section 5 expansively to allow additional jurisdictions to bail out, essentially leaving the statute intact and increasing the ability of jurisdictions to exempt themselves from its requirements.¹³⁷ In response to *Bartlett*, however, it remains to be seen whether Congressional intervention should and will occur.¹³⁸ In *Bartlett*, the Court concluded that Section 2 of the VRA did not require a jurisdiction to maintain majority-minority districts when minorities constituted less than a majority.¹³⁹

During any redistricting process, litigation is anticipated. Some jurisdictions subject to Section 5 may choose to submit redistricting plans directly to the United States District Court for the District of Columbia for the court to determine whether the redistricting plan should receive preclearance. After receiving Section 5 preclearance

133. See Tilove, *supra* note 129 (citing deeply engrained racism as a reason for Obama’s lack of popularity in the Deep South).

134. Lisa Erickson, *The Impact of the Supreme Court’s Criticism of the Justice Department in Miller v. Johnson*, 65 Miss. L.J. 409, 410 (1995) (stating one of the purposes of the VRA was to further the Fifteenth Amendment).

135. See Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 353–72 (2010) (discussing the different ways Congress and the Supreme Court respond to “changed circumstances” and address past racial discrimination).

136. See *id.* at 354–55.

137. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2526–27 (2009).

138. See *Leading Cases, Vote Dilution: Bartlett v. Strickland*, 123 HARV. L. REV. 372, 381 (2009) (arguing that the Supreme Court’s opinion in *Bartlett* is too “formalistic” and “technical”); see also Kareem U. Crayton, *Bartlett v. Strickland: Unveiling the Roberts Court Philosophy on Election Law*, 7 ELECTION L.J. 347, 347 (2008) (reviewing the Supreme Court’s decision in *Bartlett*).

139. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1243–45 (2009).

from either the United States District Court or the attorney general, the plans may be challenged under Section 2 of the VRA.

We will not witness the impact of *NAMUDNO* and *Bartlett* until the redistricting cycle begins. At that time, we can determine whether the decisions evidence an appreciable decline in minority districts and minority representation. Thus far, the *NAMUDNO* decision has not resulted in a dramatic increase in the number of jurisdictions bailing out from Section 5's requirements. Senator Kennedy noted that the bailout process had worked effectively since every jurisdiction that requested bailout had received it.¹⁴⁰

Should Congress choose to act, it may enter a political malaise in which minority groups and political parties are at odds over the use of less than majority-minority districts and the extent to which these districts need statutory protection.¹⁴¹ Consequently, the need for advocates to litigate these issues remains paramount, while the need for Congress to intervene at this time seems premature.

Accordingly, litigation should tease out potential problems, such as a jurisdiction's predisposition and attempt to dismantle majority-minority districts or draw less than majority influence or crossover districts instead of majority-minority districts. During the 2006 VRA reauthorization, Senator Kennedy was extremely vocal and supportive of extending the temporary provisions, namely Sections 5 and 203.¹⁴² His leadership, as discussed *supra*, led to bipartisan approval of the VRA that addressed concerns from, *inter alia*, *Georgia v. Ashcroft* in 2006 and *Mobile v. Bolden* in 1982.

C. Combating Contemporary "Conniving Methods"¹⁴³

The renewed efforts to challenge, intimidate, and disenfranchise voters through methods of deception are reminiscent of days passed. Deceptive tactics, voter challenges, and voter caging frustrate the political process and discourage participation.

To address voter deception, Congress could use the Elections Clause power to protect voters from false information in federal elec-

140. 152 CONG. REC. 15279 (2006) (statement of Sen. Edward M. Kennedy).

141. See, e.g., Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1640 (2010) (prescribing an approach for using discriminatory purpose analysis during the 2010 redistricting cycle); Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 350–53 (1998) (noting the pitfalls of influence districts and proposing using those districts to increase minority representation in the Senate).

142. See *supra* Part I.

143. See *supra* note 28 and accompanying text.

tions. In *Burson v. Freeman*, the Supreme Court stated that Congress has a compelling interest in “protecting voters from confusion and undue influence” and in safeguarding “the integrity of its election process.”¹⁴⁴ As a result, Congress has the authority to act under either the Elections Clause or other constitutional powers, such as those embodied in the Fourteenth and Fifteenth Amendments, to protect its citizens from voter deception. Congress’s response could come in the form of stricter penalties for those engaging in voter deception or intimidation or increased oversight of the Department of Justice to ensure enforcement of existing laws against intimidation. There exists a nationwide need for enforcement of voter deception and intimidation laws and stringent criminal penalties for violations. Congress can amend legislation to define deceptive practices and provide appropriate penalties.

In the 110th Congress, Senators Obama and Schumer introduced the Deceptive Practices and Voter Intimidation Prevention Act of 2007, which would criminalize many voter deception practices and impose five-year penalties for voter intimidation convictions.¹⁴⁵ Senator Kennedy served as a co-sponsor of this bill.¹⁴⁶ Unfortunately, the bill never reached the Senate floor. Voter deception and intimidation remains an area deserving of renewed Congressional attention.

CONCLUSION

Senator Edward Kennedy’s hard work and determination provide a strong foundation for preserving and expanding voting and civil rights. He possessed gifted abilities to reach a bipartisan compromise while still providing safeguards for the constituents he served and the country he loved. In a little more than a year since Senator Edward Kennedy’s death, the political landscape has shifted from reasonableness to extreme partisanship.¹⁴⁷ Senator Kennedy is heralded as a politician who could walk across the aisle and find a consensus.¹⁴⁸ Today, citizens are angry and polarized. Kennedy’s bipartisan approach is sorely needed.¹⁴⁹ Senator Kennedy saw Barack Obama’s election for

144. *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

145. Deceptive Practices and Voter Intimidation Act of 2007, S. 453, 110th Cong. § 2 (2007).

146. *Id.*

147. Felicia Sonmez, *At “Governing Across the Divide” Roundtable, Solutions are Elusive*, WASH. POST. (Oct. 6, 2010), <http://voices.washingtonpost.com/thefix/whitehouse/at-governing-across-the-divide.html>.

148. *Imparato, supra* note 15.

149. *See* Sonmez, *supra* note 147 (noting that the current rancor in the nation’s capitol is at an all time worst); *see also* Dean Reynolds, *Palin: “It’s Time to Take Our Country Back”*, CBSNEWS.COM (Sept. 17, 2010, 9:50 PM), <http://www.cbsnews.com/>

what it symbolized—progress—not the end of considerations of race and racism. Senator Kennedy’s presence is greatly missed and his artful method of legislating has left a vacuum in civil rights legislation and leadership in the United States Senate. We should take heart, however, in knowing that the struggle continues. As Senator Kennedy eloquently stated, “[T]he work goes on, the cause endures, the hope still lives, and the dream shall never die.”¹⁵⁰

8301-503544_162-20016903-503544.html (discussing Palin’s message that “we don’t need to fundamentally transform America, we need to restore America.”).

150. Kennedy, *supra* note 130.