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PART I

Race and Politics

Overview: How, If at All, Is Racial and Ethnic Stratification Changing, and What Should We Do about It?

Jennifer L. Hochschild

These chapters on the politics of groups push the reader to consider a difficult but essential question: How, if at all, are old forms of racial and ethnic stratification changing? A broadly persuasive answer would have powerful implications ranging from constitutional design and electoral strategies to interpersonal relationships and private emotions. However, the question is not only difficult to answer for obvious empirical reasons, but also because, for scholars just as for the general public, one's own views inevitably shape what one considers to be legitimate evidence and appropriate evaluation of it. So the study of racial dynamics is exasperatingly circular, even with the best research and most impressive researchers.

Although my concerns about circularity lead me to raise questions about all three chapters, I want to begin by pointing out their quality. Each provides the reader with a clear thesis, well defended by relevant evidence and attentive to alternative arguments or weaknesses in the preferred one. Each chapter grows out of a commitment to the best values of liberal democracy – individual freedom and dignity, along with collective control by the citizenry over their governors – but commitments do not override careful analysis. Each chapter is a pleasure to read and teaches us something new and important.

My observations begin with a direct comparison of Pildes's and Karlan's respective evaluations of the United States' Voting Rights Act and its appropriate reforms. I then bring in Hutchings and his colleagues' analysis of American racial and ethnic groups' views of each other, which provides some of the essential background for adjudicating between Pildes's and Karlan's positions. Underpinning my discussion, and becoming more explicit in the conclusion, is an observation that is not new to me but is nevertheless important: People who identify as progressives are often deeply suspicious of attempts to alter current policies about or understandings of racial and ethnic stratification, whereas people who identify as conservatives are often most eager to see and promote modifications in current practices. There is something deeply ironic here – both in the difficulties of many on the left to STET

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recognize STET what has changed and in the difficulties of many on the right to STET recognize STET what has not.

SHOULD THE VOTING RIGHTS ACT BE CONTINUED, ADJUSTED, OR TRANSFORMED?

Richard Pildes argues that it is time for the "next generation" of voting rights legislation to take over from the several-times-renewed Voting Rights Act (VRA) of 1965. In his view, the VRA succeeded in its initial mission of "getting out in front" of white public officials' strategies for disfranchising black voters, so much that it is now getting in the way of its own underlying purpose of voting equity. Section 5 of the VRA is both overinclusive – requiring oversight that is no longer necessary – and underinclusive – not capable of addressing current barriers to citizens' exercise of their right to vote. Given politicians' tendency to move in only one reform direction at a time, he urges Congress to largely scrap the old VRA and replace it with a new law that addresses more contemporary obstacles to voting, such as felon disfranchisement, outmoded voting technologies, and inefficient or deliberately ineffective electoral procedures. Although these contemporary obstacles may disproportionately affect people of color, they are not intrinsically about racial discrimination per se, so the underlying framework of the old VRA needs to be rethought rather than adjusted.

Pamela Karlan does not quite accuse Pildes of naïveté about continuing racial discrimination, but such a suggestion hovers around the edges of her essay. She points to persistent racial bloc voting, especially whites' disproportionate rejection of Barack Obama's presidential candidacy in locations covered by Section 5 of the VRA, as well as the possibility of discrimination in local elections and the distinctive barriers faced by Latinos and Native Americans. For these reasons, among others, the United States must maintain the old VRA. In fact (Pildes might agree here), "the government has an obligation to facilitate citizens' exercise of the franchise" and to become even more vigilant against states and courts' tendency to water down citizens' voting rights, especially focusing on citizens of color given America's history of racial stratification. Karlan's most pointed argument is that the VRA does not only protect individuals' right to vote – a protection that, in her view, we still need – but also gives minority groups "leverage in demanding accommodation of minority concerns." Section 5 is what gives that leverage, and therefore it warrants continued support or even strengthening.

Pildes and Karlan agree on a lot of particular reforms and share an underlying commitment to equality of individual suffrage rights and equity among group rights. They share the goal of overturning the effects of centuries of discrimination against black Americans. Nevertheless, the tone of their chapters differs intriguingly. Karlan worries more about whites' continuing preference for racial domination, or at least their indifference to its continuation. For example, if Section 5 were repealed, "the Democratic party might be tempted to spread concentrations of minority voters

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among several districts" to promote its highest priority – electing more Democrats – even if this would dilute blacks' political influence. In another example, Karlen points out not only that, Southern whites have historically "resist[ed] minority political aspirations," but also that "this backlash phenomenon seems to be alive and well today." Thus we must always remember that "[t]he past is never dead. It's not even past."

In contrast, Pildes implicitly asserts that the past *is* dead, or at least dying, and that our preoccupation with protecting minorities against the evils of twentieth-century-style discrimination is getting in the way of protecting them, and others, against twenty-first-century problems. To put my words into his mouth, racial and ethnic stratification is changing – decreasing in important ways while persisting or even worsening in others. If we cling too tightly to winning the last war, we jeopardize our chances of success in the next one. In his own words, "the voting rights issues we face today are no longer defined by the near-complete exclusion of black voters by a number of readily identifiable state and local governments. . . . If Congress is serious about protecting the right to vote, it is going to have to go beyond that model." Many of the most serious barriers to voting "tend to impact not only racial minorities, but also the poor and the elderly generally;" thus Pildes calls for laws and policies that are uniform across states and have "universal terms that extend coverage to all voters." In sum, with a few important exceptions, we no longer need laws targeted at specific racial or ethnic groups in particular locations because non-Anglos are often powerful enough to protect their own interests. Instead we need laws to protect newly recognized categories of powerless Americans, a majority of whom might even be white.

In my view, Pildes has the stronger argument; I see more change than continuity in the American racial order since the VRA was formulated and renewed. Some of that change has been for the better. With two exceptions (1976 and 1996), a higher proportion of whites voted for Barack Obama than for any of his Democratic party predecessors in the eleven elections since 1968 (Clayton 2010). Nine states, including three from the old Confederate South, switched from Republican in 2004 to Democratic in 2008, due to a combination of some white support, very strong black and Hispanic support, and changing proportions of groups in the voting public. To put it most simply, Americans have now shown that "a black candidate can win in the majority-white constituency that is the national presidential electorate" (Ansolabehere et al. 2010: 1409).

However, some of the change in the American racial order since the VRA was formulated has been for the worse. The proportion of young non-Anglo men involved with the criminal justice system has skyrocketed; when calculated in 2001, 17 percent of black and 8 percent of Hispanic men, compared with 3 percent of white men, had been incarcerated in a state or federal prison at least once (U.S. Department of Justice 2003) – and the numbers and disproportion have risen since then. Put another way, although blacks comprised 12 percent of the U.S. population in 2008, they accounted

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for 28 percent of all arrests (Bureau of Justice Statistics 2008: table 4.10.2008). Poor or poorly educated young black men are especially likely to be involved with the criminal justice system, and their families and communities are disproportionately harmed through indirect involvement (Western 2006; Clear 2007). Thus the old issue of felon disfranchisement has taken on new urgency as the prison population has soared in recent decades, and it now arguably has as much or more impact on racial disparity in political representation than more conventional forms of discrimation against would-be minority voters. I leave it to the experts to answer questions about how exactly to shape voting rights laws to combat these new forms of racial and ethnic stratification. But I am convinced that the problems revealed since roughly 2000 represent broader and deeper challenges to liberal equality than do those persisting from the civil rights era (again, with pockets of exceptions). I urge analysts and activists alike to focus more on developing policies to fight new forms of political inequality than on retaining policies to protect against the old ones.

RACIAL ATTITUDES: THE ANSWERS YOU GET DEPEND ON THE QUESTIONS YOU ASK

One of the most important changes in racial and ethnic stratification in the United States over the past few decades has been the rise in immigration. Demograhic projections show that the United States is on a course to become a majority non-Anglo country by the middle of the twenty-first century (if Hispanics are classified as non-white). I believe this to be historically unprecedented; never before has the majority group in a democratic polity permitted its elected officials to enact laws that will predictably make that group a minority. The United States could, of course, enact a new version of the 1924 Immigration Act in an effort to curtail immigration of the "wrong" kinds of people, but with each passing year since the 1965 Hart-Celler Act, the possibility of this occurring seems less likely.

As many readers also likely realize, the process of immigrant incorporation is difficult, often incomplete, and sometimes nonexistent. As I write, the state of Arizona proposes to implement a draconian law to identify and arrest illegal immigrants (it is appealing a court injunction against implementing most features of the law), and several other states may follow suit. More generally, relations between native-born and foreign-born residents, as well as among nationalities and pan-ethnic or racial groups, can be tense and full of conflict. In this political context, Vincent Hutchings and his colleagues' National Politics Survey (NPS) offers very welcome evidence of the attitudes of Americans with varying racial and immigration statuses.

The NPS has many virtues, starting with the fact that it is "the first multiracial and multiethnic national study of political and racial attitudes." It includes large samples from five distinct groups (Caucasians, Hispanics, African Americans, Asian Americans, and Afro-Caribbeans). A slight majority of the Afro-Caribbeans and Hispanics, as well as three-quarters of the Asian-American respondents, were immigrants, as

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were roughly 5 percent of the black and European respondents. The list of questions is extensive and, unlike many surveys, includes an array of political items designed to test important theories within political science.

The chapter by Hutchings and his colleagues reinforces Karlan's view that twentieth-century-style discrimination is alive and well. More than 90 percent of black respondents believe that their group faces at least some discrimination, as do more than 80 percent of Hispanics and Afro-Caribbeans, 70 percent of Asian Americans, and even 40 percent of whites. The question is clearly very broad, but if we consider the responses in relation to one another rather than in absolute terms, all non-European groups report a great deal more discrimination than do non-Hispanic whites. Additional reports on this survey show that approximately one-quarter of (each) blacks and Latinos, compared with about 15 percent of each the other three groups, agree that whites want to keep blacks and Latinos, as a group, down. A majority of the members in every non-European group report that they have faced at least a little discrimination at some time in their life. And as the chapter shows, non-European groups are all more likely to see whites as zero-sum competitors for jobs or political influence than to see each other in the same light, although intergroup competition among non-Europeans is also robust.

Like a law or regulation, perceptions of mistreatment or competition can be overinclusive, underinclusive, both, or neither. But these 2004 results are drearily similar to results from many other surveys conducted in the previous several decades, and also to those of studies using matched testers or aggregate data analysis. The NPS shows that it would be foolish – and no contributor to this volume is anywhere near that foolish – to argue that racial and ethnic stratification has disappeared in the United States or is on a certain path to extinction.

Nevertheless, the Hutchings et al. analysis would be stronger if the authors addressed the possibility that the degree or kind of racial and ethnic stratification is changing in the United States. I see several directions for development. First, the questions invite reports of illegitimate treatment or hostile relations, but there are no countervailing questions inviting reports of cooperative treatment or productive relations. Respondents can report the absence of discrimination or hostility, but they have no opportunity to express the presence of desirable interactions. Similarly, respondents are asked if "more good jobs (or influence in politics) for [another group] means fewer good jobs for people like me," but not whether "more good jobs (political influence) for another group improves the chances that my group will attain good jobs (political influence)." Respondents can disagree with the idea of zero-sum competition, and generally a majority of them do (mean scores are below 0.5 in Table 3.1). Still, they have no place to report positive-sum perceptions.

Questions focused on successful racial or ethnic relations might, of course, reveal even deeper perceptions of maltreatment, and in any case, because these questions were seldom asked in earlier surveys, one would find it hard to track change over time in positive interactions. Nevertheless, it would be useful to know if people who

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perceive a great deal of discrimination also see group dynamics as more complex, multifaceted, or even attractive than these items allow them to express (for an example of a study that shows both sets of views, see Baker et al. 2009).

A similar observation has to do with the classic item on "linked fate." The NPS shows that one-half to two-thirds of all five groups agree that "what happens generally to [respondent's race] people in this country will have something to do with what happens in your life" (Hutchings et al. 2005). These results are in accord with those in other surveys conducted in the past few decades, although the NPS helpfully extends the question to all five groups – a rare innovation, since most previous surveys asked linked-fate questions only of blacks, or at most of blacks and Latinos. Previous research shows that perceptions of linked fate are associated with a variety of political views and behaviors, so this item reveals a lot about the persistent nature of racial and ethnic stratification. However, the question is asked immediately after the series on zero-sum competition among groups and other questions on racial identity, so there is the risk of a priming effect, the real extent of which we do not know.[1] In addition, the Pew Research Center recently asked roughly the opposite question, with intriguing results. In 2007, 37 percent of black respondents agreed that "blacks today can no longer be thought of as a single race because the black community is so diverse" (no other group was asked this question). Young black adults were more likely than older ones to agree (Pew Research Center for the People and the Press 2007). A year later, young adults were also more likely than older ones to agree that "there is no general black experience in America" (results provided to author by Fredrick Harris, from ABC News et al. 2008). In 2009, approximately one-third of blacks said that middle-class and poor blacks have only a little or almost nothing in common; only 22 percent saw "a lot" in common . (Pew Research Center and National Public Radio 2010).

Is the sense of linked fate dissipating, or perhaps was it never as strong as various surveys implied? If so, what does this suggest about contestation against racial and ethnic stratification? Maybe these new items show that many blacks (and perhaps members of other non-European groups) finally have a sufficiently secure status that they can afford to publicly reveal, and perceive in others, personae unconnected with traditional racial politics – political conservative, Japan scholar, venture capitalist, rower, among others. Or maybe these new items mean that the sense of racial solidarity so essential to protect against persistent racism (Shelby 2005) is being lost in the vain pursuit of acceptance by Wall Street brokerages or elite country clubs. There is a third possibility: Perhaps affluent blacks benefit from the lowering of traditional racial barriers, but poor blacks are harmed by the loss of the traditional middle-class African American commitment to lift as we climb (Ford 2009). Whatever the answer – and the right answer will turn out to be as much a matter of political activity yet to come as of interpreting trend lines – public opinion surveys and other types of research need to be open to the possibility that the ways in which we have understood racial and ethnic stratification are increasingly outmoded. We need to analyze

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the dissolution or transformation of racial ties as much as we need to track linked fate.

Another query for the (perhaps next) NPS survey originates from the distinctive nature of the 2004 sample. As I noted earlier, a majority of NPS respondents were immigrants. But the survey was translated only into Spanish, presumably for reasons of expense and logistical difficulty. This means that Latino immigrants who were not comfortable with English could readily participate, but immigrants from other parts of the world who were not comfortable with English could not. Thus the Asian sample may differ substantially from the Latino sample in its members' degree of assimilation to the United States.

More generally, it would be very useful to have more items that emerge from an immigrant's perspective rather than that of a native-born racial minority. For example: What do you find most startling about American racial and ethnic relations? Most problematic? Most gratifying? What benefits do your children receive from living in the United States? What harms do they encounter? What would draw you into political activism? Perhaps nativism differs from discrimination in important ways that new survey items could reveal. Of course, one would need to construct such questions carefully so that they also make sense to native-born residents – but the central point is that since one-quarter of the American population are now immigrants or the children of immigrants, the kinds of issues that we should be studying to understand racial and ethnic stratification may be changing.

Hutchings and his colleagues' chapter inspires a final question, focused more on the results of their analysis than on the survey itself. One of the criteria for a good social science theory, in my view, is that it can explain movement in several directions. Why does political support for, say, intervention in Iraq rise and then fall? Or why do politicians support the president of the opposite party on some occasions but not on others? Racial contact theory has this quality; it can explain high levels of racial antagonism (too little contact, or the wrong kind of contact, among people of different races), low levels of racial antagonism (reasonably favorable contact), and racial amity (a great deal of the right kind of contact among people of different races).

I find it harder, however, to see how group position theory, or several of the others that the NPS tests, can explain movement in different directions. As Larry Bobo explains its underpinnings, group position theory was developed to explain how "feelings of competition and hostility" emerge from "judgments about positions in the social order" (Bobo 1988). It is of course easy to see why Herbert Blumer in 1958 saw no reason to explore the absence of intergroup hostility and competition, never mind the presence of intergroup sympathy and cooperation. The theory, however, would be richer, and arguably more relevant to what Hutchings et al. characterize as "the nation's increasingly complicated racial atmosphere," if it were extended or modified to show how different beliefs about group position can lead to different racial dynamics. Can group position theory explain feelings of cooperation and

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amity? Can it explain instrumental political coalitions? Alternatively, if a group's members increasingly diverge in their judgments about their own and other groups' positions in the social order, does group position theory lose its utility?

The degree to which it seems worthwhile to develop more multifaceted theories about race depends on one's view about whether traditional forms of racial and ethnic stratification are changing in important ways. In my view, they are, and I would urge researchers to develop new forms of evidence to test this possibility. Change is not synonymous with improvement, so progressives who rightly remain worried about group-based inequality need not resist the idea that American politics are changing – but the possibility of change does call for innovation in data collection as much as in policy design.

DO AMERICAN MINORITY GROUPS STILL HAVE "AN" INTEREST?

Opinions and perceptions, such as those that Hutchings et al. analyze, work through electoral structures, such as those that Pildes and Karlan evaluate, to produce political and policy outcomes. Determining whether racial and ethnic stratification are changing involves deciding whether minority groups in a majoritarian democracy are getting more or less of what they want and need compared with some point in the past. That decision, in turn, requires measuring a group's interests, which turns out to be increasingly difficult to do.

In some polities at some times – the United States before 1964, South Africa before 1994, Israel at present – it is easy to identify minority interests. At a minimum, they include first-class citizenship, the rights and opportunities to participate in liberal democratic governance, and interpersonal decency and respect. Attaining all of that almost certainly requires governmental intervention in the society and economy. Even after a polity relinquishes legal segregation – the United States after 1964, South Africa after 1994 – a minority group may be so disproportionately poor that its interests remain easy to identify. They include jobs, decent schooling, health care, decent housing, physical safety. The satisfaction of such interests probably also requires extensive policy intervention in the society and economy, although the best policies are probably a little more contestable than in the first stage. But when legal segregation is in the distant past and when a substantial proportion of the group has moved into the middle or even higher end of the income spectrum, it is harder to determine the group's interest.

Arguably, this is where minority groups in the United States are now; whether other countries such as Cuba, Brazil, and the United Kingdom are similarly positioned remains a subject of intense debate. What are group interests beyond beyond the same rights and security as all other residents of the state if one-third or one-half or more of minority group members are in the middle or upper middle class? What are group interests if minority group members marry people outside their group in high and increasing numbers, or if they occupy a proportionate share of the slots in

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high-status universities, or if a member of the group holds the most powerful and visible elected position in the world? If, as in the United States, a black man is the most important political figure *and* black men are especially likely to be poor, uneducated, jobless, and incarcerated, *and* if blacks are disproportionately victimized by crime committed by other nonwhites, is there any longer a "black interest"? One could ask a parallel question about immigrants,especially since newcomers to the United States tend to have either much less education and remunerative job skills, or much more education and remunerative job skills, than do native-born Americans. As Hutchings et al. show, even if people are upwardly mobile, they may identify their interests with that of their group; and as Karlan shows, even groups that have attained some power may still share an interest in protection against previously dominant groups. Nevertheless, it is harder than it used to be to assume that progressives' social welfare policy preferences are identical to minority groups' interests. One can still endorse those preferences, as I do, but in some places the argument increasingly needs to be made on behalf of a decent society as a whole or on behalf of poor residents of the polity, rather than on behalf of a uniquely disadvantaged group. We must be especially careful not to automatically equate conservatives' social welfare policy preferences with endorsement of minority group subordination; as group dynamics get more complicated, the best policy becomes less self-evident.

This is real progress, and progressives should celebrate it. My final and strongest plea is that we welcome what has changed for the better while simultaneously grappling with what has changed for the worse – in policy design, scholarly theories, data collection, and political action. This peroration comes perilously close to being a cliché, but some clichés are right.

NOTE

1 In most other surveys, the linked-fate question similarly comes after a series of questions about group identity and conflict, so the concern about priming effects is more general.

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Voting Rights

The Next Generation

Richard H. Pildes[1]

Today's Voting Rights Act (VRA) (1965), particularly its historically important Section 5, exists in a form and structure little different from the original Act of nearly forty-five years ago. The VRA of 1965 was a justifiably aggressive federal response to the race-based disenfranchisement of African Americans in readily identifiable geographic areas. Although it represented an unprecedented assertion of federal power over states and localities, the Act was in fact carefully and appropriately tailored to the historical context in which it originated. By focusing primarily on race-based denials of voting rights and by targeting its most stringent provisions to those areas with a history of race-based disenfranchisement, the VRA effectively tackled the predominant voting-rights issue of the prior century of American experience: the persistent efforts of mostly Southern jurisdictions to deny minority citizens the right to vote.

As a response to the specific historical conditions that existed in 1965, the VRA was perhaps the most effective civil rights statute enacted in the United States.[2] It represented the last significant step toward universal inclusion of adult citizens in American democracy, and it effectively prevented recalcitrant state and local governments from crafting new laws designed to suppress minority voting. As a policy-making attempt to address contemporary voting-rights problems, however, the VRA – particularly Section 5 – might no longer offer the most effective means of securing access to the ballot box. The issues emerging today – voting technology problems, felon disenfranchisement laws that apply even to those who have completed their sentences, burdensome and unnecessary voter registration requirements – are not confined to jurisdictions with a long history of racially discriminatory voting practices, nor do they necessarily arise from the efforts of state and local governments to target minority voting per se. For this reason, the very statutory structure that rendered the VRA so effective in the initial decades of its existence – its narrow geographic targeting and its focus on *changes* in voting rules and practices – now constrains its ability to protect the right to vote.

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As we look to the future of voting rights, one of the choices Congress and voting-reform advocates will face is how to conceive the general form that new voting-rights protections ought to take. In particular, Congress will have to decide if it wishes to continue to adhere to the historically contingent antidiscrimination model of Section 5 of the VRA or is ready to embrace new legislative models that, I want to suggest, better fit the voting rights problems of today.

So far, Congress has proven reluctant to look beyond the existing structure of the VRA, in particular Section 5 of the Act – the "preclearance" provision that requires certain jurisdictions, mostly in the South, to submit proposed changes in voting rules and practices for federal preclearance approval before those changes can be implemented. Given the symbolic significance of the VRA and the fact that racially discriminatory voting practices have not disappeared completely, any proposal to move away from the Section 5 model understandably produces anxiety. Indeed, the last time Congress revisited Section 5, in 2006, Congress reauthorized it without fully addressing whether Section 5 needed to be updated in any profound way to reflect the changes in voting behavior that had taken place since 1965, or even since 1982, when Congress had last addressed Section 5 (Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act 2006).

Since 2006, however, the Supreme Court has weighed into the debate in ways that may force Congress' hand. First, the Court's 2009 decision in *Northwest Austin Municipal Utility District Number One v. Holder* (2009) (*NAMUDNO*) has been widely interpreted as a strong warning to Congress that if Section 5 is not revised to address the Court's concerns, it could be held unconstitutional in a future decision. Even if the Court upholds the constitutionality of Section 5 or avoids confronting that issue, the Court in *NAMUNDO* expressed the kind of skepticism about the justification for Section 5 that might well lead to narrow judicial interpretations of Section 5 going forward. These constitutional issues are prompted by unresolved debates about how different the jurisdictions covered by Section 5's preclearance provisions are from those areas not covered; the Court has raised questions about whether the current pattern of coverage can be justified under the relevant constitutional standard.

Second, the Court's decision a week after *NAMUNDO* in *Ricci v. DeStefano* (2009), which appears to impose a higher standard for demonstrating racial discrimination based on disparate impact than previously required – a decision directed specifically at discrimination claims filed under Title VII of the Civil Rights Act of 1964 – may nonetheless have a significant impact on the VRA. Like Title VII, the VRA protects against voting practices that disparately impact the voting rights of racial minorities. If the disparate impact analysis of *Ricci* takes hold or is expanded, it could thus make it more difficult to establish race-based violations under the VRA, further undermining the Act's practical effect and potentially leading to additional constitutional concerns, particularly if in a later ruling, the Court goes so far as

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to find disparate-impact doctrines to conflict with the Equal Protection Clause (a question to which *Ricci* begins to open the door).

As Congress reacts to these recent Supreme Court decisions – or, perhaps more likely, to future Supreme Court decisions that might more directly force Congress to address voting issues – it has two legislative models to work from. First, it could tinker at the margins of Section 5, narrowing the Section's geographic scope to target only those jurisdictions with sufficiently egregious race-based voting rights problems to justify continued preclearance oversight. This approach would preserve the basic civil rights model of the VRA and address the constitutional concerns expressed in *NAMUDNO*, but it would further limit the Act's practical effect and do little to address emerging voting rights problems.

Alternatively, Congress could draw on two more recent voting-rights statutes enacted to address contemporary voting-rights concerns: the Help American Vote Act (HAVA) (2002) and the National Voter Registration Act (NVRA) (1993). Both HAVA and NVRA are generally applicable national laws that protect the right to vote *as such* of all citizens nationwide. Because the HAVA model relies on the fundamental constitutional right to vote – a right that was not fully recognized by the Supreme Court at the time the VRA was enacted – rather than on the equal protection concerns of the Fourteenth and Fifteenth Amendments, legislation of this type need not be limited to race-based voting-rights problems, nor tied to jurisdictions with entrenched racially discriminatory voting practices. This model also avoids the constitutional concerns raised by *NAMUDNO* and *Ricci*, even as it *expands* Congress's ability to protect the right to vote.

In this chapter, I will first explain why the VRA model, so effective in the early decades of its existence, may no longer offer an appropriate paradigm for protecting voting rights going forward. Then I will suggest that Congress would be wise, in the wake of the Supreme Court's recent decisions, to think expansively, beyond the existing structure of the VRA, if it wishes to play a proactive role in protecting voting rights moving forward.

If Congress is willing to step up and address the hard questions that the Supreme Court debate over the constitutionality of the VRA now prompts, Congress could ultimately do more to enhance the future of voting rights than by working at the margins of Section 5. In theory, of course, Congress could do both: It could update Section 5, as well as other parts of the VRA, while also enacting additional laws that would provide further protection for the right to vote on a universal, nationwide basis. But as a practical matter, legislative agendas confront various constraints, including ones of focus, energy, resources, and time; realistically, these constraints might mean that Congress will focus on only one type of approach in any future legislative efforts. Furthermore, there are constraints on frameworks of thought as well: An intellectual bias in favor of the status quo might lead Congress and advocates not to think outside the framework of existing approaches enough to pursue the changes that would actually be most meaningful and effective. Thus, my aim is to press the case

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for thinking about future voting-rights legislation through a model best attuned, I believe, to the voting problems that are central today and most likely to remain so in the immediate years ahead.

THE STRUCTURE OF THE VRA

The VRA (1965) protects the right to vote primarily through two central provisions. The first, Section 2 of the Act, is a nationwide prohibition on voting practices that result in race-based denials of the right to vote. To the extent that Section 2 prohibits voting practices that have a disparate impact on minority voting rights, whether or not those practices are motivated by a discriminatory purpose, the Supreme Court's decision in *Ricci* could lead to a narrower construction of the statute. Such a construction would diminish the practical effect of Section 2. And if the Court follows through on *Ricci*'s suggestion that broad disparate-impact laws conflict with Equal Protection Clause, Section 2 could potentially come under even greater scrutiny.

The second provision, Section 5 of the Act, is the provision most likely to be revisited by Congress in the near future. Section 5 is a more aggressive provision that singles out certain – mostly Southern – jurisdictions and requires them to seek "preclearance" by the federal government before implementing any change to their voting laws or practices.[3] In comparison to Section 2, the preclearance requirements of Section 5 provide for an exceptionally proactive form of federal oversight of state and local voting practices. These provisions essentially place the election systems of covered jurisdictions under a form of federal receivership, putting the burden on state and local governments to prove that a proposed change in voting procedures would not violate the VRA before any such changes – including even slight modifications – may be implemented (Issacharoff et al. 2001). Despite the degree of federal intervention it authorizes, however, Section 5 is in some ways narrower than Section 2. Unlike Section 2, which applies broadly to all voting laws and practices nationwide, Section 5 is more limited in scope and targeted to address a very specific set of regional and cultural conditions.

The scope of Section 5 is limited, or "targeted," in three principal ways. First, Section 5, like much of the VRA, prohibits only denials of voting rights that are racially based. This limitation reflects not only Congress's pressing concern with race-based denials of the right to vote, but also its limited power – at the time the VRA was enacted – to legislate more broadly to protect the right to vote. Until the Supreme Court recognized the right to vote as a fundamental right protected by the Constitution, Congress was limited to regulating only race-based abridgements of voting rights under the Fourteenth and Fifteenth Amendments.[4] The VRA – Section 5 included – thus does not protect the right to vote as such, but instead protects more specifically against racially discriminatory denials or abridgements of the vote.

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Second, Section 5 of the VRA narrowly targets particular geographic areas for uniquely aggressive federal oversight. In doing so, it effectively defines in advance which parts of the country have entrenched voting problems that justify the restrictive "preclearance" requirements of Section 5 for the entire authorization period (in the case of the 2006 reauthorization, the next twenty-five years).[5] This second form of targeting is also historically contingent: In 1965 and the decades following, Congress could easily predict that the worst racially discriminatory voting practices were likely to occur in those jurisdictions – mostly in the South – that possessed a long history of denying minority voters access to the ballot box. At that time, patterns of race-based disenfranchisement were clear and ingrained, and geographic targeting enabled the federal government to focus the full extent of its constitutional powers in areas where hostility to the rights of minority voters was most pervasive and deep-seated.[6]

Third, Section 5 is further limited in that it targets only *changes* in existing voting rules and practices for proactive federal supervision. Section 5 requires preclearance approval only of changes to existing practices and does not constrain the operation of baseline, status quo practices (although existing practices would, of course, be subject to the blanket prohibitions of Section 2). Again, this limitation reflects the distinct historical moment at which Section 5 was adopted originally: Prior to 1965, Southern jurisdictions managed to evade federal oversight by crafting new laws and devices to prevent black voters from registering or participating in elections.[7] As soon as one tactic was declared illegal, the state, county, or municipality would simply devise another means of keeping minority voters from the polls. The only way for the federal government to end this kind of manipulation was to get out ahead of these jurisdictions and prevent them from making changes that would impair minority voting rights. By requiring preapproval of any proposed changes to the election system, no matter how trivial, Section 5 effectively ended this game of cat-and-mouse and eventually brought most jurisdictions into compliance with the Constitution.

Thus, the structure of the VRA in general, and Section 5 in particular, reflects a targeted, antidiscrimination approach to voting-rights protection that was crafted to address the specific conditions confronting Congress in 1965. Section 5 set up an aggressive federal oversight structure but one limited in scope to addressing, in a targeted way, the race-based tactics of identifiable state and local governments. Perhaps recognizing that such a targeted provision would need to be updated to remain responsive to ever-changing circumstances, the Congress that enacted Section 5 intended it to be limited in time as well as in scope. Originally enacted for a period of five years, Section 5 was extended, with amendments, for an additional five years in 1970 and then for seven years in 1975. In 1982, however, Congress reauthorized Section 5 for an additional twenty-five years, and it did so again in 2006, extending the provision until 2031 – without making any significant changes to the jurisdictions covered or the nature of the federal oversight provided. The question now is whether

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the selective-targeting approach of Section 5, crafted to respond to the problems of a specific historical era, remains the most effective means of securing the right to vote today.

THE INHERENT LIMITATIONS OF THE SECTION 5 MODEL

It should be clear from the preceding discussion that Section 5 rests on at least two critical assumptions: first, that Congress can identify, as much as 25 years in advance, areas of the country where systematic racially discriminatory voting practices are unusually likely to arise and, therefore, where pro-active federal intervention is necessary; and second, that these discriminatory practices are likely to result from *changes* to existing voting rules and practices. At the time of the VRA's enactment, these assumptions were reasonable. Under the historical conditions of 1965 and for some years after, the narrow targeting features of Section 5 were both easy to apply and exceedingly effective.

Today, however, we face a set of circumstances and voting problems less predictable and not necessarily confined to areas with a longstanding history of racially discriminatory voting practices. The changes in voting practices over the last decades – brought about in part by the VRA itself – have rendered the structure and logic of Section 5 less well suited to addressing the nature and scope of voting rights problems today. The preclearance provision is now inherently limited, or is likely to be limited by future Court decisions, in at least three ways.

First, although race-based denials of voting rights certainly persist, the voting rights issues we face today are no longer defined by the near-complete exclusion of black voters by a number of readily identifiable state and local governments.[8] Instead, some of the most significant voting-rights problems we see today arise in so-called battleground states or in otherwise close elections, where political parties have an incentive to manipulate voting practices in their favor. Those settings can change dramatically from election to election. Consider, for instance, the 2004 elections. In the presidential race, the most widespread reports of voter problems occurred in Ohio – a state not covered by Section 5's preclearance provisions, but a pivotal battleground state in the election (Tokaji 2005). Similarly, at the state and local levels, the 2004 elections produced intensive voting-rights litigation in Washington State, Puerto Rico, and San Diego,[9] none of which are subject to the preclearance provisions of the VRA. This pattern was also in evidence, of course, in the most significant voting controversy in recent years – the disputes over the highly contested 2000 presidential election results in Florida. Although Florida is partially covered by Section 5, the counties that sparked the greatest voting-rights conflicts during the 2000 election were not among the state's five "covered" jurisdictions and thus not subject to the Act's heightened preclearance scrutiny.[10]

The fact that Section 5 was of no relevance in any of these major voting-rights controversies should give us pause. But it should also appear perfectly logical. Premised

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as it is on predictable and geographically confined patterns of race-based disenfranchisement, the Section 5 model simply is not equipped to address voting-rights problems that cluster around something as fluid and unpredictable as where elections today turn out to be most competitive and where the stakes are therefore the highest. The location of competitive races with small margins of victory changes election to election, and there is little way to base national legislation on ex ante predictions of where federal, state, and local elections are likely to be close over any significant period of time. When the geographic targeting of Section 5 was crafted, Congress confronted distinct areas that systemically denied minority voting rights, whether or not elections were competitive. As these areas have diminished, and competitiveness has become a better predictor of large-scale voting-rights violations, the Section 5 model has become both under- and overinclusive.

Second, we now confront voting-rights problems of a fundamentally different *nature* than those envisioned by Section 5. For the most part, the problems emerging today cannot be tied to the systematic discriminatory actions of state and local governments in predictable, geographically limited areas. Consider the problems that have garnered the most attention in recent years: concerns about voting technology; lack of clear standards for identifying a valid vote; ballot design confusions; long lines at polling places; partisan administration of voting laws; incompetent administration at the precinct level; and burdensome voter registration and identification requirements (Tokaji 2006). These problems are not confined to any particular jurisdictions, and in some cases do not represent predictable or systematic problems at all. As with closely contested elections, Section 5 is a poor fit for these emerging problems, for they cannot be accurately identified in advance and they are less likely to be unique to particular areas that can be targeted for more intensive oversight than at the time the model of Section 5 was designed.

Importantly, some of these new problems have in fact been dealt with through Section 5's preclearance requirements, but in a way that presents further complications for the viability of this model. For instance, in May, the Department of Justice refused to preclear a Georgia law requiring verification of voter citizenship prior to elections, based on the disproportionate impact the law would likely have on black and Hispanic citizens (Letter from King 2009). But voter registration, verification, and identification laws are cropping up all over the country, and they should be dealt with in a uniform way, whether or not they arise in jurisdictions currently covered by Section 5. Ultimately, it is far more difficult today to tailor a geographically targeted provision to areas that can be predicted in advance to be unique in the voting problems they generate. Although there might be a readily identifiable *partisan* dimension to the debates over these laws, they cannot be said to have a similarly identifiable *geographic* dimension, particularly not one that correlates with other voting-rights issues in a way that identifies specific jurisdictions that are systematically infringing upon voting rights, and justifies the selective oversight of Section 5.

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Finally, it is not clear that targeting *changes* in voting rules and practices is the best way to protect the right to vote today. In contrast to conditions in 1965, when Congress confronted states and localities intentionally crafting new rules and devices to evade federal oversight, some of the most significant barriers to voting today are actually *existing* laws and *outdated* practices. Felon disenfranchisement laws, for instance, are responsible for the disenfranchisement of a significant proportion of African-American males in this country (Issacharoff et al. 2001). Most of these laws are not recent enactments, nor do they reflect changes in rules or practices associated with voting itself. Rather, the laws are problematic precisely because they were enacted many years ago, when felony conviction rates were lower and the laws had a less significant effect on the voting rights of the population as a whole. Because these laws involve no changes to voting rules or practices, they simply do not fall within the purview of Section 5. Nor could they be brought within the scope of Section 5 without thoroughly disrupting the preclearance model. The entire notion of preclearance is premised upon the existence of some change or new enactment to be preapproved.

Section 5 is similarly unhelpful when it comes to problems with existing voting technology and existing election administration that is incompetent or structurally designed to be controlled by partisan actors. In these cases, the problem is not a *change* in voting procedures, but rather the failure to act to modernize voting administration. Problems with faulty ballots and poor election administration arise primarily from preservation of the status quo, whether that involves a failure to update voting technology, to create nonpartisan administration structures, or to train election officials properly.

Thus, for at least these three reasons, the targeted provisions of Section 5, which conformed well to the historical conditions following the VRA's enactment, are less well adapted to the voting-rights problems we face today. Indeed, one of the practical limitations of Section 5 is suggested by the greater difficulties Congress and academic experts face, as compared to earlier eras, in identifying particular jurisdictions that are systematically more likely than others to adopt racially discriminatory voting rules and practices.[11]

This is not to say that there are no longer any unique, identifiable jurisdictions with entrenched patterns of racially discriminatory voting practices. On the state level, Mississippi continues to generate more minority voting-rights problems than any other state (Lawyers' Commission for Civil Rights 2006). And Native Americans today face obstacles to voting similar to those faced by African Americans at the time of the VRA's enactment (McCool 2006). If Congress focused a renewed Section 5 more narrowly on smaller jurisdictional units, such as counties rather than states, it might be better able to identify in advance those jurisdictions with the deeply ingrained, race-based voting-rights problems that justify Section 5 coverage.[12] Yet such a solution fails to get to the root of the problem. Rather than expanding

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protection to address the widespread voting-rights issues emerging today, it would simply retain the already limited status quo in a narrower form capable of protecting fewer and fewer voters. Any legislation that aims to seriously grapple with the limitations of Section 5 will have to go further and look to other legislative models more targeted to twenty-first-century problems.

ADDITIONAL PRESSURE FROM THE SUPREME COURT

As the congressional reauthorization of Section 5 in 2006 demonstrates, Congress did not reexamine the basic conceptual or policy structure of this provision when it reauthorized the Act. Absent significant external pressure, Congress is unlikely to do so. Although all the inherent limitations of Section 5 discussed above existed in 2006, one significant thing has since changed: The Supreme Court has entered the debate with two decisions that put further pressure on the model of voting rights protection reflected in Section 5 and, to some extent, in Section 2 of the Act as well.

The first of these decisions, *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO* 2009), directly addresses the VRA. Prior to 2006, many academics had suggested that Section 5 would face serious constitutional scrutiny from the Supreme Court if Congress did not revisit the coverage formula and other elements of the Act when reauthorizing it in 2006. As it becomes harder to marshal evidence demonstrating that, absent federal oversight and control, covered jurisdictions are more likely than noncovered areas to engage in widespread discriminatory voting practices, it becomes harder to persuade a skeptical Court that a geographic pattern of federal oversight established at least forty years ago continues to be constitutionally defensible today. In fact, before the 2006 reauthorization, some scholars, including myself, urged Congress to take a more serious look at Section 5, in part to forestall its invalidation on constitutional grounds (Pildes 2006).

In its first confrontation with these issues, the Court in *NAMUDNO* avoided resolving the constitutional issues, but in a way that left doubt lingering over how the Court would ultimately rule. The Court avoided the constitutional question by finding a way, through statutory interpretation, to give the particular jurisdiction all the relief it claimed to want (*NAMUNDO* 2009). In doing so, however, Chief Justice Roberts, writing for the Court, spoke directly of the "federalism costs" imposed by Section 5 and suggested that because the "evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," serious questions existed concerning whether Congress had exceeded its constitutional authority by reauthorizing the provision in 2006 (*NAMUNDO* 2009). Rather than concurring separately to express support for Section 5's continued constitutionality, all the Justices joined the 8–1 opinion (with only Justice Thomas in dissent). Given this, the *NAMUDNO* opinion may be seen as a warning to Congress: Either modernize Section 5 or risk seeing it struck down in a future decision.

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The second decision, *Ricci v. DeStefano*, involved a different civil rights statute, Title VII of the Civil Rights Act. Title VII, which deals with discrimination in the employment context, imposes liability for employment decisions that involve disparate *treatment* or disparate *impact* based on race and other protected classifications. In *Ricci*, the City of New Haven argued that it could legitimately reject the results of a promotional exam it had given to city firefighters because failing to reject those results would have left the city vulnerable to challenge under Title VII. The exam results would have disproportionately excluded black candidates from promotion; had the city certified the exam results, it argued, it therefore would have been subject to potential disparate-impact liability (*Ricci* 2009). To determine whether the city was justified in rejecting the exam, the Court had to determine whether the city had a "strong basis in evidence" to believe that it would be subjected to disparate impact liability had it certified the test results (*Ricci* 2009).

Although *Ricci* addressed a different statute than the VRA, the Court's treatment of disparate-impact issues under Title VII must be taken seriously by those concerned about the future of voting rights. The concept of disparate impact plays a key role in Section 2 and Section 5, both of which prohibit actions that have a disparate impact upon the voting rights of minority citizens. *Ricci*'s disparate impact analysis is important for the VRA in two respects. First, by narrowly defining what constitutes a legitimate disparate impact case, *Ricci* could make it more difficult to prove a violation of the VRA, thereby further diminishing the Act's practical effect. In applying the "strong basis in evidence" standard, the *Ricci* majority stated that a threshold showing of a statistical disparity alone – even a showing of "significant" statistical disparity – is "far from a strong basis in evidence that the city would have been liable" under the disparate impact provision of Title VII (*Ricci* 2009). Instead, to demonstrate a strong basis in evidence for a disparate impact claim (let alone to win one), the Court indicates that more must be examined, including whether the city might nonetheless have legitimate reasons for implementing the policy, in spite of its impact (*Ricci* 2009). This is now a demanding standard; it generates reason to believe the Court may be similarly more demanding in the VRA context. The Court may well start insisting more demandingly on proof of disparate impact "plus" – a requirement of more than just a racially disparate impact – before it will find a state or local voting law in violation of the VRA. Such a heightened standard would affect both the targeted provisions of Section 5 and the general, nationwide provisions of Section 2. The result would be to further limit the practical effectiveness of the race-based model of voting-rights legislation.

Second, *Ricci* could potentially raise additional constitutional questions for the entire VRA, although this concern is more speculative. *Ricci* identifies a potential collision course between Title VII, which requires employers to take remedial, race-conscious action to avoid employment policies that produce unjustifiable disparate impact, and the Equal Protection Clause, which forbids the government from using

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race except in a narrowly cabined circumstances. Although the Court did not directly address this issue, Justice Scalia concurred separately to speak to the constitutional question, noting that it was "not an easy one" but would have to be confronted eventually (*Ricci* 2009).

A similar potential collision course underlies the VRA. The VRA requires state and local governments to avoid disparate racial impacts in the voting area, whereas the Constitution's general prohibition on race-based decision making is being construed more and more by the Court to apply to all race-based public actions, whether in the affirmative action context or not. Indeed, Justice Kennedy has already raised this concern in several of his VRA opinions. *Ricci* is only likely to increase this tension in the VRA context.

Justice Scalia's concurrence implies that the issue might be resolved through doctrine that distinguishes among the kinds of disparate impacts that federal laws make illegal. Laws that invoke disparate impact as "an evidentiary tool used to identify genuine, intentional discrimination" would pass constitutional muster (*Ricci* 2009). In contrast, statutes that bar disparate impact standing alone, without any connection to a discriminatory purpose, would be unconstitutional. If this were where the *Ricci* decision is heading, the consequences for the VRA would be twofold: an increased vulnerability to constitutional challenge and ever-narrower constructions of the Act as a whole to avoid constitutional problems.

Taken together, *NAMUDNO* and *Ricci* thus give Congress strong reason to act to update voting-rights policy. Congress, however, might well do nothing unless the Court actually holds Section 5 unconstitutional, either on its face or in a series of important as-applied decisions. The Court's opinion in *NAMUDNO* confirms that Section 5 will be vulnerable to constitutional challenges, and, in fact, if Georgia decides to appeal the DOJ's preclearance decision on its voter verification law, that challenge could come sooner rather than later. Although the effect of *Ricci* could prove more attenuated, given the differences between the VRA and Title VII, it too could raise additional constitutional complications and is likely to further diminish the Act's already limited practical effect by imposing a heightened disparate impact standard. These decisions, and *NAMUDNO* in particular, could force Congress to take a hard look at Section 5 and create an opportunity to craft legislation better tailored to the voting-rights problems we face today.

THE FUTURE OF VOTING RIGHTS

If Congress decides to take charge of this issue – either in response to *NAMUDNO* and *Ricci*, or, more likely, after further Supreme Court decisions force Congress' hand more directly – it should start by recognizing that the history of voting-rights legislation provides us with two possible models: the targeted, antidiscrimination approach of Section 5 of the VRA; and the broader, right-to-vote approach of more

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recent federal legislation, such as the Help America Vote Act of 2002 and the National Voter Registration Act of 1993. Indeed, the choice between these two models may prove to be the most important decision for the future of voting rights.

Of course, if Congress responds to *NAMUDNO* or another Court decision, it will likely be tempted to try to preserve Section 5 by simply adjusting the formula used to determine the jurisdictions subject to preclearance. As discussed above, the symbolic significance of the VRA and the notion that legislation to protect voting rights must hew to the civil rights, antidiscrimination approach means that any departure from the Section 5 model is difficult, both intellectually and politically. If Congress renews debate over Section 5, we will likely see mobilization in defense of preserving some form of the status quo, just as we did during the 2006 reauthorization debates.

To be sure, Congress might be able to construct a constitutionally viable Section 5 by focusing its coverage on smaller jurisdictional units and narrowly targeting those areas where systematic race-based voting problems or preclearance denials persist. But I have argued that the geographic targeting of Section 5 is part of what limits the practical effectiveness of the Act (or any modestly modified version) today, and this solution would narrow its geographic reach even further. More importantly, this approach would do nothing to address the fundamental limits inherent to the Section 5 model: The fact that the major voting-rights problems are no longer as satisfactorily addressed by the targeted features of Section 5 as they were in the past. If Congress is serious about protecting the right to vote, it is going to have to go beyond that model and confront the hard questions it avoided in 2006.

If Congress and reformers are willing to think outside the box of the VRA and consider alternative models, they need not look far for models that track today's voting-rights problems. In the past twenty years, Congress has quietly worked its way into a new approach to voting-rights legislation, reflected in recent enactments like the NVRA and HAVA. In contrast to the targeted, antidiscrimination model of the VRA, these statutes embody a much broader substantive right-to-vote model that seeks to protect the right to vote *as such* by regulating the way the election process functions for all citizens. HAVA's (2002) provisions, for instance, create uniform, nationwide rights and standards – such as the right to a provisional ballot, statewide registration databases, and financial incentives for improved voting technology – that are not specifically targeted only at race-based discrimination in voting, at changes in laws, or at certain pre-identified jurisdictions.

This model is possible now because of changes in the Supreme Court's view of Congress's powers under the Fourteenth Amendment. If, as we see in *Ricci*, the Court is narrowing the power of government to take certain race-conscious steps to eliminate racially disparate impacts of the policies, the Court at the same time has expanded Congress's power to protect the right to vote as a fundamental constitutional right under the substantive standards of the Fourteenth Amendment. Whether Congress had such power was unclear, at best, in 1965. By now, however,

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Supreme Court doctrine has entrenched the right to vote as a fundamental constitutional right, as cases like *Bush v. Gore* (2000; Pildes 2004) confirm. As a result, Congress has constitutional power to legislate to protect against arbitrary or unfair voting practices generally, whether or not they involve racial discrimination. This relatively new authority enabled Congress to enact the uniform, national standards of HAVA and NVRA, and it could be used more broadly to address many of the voting-rights issues emerging today.

Accepting the legislative model of universal laws like HAVA would allow Congress to shift focus from the geographically targeted, selective federal oversight model of Section 5 and concentrate instead on developing voting-rights legislation of uniform national scope. It would also allow Congress to move away from Section 5's prophylactic targeting of changes in voting rules and to focus instead on establishing an appropriate baseline for election practices nationwide. This, in turn, could bring some much-needed uniformity to our decentralized election system and ensure that elections are conducted in conformity with basic national standards. HAVA and the NVRA themselves were both relatively limited in scope – HAVA to voting technology and provisional ballots, NVRA to registration issues. But the model of voting-rights legislation they represent nonetheless constitutes a major breakthrough in national voting-rights policy. Such laws provide a conceptual model for creating the uniform, national laws necessary to protect voting rights today.

Of course, national standards are not appropriate for every aspect of the electoral process, and when it comes to state and local elections in particular, the boundary between which aspects ought to be regulated nationally rather than locally is a difficult question. But HAVA demonstrates that national policy can impose uniform standards without dictating precisely how these standards must be met at the state level. In the realm of voting technology, for instance, HAVA sets national standards and offers incentives for states to replace certain equipment, but it does not require states to adopt any particular technology. Uniform, national standards can thus retain flexibility and allow for state-based experimentation where appropriate. National goals can be established, without command-and-control impositions of identical means to reach those goals required in every state.

Moreover, a number of the pressing voting-rights issues of today do seem well suited to national regulation, if they are going to be regulated at all. For instance, the forms of identification necessary to protect against voter fraud – currently a subject of heated debate in state legislatures – might be most effectively resolved through national legislation. There seems to be little need or justification for state variation in this area, and consistent national standards would make it easier for voters moving from state to state to secure access to the ballot. Under the VRA, establishing this kind of national consistency would not be possible. Under Section 5, of course, the same voter ID law might be illegal in states covered by the preclearance requirement while being legal in others. And because voter ID laws tend to impact not only racial minorities but also the poor and the elderly generally, even the nationwide

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prohibitions of Section 2 might treat the same laws differently in different states. An ID requirement in Georgia that disproportionately impacts the state's large African-American population might violate Section 2, whereas the same requirement in a state without a significant minority population might disenfranchise poor and elderly whites without actually violating the prohibitions of the Act. Of course, it is possible that uniformity might eventually be achieved through constitutional litigation. But states have passed, or are in the process of passing, numerous and varied laws regarding voter identification, registration, and verification standards, and it would take years for all of these to work their way through the courts. Instead, Congress could use the HAVA model to legislate uniform, national voter identification requirements and resolve the issue at the federal level rather than awaiting costly case-by-case resolution in the courts.

There are also a number of ways in which the HAVA model would allow Congress to legislate beyond the limits not only of Section 5, but the VRA more generally. Although Section 2 of the Act is not targeted geographically or focused on changes in voting practices, it is limited to protecting against voting-rights violations that are racially discriminatory. As noted earlier, this limitation reflects not only the massive race-based voting problems that the 1965 Congress confronted, but also Congress's belief at that time that it lacked the constitutional authority to protect the right to vote more broadly. In contrast, more recent legislation like HAVA and NVRA draw on Congress's now-recognized power to enforce the fundamental constitutional right to vote, whether or not the abridgments at issue involve the element of racial discrimination. These statutes thus sweep more broadly than the VRA, covering all forms of voting-rights denials without forcing Congress to provide evidence of racially discriminatory impact or purpose.

Although racial discrimination unfortunately remains a concern in American elections, there are a number of reasons why legislation that is not tied to a race-based, antidiscrimination model might actually be better able to protect the right to vote of voters in general and minority voters in particular. First, in the context of modern politics, where large-scale voting rights violations tend to cluster around highly contested elections, it is often difficult to untangle racial considerations from partisan concerns. Voter ID laws, for instance, are highly partisan when voted on in legislative bodies – typically supported by Republicans, eschewed by Democrats – but they do have a racial impact in places with significant minority populations, and some charge that they are in fact racially motivated. The VRA model requires courts to separate the racial motivations from the partisan ones to determine which actually "caused" the voting practice to be adopted. This problem will only be heightened if the Supreme Court, following the line of analysis in *Ricci*, continues to construe disparate impact statutes more narrowly by requiring a showing of something closer to discriminatory intent to prove a violation of the VRA. With disparate impact largely off the table, litigants would have to show that voter ID laws, even those with a statistical disparate impact, were motivated primarily by race rather than politics.

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As long as black voters remain predominantly Democratic, however, it will be nearly impossible in many contexts to separate race from politics for these purposes. Particularly if close elections continue to produce most large-scale voting-rights violations, it is likely only to become harder for courts to separate political motivation from racial discrimination. And as the lines between these considerations continue to blur, there is greater risk that courts will find laws and practices to be motivated primarily by politics and therefore not violations of the VRA. A more general law based on the HAVA model could avoid this stew of problems by prohibiting laws that impinge on access to the ballot box without sufficient countervailing justification; such a standard would not require litigants to prove, or courts to judge, whether laws like these "really" reflect or amount to racially discriminatory voting rules. Counterintuitively, perhaps, such general laws might actually afford better protection to minority voters than the antidiscrimination model of the VRA.

Such general laws would also reduce incentives to racialize conflicts over voting policies. Under the VRA, most challenges to a voting law or practice must necessarily be cast in racial terms; otherwise, the VRA is of no relevance. Yet it is far from clear that requiring all voting challenges to be framed as a form of racial discrimination is helpful or desirable, particularly when alternative means of addressing voting-rights violations are available.

As I noted at the outset, the HAVA/NVRA model and the existing VRA model are not logically or inherently exclusive. In addition, there are some issues, like vote dilution, that can only be addressed effectively through legislation that singles out minority voting rights for protective regulation. Language assistance requirements also seem best dealt with through targeted legislation intended to assist only those voters with unique language assistance needs.

These kind of issues aside, though, the more far-reaching question is how Congress and others ought to think about the general form that future voting-rights legislation ought to take. For the reasons described here, my analysis suggests that future national legislation to protect the right to vote will have the greatest practical effect if designed in the model of nationwide laws that apply uniformly throughout the country and universal terms that extend coverage to all voters.

NOTES

1 I would like to thank Laura Trice for her assistance with this chapter.

2 See Pildes 1995 for a summary of studies on the effectiveness of the Act.

3 For detailed discussion of the structure and justification of Section 5, see *South Carolina v. Katzenbach* (1966), which upheld the constitutionality of this provision, and *Allen v. State Bd. of Elections* (1969), which defined the scope of voting practices that Section 5 covers.

4 In several Reconstruction-era cases, for instance, the Supreme Court construed 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

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grants Congress. See, e.g., *United States v. Cruikshank* (1875); *United States v. Reese* (1875).

5 Coverage is determined by a formula specified in Section 4 of the VRA. 42 U.S.C. § 1973b(b) (2009). States currently covered as a whole are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. app. pt. 51.In addition, selected counties in California, Florida, New York, North Carolina, and South Dakota are covered, as well as certain townships in Michigan and New Hampshire. Id. See also U.S. Department of Justice Civil Rights Division website, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.php (accessed August 12, 2009).

6 For a detailed history of the original Voting Rights Act, see generally Davidson and Grofman 1994.

7 This history is recounted in detail in *South Carolina v. Katzenbach* (1966).

8 Native American voters, however, face exclusionary barriers to voting resembling those of the pre-VRA world. See McCool 2006.

9 For details of these election disputes, see Issacharoff et al 2001, 199–205.

10 *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 *Bush v. Gore* (2000); U.S. Department of Justice Civil Rights Division website, http://www.usdoj.gov/crt/voting/sec_5/covered.php (accessed August 12, 2009).

11 For a discussion of recent studies, see Pildes 2006.

12 For the suggestion that an amended Section 5 should be targeted at counties rather than states, see Grofman 2006. See also Pitts 2005 (noting that thirty-seven of the forty DOJ objection letters since 2000 under Section 5 have addressed local, not state, voting changes).

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