

VOTING RIGHTS IN VIRGINIA: 1982–2006

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INTRODUCTION TO THE VOTING RIGHTS ACT

Virginia is one of the six original states covered entirely by Section 5 of the Voting Rights Act¹ (VRA) as a result of its long history of intentional discrimination against African-Americans.² The VRA has succeeded in removing some of the direct and indirect barriers to voting for African-Americans and other racial minorities, but a period of forty years of VRA protection has been insufficient to completely erase the effects and continued practice of voting discrimination. To the extent that there has been progress, it has come at the behest of the Department of Justice (DOJ) or the federal courts, sometimes after extensive litigation. As detailed below, there have been numerous Section 5 objections in every decade since the last reauthorization of the VRA in 1982 and in a wide range of areas, including: redistricting, voting procedures, election schedules and the structure of elected bodies.³ In addition to the Section 5 objections, there have been multiple successful Section 2 vote dilution challenges, consent decrees and even constitutional challenges to discriminatory voting practices in Virginia.⁴

Overall, Virginia's progress in providing electoral practices and structures that can provide equal opportunities for minority voters is mixed. On the one hand, it is the only Section 5 covered jurisdiction to have elected an African-American governor in recent times. On the other hand, racially po-

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¹ Pub. L. No. 89-110, tit. I, § 5, 79 Stat. 439 (1965) (codified as amended at 42 U.S.C. § 1973c (2006)).

² See generally Thomas R. Morris & Neil Bradley, *Virginia*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* 271 (Chandler Davidson & Bernard Grofman eds., 1994).

³ See *infra* Part II.B.2.

⁴ See *infra* Parts III–V.

larized voting persists, and African-Americans are elected to Congress, the state legislature and local governing bodies at rates significantly lower than their percentages in the population. In 2000, the state's population of more than seven million was 70.2% white (non-Hispanic), 19.6% black (non-Hispanic) alone or in combination, 4.7% Hispanic of any race and 4.1% Asian (non-Hispanic) alone or in combination.⁵ Population estimates for 2004 suggest that while the population in the state is growing overall, the relative percentages of each minority group did not shift significantly in the first part of the decade.⁶

There were eighteen objections to voting changes in Virginia issued by the DOJ under Section 5 of the Voting Rights Act from 1982 through 2004, most dealing with redistricting plans.⁷ Voting rights litigation on behalf of minorities in the state has ranged from challenges to the state's legislative and congressional redistricting plans following the 1990 and 2000 Censuses,⁸ to the Supreme Court's ruling in 1996 that the State Republican Party's requirement that delegates to the nominating convention pay a registration fee is subject to challenge under Section 2 of the Voting Rights Act.⁹ The state is also one of the few that permanently disenfranchises former felons¹⁰ and is one of just a handful of states that unsuccessfully litigated against implementation of the National Voter Registration Act.¹¹

Virginia is also noteworthy because ten local jurisdictions have made use of the bailout process to end their coverage under Section 5.¹² The

⁵ U.S. Census Bureau, 2000 Census Summary File 1, at tbls.P4, P10 & P11, available at <http://factfinder.census.gov> (last visited Feb. 29, 2008).

⁶ See U.S. Census Bureau, Table 3: Annual Estimates of the Population by Sex, Race and Hispanic or Latino Origin for Virginia: April 1, 2000 to July 1, 2004, available at http://www.coopercenter.org/demographics/sitefiles/documents/excel/popestimatesagesexrace/varace_ethnicity.xls.

⁷ See Department of Justice, Section 5 Objection Determinations: Virginia, http://www.usdoj.gov/crt/voting/sec_5/va_obj2.htm (last visited Feb. 25, 2008).

⁸ See *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004); *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002); *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), *aff'd mem.*, 521 U.S. 1113 (1997).

⁹ See *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996).

¹⁰ VA. CONST., art. II, § 1; see also VA. CODE ANN. § 24.2-427 (2007) (providing that "[t]he general registrar shall cancel the registration of (i) all persons known by him to be . . . disqualified to vote by reason of a felony conviction").

¹¹ See *Virginia v. United States*, No. 3:95CV357 (E.D. Va. 1995).

¹² See *The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 89, 90, 93 (2005) [hereinafter *Hearing*] (statement of J. Gerald Hebert, Former Acting Chief, Civil Rights Division, Department of Justice).

State as a whole unsuccessfully sought to bail out in 1974,¹³ but since then, a handful of cities and counties around the state have successfully petitioned for bailout. Evidence indicates that other jurisdictions in Virginia have considered bailout and decided not to pursue it.

I. FACTORS IMPACTING MINORITY POLITICAL PARTICIPATION IN VIRGINIA

Before turning to the specifics of Virginia's experience with the VRA since 1982, it is important to place the voting experiences of Virginia's African-American citizens in the context of their broader social and economic experiences. In 1988, in analyzing an alleged Section 2 vote dilution claim, the U.S. District Court for the Eastern District of Virginia described the socio-economic disparities among African-American citizens and white citizens in Virginia.¹⁴ The court found that African-Americans

continue to suffer from the socio-economic consequences of past discrimination. . . . [The] effects are evident in all facets of everyday life. They include depressed economic, educational and employment levels and inferior residential circumstances. In general, blacks have less education than do whites of the same age, have higher rates of unemployment, lower per capita income and lower quality of housing than do whites. . . . [T]hese depressed socio-economic conditions are likely to result (and have resulted) in lower voter registration and voter turnout on the part of blacks.¹⁵

And, in fact, throughout the 1980s, African-Americans in Virginia were registered to vote in lower percentages than whites.¹⁶

African-Americans (and other racial minorities) have not made significant socio-economic gains since the late 1980s.¹⁷ In 1999, the median income of African-Americans in Virginia was 36% lower than that of whites.¹⁸ The unemployment rate for African-Americans was more than double that of whites.¹⁹ In the 2005–2006 period, 21% of African-Americans lived below the poverty level, as compared to only 10% of

¹³ See *Virginia v. United States*, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 901 (1975).

¹⁴ *Neal v. Coleburn*, 689 F. Supp. 1426, 1428–29 (E.D. Va. 1988).

¹⁵ *Id.* at 1428.

¹⁶ *See id.*

¹⁷ See generally FAIRDATA2000, SELECTED SOCIO-ECONOMIC DATA: VIRGINIA: AFRICAN AMERICAN AND WHITE, NOT HISPANIC (2003), http://www.fairdata2000.com/SF3/contrast_charts/Statewide/Black/Virginia_SF3_Black.pdf.

¹⁸ U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P152A, P152B, available at <http://factfinder.census.gov> (last visited Feb. 29, 2008).

¹⁹ FAIRDATA2000, *supra* note 17, at Chart 4.

whites.²⁰ During the 2005–2006 period, 15% of nonelderly African-Americans in Virginia were enrolled in Medicaid, while only 5% of nonelderly white Virginians were enrolled.²¹ Whereas 75% of whites received employer-sponsored health insurance coverage during the 2005–2006 period, only 60% of African-Americans and 37% of Hispanics received coverage.²² In 2002, African-Americans had a rate of 62.5 teen births per 1000 population; Hispanics had a rate of 75.7 per 1000; whites had a rate of just 27.3 per 1000.²³ At 14%, the infant death rate of African-Americans is roughly three times that of whites in Virginia and is higher than the national average.²⁴ In 2005, the rate of African-Americans with AIDS was 32.6 per 100,000, as compared to 4 per 100,000 for white citizens.²⁵

African-Americans continue to lag behind whites in education and housing. In 2000, the median home value for homes owned by African-Americans was \$85,700, whereas it was \$132,400 for homes owned by whites.²⁶ Over 4.5% of African-American households lacked telephone services and 16.7% lacked vehicles—both more than three times the number of whites.²⁷ In 2002, the mean SAT scores for whites were over 100 points higher than those for African-Americans in both verbal and math.²⁸ Finally, as a further legacy of prior intentional discrimination in education, African-Americans remain behind whites in all levels of higher education attainment.²⁹

²⁰ Henry J. Kaiser Family Foundation, Virginia: Poverty Rate by Race/Ethnicity, states (2005–2006), U.S. (2006), <http://statehealthfacts.org/profileind.jsp?ind=14&cat=1&rgn=48>.

²¹ Henry J. Kaiser Family Foundation, Medicaid Coverage Rates for the Nonelderly by Race/Ethnicity, states (2005–2006), U.S. (2006), <http://statehealthfacts.org/comparebar.jsp?ind=163&cat=3>.

²² Henry J. Kaiser Family Foundation, Employer-Sponsored Coverage Rates for the Nonelderly by Race/Ethnicity, states (2005–2006), U.S. (2006), <http://statehealthfacts.org/comparebar.jsp?ind=153&cat=3>.

²³ Henry J. Kaiser Family Foundation, Teen Birth Rate per 1,000 Population by Race/Ethnicity, 2002, <http://statehealthfacts.org> (on file with authors).

²⁴ Henry J. Kaiser Family Foundation, Infant Mortality Rate (Death per 1,000 Live Births) by Race/Ethnicity, 2002–2004 Linked Files, <http://www.statehealthfacts.org/comparebar.jsp?ind=48&cat=2>.

²⁵ Henry J. Kaiser Family Foundation, Adult and Adolescent Annual AIDS Case Rate per 100,000 Population, by Race/Ethnicity, Reported in 2005, <http://www.statehealthfacts.org/comparebar.jsp?ind=515&cat=11>.

²⁶ FAIRDATA2000, *supra* note 17, at Chart 18.

²⁷ *Id.* at Charts 13 & 14.

²⁸ Virginia State Educational Profile, Virginia Educational Student Achievement Statistics By Race, Ethnicity and Gender, Mean SAT Scores, By Race and Ethnicity, 2002, *available at* <http://www.maec.org/vastats.html>.

²⁹ FAIRDATA2000, *supra* note 17, at Chart 3.

II. SECTION 5 COVERAGE OF VIRGINIA

A. HISTORY OF VOTING DISCRIMINATION BEFORE THE VRA

In 1870, the Virginia General Assembly passed a statute providing for separate voting registration books for African-Americans and whites.³⁰ Keeping separate logs made it easier to limit the number of African-American voters through such “technical delays” as misplacing the African-American voter list while limiting the time period allowed for voting.³¹ During reapportionment in the late 1800s, pockets of African-American voters were “cracked” through racial and political gerrymandering, further diluting the power and influence of minorities.³² In 1876, legislators pushed through a state constitutional amendment making payment of a poll tax a prerequisite for voting.³³ The poll tax was repealed in 1882, but the overt discrimination against African-Americans did not end.³⁴ In 1894, the legislature enacted the Walton Act, which allowed for publicly printed ballots to be marked secretly in booths.³⁵ There were no party names or symbols allowed on the ballots, and although special election judges were allowed to assist illiterates, “the practical effect was to end voting by most blacks in Virginia.”³⁶

Disenfranchisement efforts continued into the 1900s with the Virginia constitutional convention of 1901–1902 including provisions for a framework of poll taxes, an “understanding clause” and literacy tests designed explicitly for the purpose of disenfranchising African-American voters.³⁷ The Fourth Circuit has held that the purpose of the 1902 state constitutional convention was “to disenfranchise as many impoverished people, including most blacks,” as possible.³⁸ Thus, in the early to mid-1900s, African-Americans were virtually eliminated from electoral participation in Virginia. As two leading commentators note, “Between the 1870s and 1960s, . . . various suffrage restrictions effectively limited black voting to a

³⁰ Morris & Bradley, *supra* note 2, at 272.

³¹ *Id.* This practice was declared unconstitutional in 1964. See Hamm v. Va. State Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964), *aff’d sub nom.* Tancil v. Woolls, 379 U.S. 19 (1964) (declaring unconstitutional Virginia laws requiring separation of names by race on voter registration, on poll tax and residence-certificate lists and on property ownership and tax lists).

³² Morris & Bradley, *supra* note 2, at 272.

³³ *Id.*

³⁴ *Id.* at 273.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1354 (4th Cir. 1989).

level that was not threatening to white supremacists and virtually eliminated black officeholding.”³⁹

When it was apparent in 1963 that the poll tax would be eliminated, Virginia convened a special session of the General Assembly to design an alternative way of limiting participation by African-Americans.⁴⁰ It enacted legislation requiring each voter to file a certificate of residence six months before each federal election.⁴¹ Although the provision was invalidated by a federal district court in 1964,⁴² it symbolized the continued resistance of the white population in Virginia to enfranchising African-Americans. This was further underscored by the fact that almost the entire Virginia congressional delegation voted against the VRA and its three subsequent extensions.⁴³ Moreover, until 1974, the Virginia Constitution required proof of literacy for persons registering to vote, in violation of Section 5,⁴⁴ and before 1966, Virginia unconstitutionally maintained a poll tax that was specifically recognized as intended to discriminate against African-American voters.⁴⁵ In fact, in the mid-to-late 1960s, in contrast with Virginia, Mississippi was considered a “hotbed of democracy.”⁴⁶

Virginia’s racially discriminatory voting practices illustrate only a few examples of a long history of discriminatory traditions aimed at suppressing minority populations. As part of its “massive resistance” to school desegregation, Virginia shut down many of its public schools and created private academies for white students in the wake of the Supreme Court’s 1954 decision in *Brown v. Board of Education*.⁴⁷ Public schools in Prince Edward County, for example, did not reopen until 1964.⁴⁸ Furthermore, until 1963, Virginia statutes required racial segregation in places of public assemblage,⁴⁹ and interracial marriage was prohibited by law until 1967.⁵⁰

³⁹ Morris & Bradley, *supra* note 2, at 275.

⁴⁰ *Id.* at 276.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 279.

⁴⁴ See *Virginia v. United States*, 386 F. Supp. 1319 (D.D.C. 1974), *aff’d mem.*, 420 U.S. 901 (1975).

⁴⁵ See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

⁴⁶ V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 20 (1984).

⁴⁷ See ROBERT C. SMITH, *THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964* 104–05 (1965).

⁴⁸ *Id.* at 257–59.

⁴⁹ See *Brown v. City of Richmond*, 132 S.E.2d 495 (Va. 1963).

⁵⁰ See *Loving v. Virginia*, 388 U.S. 1 (1967).

B. HISTORY OF VOTING DISCRIMINATION AFTER THE VRA

1. “Old poison into new bottles”⁵¹

After the enactment of the VRA, Virginia began a new phase of its campaign to minimize the African-American vote through the use of multi-member districts, municipal annexations and at-large city elections.

In fact, Virginia’s record of legislative redistricting was one of the primary reasons cited for the need to extend the VRA in 1982.⁵² The General Assembly failed to make significant improvements in the 1980s’ round of redistricting.⁵³ At the time of reapportionment in the 1980s, only four of the 100 members of the Virginia House of Delegates were African-American because “the drawing of legislative boundaries and the extensive use of multimember districts ha[d] limited black opportunities for elected office.”⁵⁴ The total number of African-American elected officials in Virginia (federal, state, county and municipal) was 124—the lowest number of such officials in any state covered by Section 5 of the Voting Rights Act.⁵⁵ Thus, although African-Americans made up 18.9% of the population, African-Americans held only 4.1% of elected offices.⁵⁶ Virginia had the dubious distinction of having the lowest level of African-American legislative representation in the South.⁵⁷ Instead of remedying this situation in the process of redistricting following the 1980 Census, the legislature attempted to further suppress minority electoral participation. “In 1981–82 there were some fourteen legislative sessions, six redistricting plans, a ruling of unconstitutional population disparities by a three-judge federal panel, a gubernatorial veto, and Justice Department section 5 objections to plans for both houses.”⁵⁸

In the early 1990s, there were only 155 African-American elected officials in Virginia, below the national average and again among the lowest number in jurisdictions covered by Section 5.⁵⁹ In 1990, African-Americans held only three Senate and seven House of Delegates seats in

⁵¹ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000).

⁵² See S. REP. NO. 97-417, at 12 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 189.

⁵³ See Morris & Bradley, *supra* note 2, at 281.

⁵⁴ U.S. COMM’N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 56 (1981).

⁵⁵ See *id.* at 12 tbl.2.1.

⁵⁶ See *id.* at 15 tbls.2.3 & 2.4.

⁵⁷ Morris & Bradley, *supra* note 2, at 281.

⁵⁸ *Id.*

⁵⁹ See DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER 435 (1993).

the Virginia General Assembly and no congressional offices.⁶⁰ The low numbers of African-American representatives reflected both the socio-economic disparities and structural impediments to effectively participating in the electoral process. As of 1991, only nine of the state's forty-one cities abandoned at-large council elections.⁶¹ Eight of the nine converted because of litigation under the Equal Protection Clause or DOJ intervention under the VRA.⁶² Without the VRA, African-Americans would have undoubtedly been denied participation or accorded only token representation on governing bodies in these jurisdictions. Further, Virginia is one of only four states in which judges are elected by the state legislature.⁶³ As a result of this practice, in 1990, "fewer than 5 percent of Virginia's judges were black in a state whose black population was 19 percent . . ."⁶⁴ According to Thomas Morris and Neil Bradley, as of 1990,

[t]he virtual absence of blacks from the state's town councils indicates a continuing racial polarization at the grass-roots level—a polarization also reflected in the difficulty blacks have in winning in majority-white jurisdictions The continuing underrepresentation of blacks in many at-large county and city governments drives this fact home, as does the resistance of at-large jurisdictions to adopting an election structure that gives blacks a better chance of representation.⁶⁵

This is still true today. African-Americans make up 19.4% of Virginia's population, but only 10% of the Virginia House Representatives, 12.5% of the State Senators and 8.9% of the U.S. House Representatives.⁶⁶ Further, 91% of the African-American Virginia House Representatives, 83% of the African-American State Senators and the only African-American member of Congress are elected from African-American-majority districts.⁶⁷

Electoral structure, capitalizing on racially polarized voting patterns, plays a significant role in limiting the political power and influence of African-Americans. A comprehensive study of minority elected officials in eight Southern states, including Virginia, found that although there has

⁶⁰ See DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER 435 (1990) (on file with authors).

⁶¹ Morris & Bradley, *supra* note 2, at 290.

⁶² *Id.* at 289.

⁶³ *Id.* at 286.

⁶⁴ *Id.*

⁶⁵ *Id.* at 291.

⁶⁶ See DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 14 tbl.2 (2001).

⁶⁷ David Lublin et al., Redistricting in the 2000s, tbls.1 & 3, <http://www.american.edu/dlublin/redistricting> (last visited Mar. 1, 2008).

been an increase in the number of African-American representatives since 1982, it is due largely to the effects of VRA litigation and enforcement.⁶⁸ The study found no indication that the increase was a result of a decline in racially polarized voting.⁶⁹ A few high-profile examples of African-Americans elected in majority-white jurisdictions, such as Virginia's Governor L. Douglas Wilder in 1990, appear to be the exceptions to the general rule, and according to leading scholars, should not be viewed as evidence that the protections of the Act are no longer needed.⁷⁰ In fact, "the noteworthy instances of Black electoral success in White jurisdictions, fully understood, often suggest that safe districts have played an important integrative role."⁷¹ Governor Wilder, for example, started his political career in a "safe" majority-minority district.⁷² Moreover, Wilder's victory was by the closest margin in a Virginia gubernatorial election in that century. It is estimated that he won only "41% of the white vote and benefited from a turnout rate among black registered voters that was 8 percentage points higher than the figure for white voters. . . ."⁷³

A more recent example of how electoral structures impede African-American representation comes from the testimony of the Chairman of the Danville Democratic Party, Sheila Baynes, at the January 19, 2006 public hearing in Danville, Virginia. The city of Danville holds at-large elections for city council, which limits the ability of segments of the African-American population to elect representatives of choice.⁷⁴ There are currently two African-American representatives on the nine-member council—only one of the two was elected, as the other was appointed—even though African-Americans make up approximately 40% of the population of Danville.⁷⁵ The situation in Danville is certainly not an anomaly. Similar voting structures exist across the state.

Dr. John Boyd, of Mecklenburg County, Virginia, who testified at a January 26, 2006 public hearing in Raleigh, North Carolina, also provided

⁶⁸ Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION IN THE SOUTH*, *supra* note 2, at 336, 340.

⁶⁹ *See id.* at 337–39.

⁷⁰ *See, e.g.*, Richard H. Pildes, *The Politics of Race*, 108 *HARV. L. REV.* 1359, 1375–76 (1995) (reviewing *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* (Chandler Davidson & Bernard Grofman eds., 1994)).

⁷¹ *Id.* at 1376.

⁷² *Id.*

⁷³ Morris & Bradley, *supra* note 2, at 278.

⁷⁴ *Public Hearing on Reauthorization of the Expiring Provisions of the Voting Rights Act, Danville, Va.*, 27 (Jan. 19, 2006) [hereinafter Baynes Testimony] (testimony of Sheila Baynes).

⁷⁵ *Id.* at 23–24.

a poignant illustration of the continued prevalence of racially polarized voting. In the past several years, Dr. Boyd has twice run to be the congressional representative from Virginia's Fifth District.⁷⁶ While campaigning, he attended a political function in the southwestern part of the state.⁷⁷ He encountered a white woman at the function who stated, "It's a pleasure to meet you. You speak very well. You would have done a lot better if you had not made an appearance here because you have a White last name, which is Boyd, and we're all voting for those candidates."⁷⁸

In general, despite the many Section 5 objections, successful Section 2 vote dilution claims and other litigation challenging practices and structures that disadvantage minority voters, it is still true that racially polarized voting hinders the ability of minority voters to participate in the political process. The Virginia State Supreme Court observed as recently as 2002 that there is "a high correlation between race and voting patterns."⁷⁹ In these circumstances, the protections afforded by the preclearance requirement are still required to prevent any erosion in the ability of minority voters to have an equal opportunity to participate in the electoral processes at the local, state and federal levels.

2. Section 5 Objections Since 1982

As stated above, since 1982, Section 5 objections have helped prevent discriminatory changes in a wide range of areas, including redistricting, voting procedures and election schedules or structure of elected bodies. Below are examples from each decade since the last reauthorization of the VRA.

a. Redistricting

Most of Virginia's Section 5 objections since 1982 have involved redistricting. Officials have consistently attempted to limit African-American voters' political influence by "packing" them into a few districts or dispersing them among several majority-white districts to limit their ability to elect candidates of choice. This form of "vote dilution" is designed to cabin minority voting power and is indeed "old poison into new bottles."⁸⁰ Moreover, changes made during redistricting usually have an impact for a decade or even beyond. Section 5's role in ensuring that the

⁷⁶ *Public Hearing on Reauthorization of the Expiring Provisions of the Voting Rights Act, Raleigh, N.C.*, 20, 24 (Jan. 26, 2006) (testimony of Dr. John Boyd).

⁷⁷ *Id.* at 27.

⁷⁸ *Id.*

⁷⁹ *Wilkins v. West*, 571 S.E.2d 100, 115 (Va. 2002).

⁸⁰ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000).

political opportunities of African-Americans are not further limited during redistricting has likely protected the rights of innumerable African-American voters.

March 1982: The Petersburg City Council proposed an ordinance (Ordinance No. 8191) to realign the voting districts and change voting precinct boundaries and polling places for the city of Petersburg.⁸¹ The DOJ objected, finding that the proposed redistricting plan would lower the African-American proportions in the First District from 69.9% to 61.5% and in the Fourth District from 71.2% to 61.6%.⁸² According to the DOJ, such a diminution was intended by the majority-white city council to increase white voting strength in those districts and would, likewise, diminish the opportunity of African-American voters to elect candidates of choice and lead to a decline in African-American representation.⁸³

March 1982: The DOJ objected to portions of the 1981 reapportionment of the Virginia House of Delegates.⁸⁴ Specifically, the DOJ noted that the city of Norfolk was retained as a large, multi-member district, whereas a fairly apportioned plan of single-member districts would have provided for two districts with substantial African-American majorities.⁸⁵ The multi-member district plan had the inevitable effect of limiting the potential of African-Americans to elect their candidates of choice.⁸⁶ Further, the DOJ rejected the stated rationale for the plan—that the city of Norfolk had a large population that did not vote locally—finding that this rationale was not applied uniformly throughout the state.⁸⁷ The DOJ also objected to the packing of African-American populations in Hampton and Newport News into one 75% African-American district.⁸⁸ The remainder of the African-American population was divided among three other districts, all of which had substantial white majorities.⁸⁹ According to the DOJ, a fairly drawn plan in this area would have two districts with a substantial African-American majority.⁹⁰ Finally, the DOJ found that although District 90 contained a sizeable African-American majority, it was so contorted as to

⁸¹ Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John F. Kay, Jr., Mays, Valentine, Davenport & Moore, at 1 (Mar. 1, 1982).

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Gerald L. Baliles, Va. Attorney Gen., at 3 (Mar. 12, 1982).

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

likely confuse voters and candidates, exacerbating financial and other disadvantages experienced by many African-American candidates.⁹¹

November 1982: Greenville County proposed a redistricting ordinance to change four single-member districts into two double-member districts and to add a fifth member to be elected at-large.⁹² The DOJ objected because the plan attempted to merge districts with politically active African-American voters with districts that were politically inactive, thereby reducing the electoral capability of African-American voters.⁹³ According to the DOJ, because the current four single-member districts provided an opportunity for African-Americans to elect their candidates of choice, the plan presented a clear retrogression of African-American voting strength.⁹⁴

March 1986: The city of Franklin proposed three annexations that would have reduced the city's African-American population by 3.7%—from 55.4% to 51.7%—causing the city's voting-age population to shift from an African-American majority (51.9%) to a white majority (51.7%).⁹⁵ The DOJ objected, finding that under the city's at-large election system, African-American candidates had limited success because of racial bloc voting.⁹⁶ The proposed annexations would have perpetuated and enhanced the existing restrictions on the ability of African-Americans to realize their voting potential.⁹⁷

July 1991: The DOJ objected to a portion of the 1991 reapportionment of the Virginia House of Delegates.⁹⁸ The DOJ found that the proposed configuration of district boundary lines appeared to have been drawn in such a way as to minimize African-American voting strength in Charles City County, James City County and the Richmond/Henrico County areas.⁹⁹ Specifically, there were large concentrations of African-Americans placed in majority-white districts.¹⁰⁰ The legislature rejected available alternatives that would have recognized this concentration of voters by drawing them into a district with African-American voters in the Richmond

⁹¹ *Id.* at 3.

⁹² Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charles A. Sabo, Chairman, Greenville County, at 1 (Nov. 15, 1982).

⁹³ *Id.* at 2.

⁹⁴ *Id.*

⁹⁵ Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Carter Glass, IV, Mays, Valentine, Davenport & Moore, at 1 (Mar. 11, 1986).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to K. Marshall Cook, Va. Deputy Attorney Gen., at 2 (July 16, 1991).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

area.¹⁰¹ Such a configuration likely would have resulted in an additional district, providing African-American voters an “equal opportunity to participate in the political process and elect candidates of their choice.”¹⁰² The DOJ noted that the protection of incumbents, which the State explained was the reason for this districting, was not in itself inappropriate, but it could not be done at the expense of minority voting rights.¹⁰³

November 1991: The DOJ objected to the proposed redistricting of supervisor districts and precinct realignment in Powhatan County.¹⁰⁴ The DOJ found that although the county had a 21.4% African-American population, no African-American had ever been elected county supervisor.¹⁰⁵ Powhatan’s African-American population was concentrated in such a manner that available alternatives would have allowed African-American voters an opportunity to elect candidates of choice in one of the five supervisor districts.¹⁰⁶ This result was avoided, however, through the division of the county’s African-American population between Districts Three and Five.¹⁰⁷ Even though District Three had a majority African-American total population, it was only 38% when the non-voting population of the Powhatan Correctional Center was excluded.¹⁰⁸ The county rejected a plan that would have created a district that combined the African-American population in the northern portion of the county in one district, which could recognize better the voting potential of African-American citizens.¹⁰⁹ Again, the DOJ noted that “the county’s actions may have been motivated, in large part, by the desire to maintain districts conducive to the re-election of the incumbent supervisors” who were all white, which was not per se improper.¹¹⁰ The protection of incumbents, however, could not be achieved at the expense of minority voting potential.¹¹¹

April 2002: Pittsylvania County proposed a redistricting plan for its board of supervisors and school board members, which would have reduced the African-American population in the only majority-minority dis-

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to James N. Hopper, Parvin, Wilson, Barnett & Hopper, at 2 (Nov. 12, 1991).

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1–2.

¹¹¹ *Id.* at 2.

trict in the county (Bannister District).¹¹² The DOJ objected, finding the proposed reduction was retrogressive.¹¹³ In fact, according to the DOJ, even a minute reduction would have greatly impaired African-American voters' ability to elect candidates of choice.¹¹⁴ Furthermore, the existence of alternative plans that actually ameliorated minority voters' ability to elect their choice candidates underscored the DOJ's objection.¹¹⁵

July 2002: The DOJ objected to Cumberland County's proposed redistricting plan for its board of supervisors.¹¹⁶ The DOJ found that District Three was the only district in which African-Americans constituted a majority (55.9%) of the population.¹¹⁷ The proposed plan would have reduced that majority to 55.3% and reduced the voting-age African-American population from 55.7% to 55.2%.¹¹⁸

September 2001, May 2003 and October 2003: Northampton County proposed a change in the method of electing the board of supervisors, collapsing six districts into three larger districts.¹¹⁹ The DOJ objected, finding that three of the six districts were majority-minority districts in which African-American voters regularly elected their candidates of choice.¹²⁰ The new plan would have diluted the minority-majorities and caused them to completely disappear in two of the three new districts—clearly having retrogressive effects.¹²¹ In 2003, the county provided a new six-district plan, which had the same retrogressive effects of the three-district plan.¹²² The DOJ objected and provided a model non-retrogressive, six-district plan, which has yet to be followed by the county.¹²³

¹¹² Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to William D. Sleeper, County Adm'r & Fred M. Ingram, Chairperson, Bd. of Supervisors of Pittsylvania, Va., at 1 (Apr. 29, 2002).

¹¹³ *Id.* at 2.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Darvin Satterwhite, County Attorney, Goochland, Va., at 3 (July 9, 2002).

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.*

¹¹⁹ See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Bruce D. Jones, Jr., County Attorney, Northampton County, Va., at 1 (Sept. 28, 2001) [hereinafter Sept. 28, 2001 Boyd Letter].

¹²⁰ *Id.* at 2, 4.

¹²¹ *Id.* at 2-3.

¹²² See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Bruce D. Jones, Jr., County Attorney, Northampton County, Va., at 3-4 (May 19, 2003) [hereinafter May 19, 2003 Boyd Letter]; Letter from J. Michael Wiggins, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Bruce D. Jones, Jr., County Attorney, Northampton County, Va., at 2-3 (Oct. 21, 2003).

¹²³ See May 19, 2003 Boyd Letter, *supra* note 122, at 3.

b. Voting Procedures

In addition to redistricting, jurisdictions have also pursued new ways to prevent African-American voters from achieving electoral power. One particularly successful method in Virginia has been the use of at-large election methods. As the discussion above indicates, African-Americans have been largely unsuccessful in electing candidates of choice in at-large elections largely due to racially polarized voting.

August 1984: A proposed change to Chapter 775 of the Virginia Laws would have exempted “a candidate for an office to be voted on at the election” from helping voters needing assistance to vote by reason of blindness, disability or inability to read or write.¹²⁴ The DOJ objected, finding that this provision did not conform to the requirements of Section 208 of the Voting Rights Act.¹²⁵

February 1993: The DOJ objected to the proposed adoption of an at-large method of election of school board members in Newport News.¹²⁶ African-Americans made up 33% of the city’s population and 31% of its voting-age population.¹²⁷ Under the then-existing appointment system for the school board, the city council had consistently (since 1982) appointed two African-Americans to serve on the seven-member board.¹²⁸ The DOJ found that under the proposed school board election system, members would be elected using the same at-large system as the city council.¹²⁹ Since 1989, the minority community had been largely unsuccessful in electing candidates of choice to the city council under the existing at-large system.¹³⁰ Moreover, the decision to propose an at-large election system was made without public hearings, consideration of alternative electoral systems or input from the minority community.¹³¹

June 1994: The DOJ objected to the proposed adoption of an at-large method of election for the board of education in the city of Chesapeake.¹³² According to the 1990 Census, Chesapeake had a total population of

¹²⁴ Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to William J. Bridge, Va. Assistant Attorney Gen., at 1–2 (Aug. 3, 1984) (on file with authors).

¹²⁵ *Id.* at 2.

¹²⁶ Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Verbena Askew, City Attorney, Newport News, Va., at 3 (Feb. 16, 1993) (on file with authors).

¹²⁷ *Id.* at 2.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Letter from Gerald W. Jones, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Martin McMahon, Assistant City Attorney, Chesapeake, Va., at 3 (June 20, 1994) (on file with authors).

151,976, of which 27.2% were African-American.¹³³ African-Americans comprised 25.6% of the voting-age population.¹³⁴ Under the existing plan, school board members, three of which were African-American, were appointed by the city council.¹³⁵ The proposed plan would have elected a city school board at-large, composed of nine members serving four-year staggered terms.¹³⁶ The council had adopted the at-large proposal over the objection of two of its African-American council members.¹³⁷ The DOJ was particularly concerned with whether the at-large method would allow African-American voters an equal opportunity to elect their candidates of choice to the school board.¹³⁸ At the time, an at-large system was used to elect the city council, and according to the DOJ, there was evidence of persistent and severe polarization along racial lines in these elections.¹³⁹ In fact, in each election in the preceding decade, one or more African-American candidates had been the leading candidates of choice among African-American voters, but these candidates generally had not finished among the group of candidates white voters favored for election to the council.¹⁴⁰ For example, in 1994, an African-American candidate appeared to have received nearly unanimous African-American support but received almost no votes among white voters, and thus, was defeated.¹⁴¹

October 1999: In 1999, the County Board of Supervisors of Dinwiddie County was forced to move the location of the polling center for the Darvills Precinct (No. 101) because the previous center burned down.¹⁴² Precinct voting was moved to the Cut Bank Hunt Club (Hunt Club), which was privately owned and had a predominantly African-American membership.¹⁴³ Subsequently, 105 citizens submitted their signatures to have the precinct moved to the Mansons United Methodist Church, located three miles southeast of the Hunt Club.¹⁴⁴ The petition's stated purpose for moving the precinct was for a "more central[] locat[ion]."¹⁴⁵ Before the board's meeting to discuss moving the polling place, the Mansons United Method-

¹³³ *Id.* at 1.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 2.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Letter from Bill Lann Lee, Acting Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Benjamin W. Emerson, Sands Anderson Marks & Miller, at 1 (Oct. 27, 1999).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.*

ist Church withdrew its name as a possible location.¹⁴⁶ The board then placed an advertisement for a public hearing on changing the polling place, which stated that if any “suitable centrally located location [could] be found prior to July 15, 1999,” it would consider moving the polling place there.¹⁴⁷ On July 12, 1999, the Bott Memorial Presbyterian Church offered its facilities for polling.¹⁴⁸ On August 4, 1999, the board approved changing the polling place to the Bott Memorial Presbyterian Church.¹⁴⁹ The church was located at the extreme east end of the precinct, however, and 1990 Census data showed that a significant portion of the African-American population resided in the western end of the precinct.¹⁵⁰ Thus, the DOJ objected to the change, finding that the polling place was moved for discriminatory reasons because the local officials failed to prove otherwise.¹⁵¹

c. Election Schedules or Structure of Elected Bodies

Finally, where African-Americans have had some success in electing at least one representative of choice under at-large voting systems, some jurisdictions have sought to reduce the number of board seats available, undeniably leading to retrogressive results for minority voters.

April 1988: The DOJ objected to a proposed reduction in the number of council members from seven to six, with three elected at-large to concurrent terms and three elected from single-member districts.¹⁵² The DOJ found that although there did not appear to be any racial animus underlying the proposed 3-3 system, the opportunity for African-American voters to elect a representative of their choice to an at-large position would be limited because of the reduced number of seats to be filled at-large and because there would have been less opportunity to participate in election of a representative from one of the districts as they were drawn.¹⁵³ The 3-3 election system would have led “to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”¹⁵⁴

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 2–3.

¹⁵¹ *Id.* at 4.

¹⁵² Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to James M. Pates, City Attorney, Fredericksburg, Va., at 1–2 (Apr. 7, 1988) (on file with authors).

¹⁵³ *Id.* at 2.

¹⁵⁴ *Id.* (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

July 1989: The DOJ objected to a proposed change in the method for staggering city council terms for the city of Newport News implemented in conjunction with a change from having the city council members elect one of their number as mayor to direct election of the mayor, who would also continue to serve as a member of the council.¹⁵⁵ The DOJ found that the proposed change would cause the election system to go from four regular council members elected at-large as a group in one election year and three in the following election year to three elected at-large as a group in each election.¹⁵⁶ The DOJ noted that African-American voters had only limited success in electing candidates of their choice to office, that African-American candidates typically won by narrow margins, only a few votes ahead of their rivals and that African-American candidates often came in fourth in election years where there were only three seats available.¹⁵⁷ Because of these circumstances, the DOJ determined that a change from a 4-3 to a 3-3 system would diminish the electoral opportunity provided to African-American voters.¹⁵⁸ The loss of the fourth seat would be retrogressive in the context of an at-large election system characterized by racially polarized voting and limited African-American success in electing candidates of choice to office.¹⁵⁹

February 1990: The city of Newport News requested that the DOJ reconsider its July 1989 objection to its proposed change in the method of staggering city council terms.¹⁶⁰ The city contended that the DOJ erred in focusing solely on the success of the African-American candidates, because there had been white candidates elected for whom more than 50% of the African-American voters had cast one of their available votes, and these candidates should also be considered “candidates of choice” for African-American voters.¹⁶¹ The city contended that there was no difference in African-American electoral opportunity when three or four seats were open for election.¹⁶² The DOJ declined to withdraw its objection, however, noting that except for possibly “one white candidate elected in 1980, the other elected white candidates who received majority black voter support may

¹⁵⁵ Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Michael A. Korb, Jr., Assistant City Attorney, Newport News, Va., at 1–3 (July 24, 1989) (on file with authors).

¹⁵⁶ *Id.* at 2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Michael A. Korb, Jr., Assistant City Attorney, Newport News, Va., at 1 (Feb. 9, 1990) (on file with authors).

¹⁶¹ *Id.* at 1–2.

¹⁶² *Id.* at 2.

not properly be considered ‘candidates of choice’ by the black voters.”¹⁶³ The white candidates with apparent African-American voter support ran in contests with no African-American candidates that also had abnormally low African-American voter turnout.¹⁶⁴ Other white candidates elected with African-American voter support “all received significantly fewer votes among black voters than the black candidates running in the same elections.”¹⁶⁵ Thus, according to the DOJ, the city had not satisfied its burden under Section 5 of showing that the proposed changes lacked a prohibited retrogressive effect.¹⁶⁶

3. Withdrawn Preclearance Submissions Since 1982

In addition to the Section 5 objections discussed above, other preclearance requests were withdrawn before the review period was over when it became clear that the DOJ was likely to object. Since 1982, there have been at least four such withdrawals in Virginia involving polling place changes and a redistricting plan, with the most recent occurring in 2001.¹⁶⁷

4. Section 5 Litigation Since 1982

“In 1994, all registered voters in Virginia who were willing to declare their intent to support the Republican Party’s nominees for public office at the next election could participate in the nomination of the Party’s candidate for the office of United States Senator if they paid either a \$35 or \$45 registration fee.”¹⁶⁸ Plaintiffs filed suit in district court claiming that the imposition of the fee as a condition precedent to participation in the candidate selection process was a poll tax prohibited by the VRA and also violated the Equal Protection Clause of the Fourteenth Amendment and the Twenty-Fourth Amendment to the U.S. Constitution.¹⁶⁹ A three-judge panel granted the defendants’ motion to dismiss the claims, concluding that Section 5 of the VRA did not apply to the selection of delegates to a state nominating convention.¹⁷⁰

On review of the three-judge panel’s decision, however, the U.S. Supreme Court reversed and remanded.¹⁷¹ The Court concluded that the

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 3.

¹⁶⁷ See Appendix A.

¹⁶⁸ *Morse v. Republican Party of Va.*, 517 U.S. 186, 190 (1996).

¹⁶⁹ *Id.* at 191–92.

¹⁷⁰ *Id.* at 192.

¹⁷¹ See *id.* at 235.

party's decision to exact the registration fee was subject to Section 5 of the Voting Rights Act, which, among other things, prohibited Virginia and other covered jurisdictions from enacting or enforcing any "voting qualification or prerequisite . . . different from that in force" on a specified date unless the change had been precleared by the DOJ.¹⁷² The Court held that the party was clearly "acting under authority explicitly or implicitly granted by a covered jurisdiction," and thus, subject to the preclearance requirement.¹⁷³ Further, Section 5 required preclearance of any change bearing on the "effectiveness" of a vote cast in a primary, special or general election, including changes in the composition of the electorate that votes for a particular office.¹⁷⁴ "By limiting the opportunity for voters to participate in the Party's convention, the fee undercut[] their influence on the field of candidates whose names w[ould] appear on the ballot, and thus weaken[ed] the 'effectiveness' of their votes cast in the general election itself."¹⁷⁵ The Court noted, significantly, that the legislative history revealed that Congress was cognizant of the White Primary Cases, the failure of Fifteenth Amendment enforcement and Mississippi's attempt to use an "all-white" convention process to nominate a Democratic presidential candidate.¹⁷⁶ In light of this awareness, the Act's "party office" provision was clearly adopted to cover situations similar to that in Mississippi.¹⁷⁷ Accordingly, the Act could not be interpreted to contain a loophole excluding all political party activity, but had to be read in order to apply to voting practices and procedures relating to conventions.¹⁷⁸

5. Deterrent Impact of Section 5

The need for Section 5's ongoing protection is further underscored when one considers that awareness of the necessity of Section 5 preclearance has likely deterred even greater levels of voting discrimination.

In fact, Sheila Baynes testified at the January 19 hearing that she believes the VRA's protections are still necessary to protect minority citizens from overt and covert discriminatory tactics aimed at limiting their political power and influence in Danville.¹⁷⁹ Danville was the site of the most vio-

¹⁷² *Id.* at 203–04, 210.

¹⁷³ *Id.* at 194–95.

¹⁷⁴ *Id.* at 205.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 213 n.27.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 236–37.

¹⁷⁹ Baynes Testimony, *supra* note 74, at 20; *see also Public Hearing on Reauthorization of the Expiring Provisions of the Voting Rights Act, supra* note 74, at 38 [hereinafter Williams Statement] (statement of Jerry L. Williams, Jr.).

lent episode of the civil rights movement during the summer of 1963. “Not only did the city resist the so-called [Civil Rights] Movement’s demands, but in a coordinated fashion every instrument of power was used to create an atmosphere of intimidation.”¹⁸⁰ Today, in Danville, African-Americans are still the victims of overt and covert racial intimidation and discrimination campaigns. For example, Wyatt Watkins testified that during the fall of 2005, hate literature was distributed in his neighborhood, threatening to “lynch” African-Americans and warning that if citizens “didn’t vote a certain way certain things could happen to you.”¹⁸¹

6. Section 5 Bailouts Since 1982

Since 1982, ten jurisdictions have successfully bailed out of Section 5 coverage and all of them are in Virginia.¹⁸² Although Section 4 establishes specific bailout criteria, in general terms, jurisdictions must establish that they are free of racial discrimination in voting and that they have complied with the VRA.¹⁸³ In some respects, the successful use of the bailout provision in Virginia reflects a degree of progress in overcoming the legacy of discrimination that may not exist in many other covered jurisdictions.

The successful bailouts in Virginia illustrate two points. First, it is possible for jurisdictions to successfully bail out under the current formula,¹⁸⁴ and second, covered jurisdictions within Virginia are aware of bailout procedures. The low numbers of local jurisdictions that have actually applied for bailout do not appear to result from structural disincentives or inadequacies of the bailout process. Rather, at least in part, jurisdictions

¹⁸⁰ Virginia Historical Society, Danville, The Civil Rights Movement in Virginia, <http://www.vahistorical.org/civilrights/danville.htm> (last visited Mar. 2, 2008).

¹⁸¹ *Public Hearing on Reauthorization of the Expiring Provisions of the Voting Rights Act*, *supra* note 74, at 29–30 (testimony of Wyatt Watkins).

¹⁸² The jurisdictions that have successfully bailed out are Fairfax City (Oct. 1997), Frederick County (Sept. 1999), Shenandoah County (Oct. 1999), Roanoke County (Jan. 2001), Winchester City (May 2001), Harrisonburg City (Apr. 2002), Rockingham County (May 2002), Warren County (Nov. 2002), Greene County (Jan. 2004) and Augusta County (November 2005). *See Hearing, supra* note 12, at 93 (statement of J. Gerald Hebert).

¹⁸³ *Id.* at 89–90.

¹⁸⁴ *See id.* at 90. In 1973, the Virginia General Assembly passed a resolution directing the State Attorney General to take the necessary steps to bail out Virginia from coverage of Section 5 of the VRA. Morris & Bradley, *supra* note 2, at 279. The State filed suit in the U.S. District Court for the District of Columbia claiming that it met the statutory requirement of a ten-year absence of any evidence of discriminatory device for voting because its literacy test had been fairly administered before it was banned by the Act. *Virginia v. United States*, 386 F. Supp. 1319, 1325 (D.D.C. 1974), *aff’d mem.*, 420 U.S. 901 (1975). The court denied Virginia’s petition, however, finding that the State’s record of “segregated, inferior education for blacks contributed to low literacy rates, negatively impacting the ability of [African-Americans] to satisfy the literacy requirements.” Morris & Bradley, *supra* note 2, at 279.

are making individualized assessments and informed decisions after weighing cost savings against concerns of their own citizens who believe the protections of the VRA are still necessary.

Some estimates indicate that as of 1984, fifty-one counties and about sixteen cities in Virginia were eligible for bailout, yet only ten have bailed out since the 1982 VRA Amendments became effective.¹⁸⁵ Further, in 2002, the Virginia General Assembly passed a joint resolution requesting the Virginia Attorney General

to collect and disseminate certain information pertaining to the bailout of Virginia localities from requirements of Section 5 of the Voting Rights Act. Specifically, the Attorney General is requested to (i) collect information, including historical data on preclearance submissions, that would be needed to obtain a bailout, (ii) notify localities on what assistance the Attorney General can provide to them in petitioning the court, (iii) advise localities on what corrective actions and improvements are needed to promote electoral integrity to qualify for bailout, and (iv) develop a model strategy for localities to utilize in applying for bailout status.¹⁸⁶

Despite this statewide effort, not all jurisdictions are seeking bailouts. For example, at the January 19th Danville hearing, Jerry Williams, Jr. stated that one of the members of the electoral board proposed that Danville apply for bailout in order to save the expense of having to preclear all changes with the DOJ.¹⁸⁷ During a public hearing in which the potential cost savings were explained to the community, citizens in attendance nevertheless overwhelmingly opposed the proposal to apply for bailout.¹⁸⁸ Danville remains subject to the preclearance requirement.

III. SECTION 2 VOTING RIGHTS LITIGATION SINCE 1982

In addition to the fact that many changes affecting voting failed to obtain preclearance under Section 5 of the VRA, minorities in Virginia also have initiated successful vote dilution claims under Section 2 since 1982.¹⁸⁹ One of the most notable is *Collins v. City of Norfolk*.¹⁹⁰ In this case, filed in 1983, seven African-American citizens of Norfolk, Virginia and the Norfolk Branch of the NAACP alleged that the at-large system of electing

¹⁸⁵ See Timothy G. O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 795-97 (1983).

¹⁸⁶ H.R.J. Res. 95, 2002 Gen. Assem., Reg. Sess. (Va. 2002), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+HJ95ER>.

¹⁸⁷ Williams Statement, *supra* note 179, at 38-39.

¹⁸⁸ *Id.* at 38.

¹⁸⁹ See Appendix B for an extended summary of these cases.

¹⁹⁰ 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

members of the Norfolk City Council unlawfully diluted African-American voting strength and had been maintained for racially discriminatory purposes.¹⁹¹ The court found:

Since 1952 the council ha[d] consisted of seven members elected at-large. Council members serve[d] four-year, staggered terms, so every two years three or four of the seven seats [were] contested. . . . From 1918 until 1968, every member of Norfolk's city council was white. In 1968, Joseph A. Jordan, Jr., a black citizen, was elected to the council, and from that time until this action was filed the council had one black member. . . . Although the city's population [was] 35% black and the rate of black participation in the electoral process [was] high, black citizens were unable to elect more than one black member . . . to the seven-member council. . . .¹⁹²

One of the most significant legal issues in the case was how to identify a "candidate of choice" of African-American voters in a multi-seat election where each voter can vote for more than one candidate.

After lengthy litigation, including six reported opinions and one *vacatur* by the Supreme Court,¹⁹³ the plaintiffs eventually were able to establish a violation of Section 2. The Fourth Circuit ultimately reasoned that the critical factor was "the difference between the black support for the candidate who received the most black votes yet lost and the candidates who won with fewer black votes."¹⁹⁴ The court relied upon data showing that "from 1968 until 1984 all of the minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters"¹⁹⁵ and statistics showing that before 1984, "white voters were able to defeat the combined strength of black voters and white crossover voters, denying the black community a second seat on the council."¹⁹⁶ Furthermore, the court held that recent re-elections of African-American incumbents did not negate the existence of white bloc voting.¹⁹⁷ Thus, the court reversed the district court's judgment and held that Section 2 was violated.

The plaintiffs in a 1988 case, *McDaniels v. Mehfoud*,¹⁹⁸ were also successful in proving illegal vote dilution. Henrico County is an urban and suburban county bordering Richmond, Virginia.¹⁹⁹ According to the 1980

¹⁹¹ *Id.* at 1234.

¹⁹² *Id.* at 1235.

¹⁹³ *See id.* at 1234 n.2.

¹⁹⁴ *Id.* at 1238.

¹⁹⁵ *Id.* at 1241.

¹⁹⁶ *Id.* at 1242.

¹⁹⁷ *Id.* at 1243.

¹⁹⁸ 702 F. Supp. 588 (E.D. Va. 1988).

¹⁹⁹ *Id.* at 589.

Census, the total population of Henrico County was 180,735, of which 15% were African-American.²⁰⁰ In analyzing the plaintiffs' Section 2 claim, the court found that the African-American population in Henrico County was "sufficiently large and geographically compact to constitute a majority in one or more single-member districts."²⁰¹ Further, voting patterns in the county revealed "a severe and persistent pattern of racially polarized voting,"²⁰² "[a] legacy of official discrimination in voting matters, and to a lesser extent, . . . continuing effects of discrimination in education and employment."²⁰³ The court found that these factors "combined with the single-member districting scheme to impede the ability of a geographically compact and politically cohesive group of blacks to participate equally in the political process and to elect their candidates of choice in violation of the Voting Rights Act of 1965."²⁰⁴

In *Neal v. Coleburn*,²⁰⁵ the African-American plaintiffs successfully challenged the method of electing the Nottoway County Board of Supervisors. The county is predominantly rural.²⁰⁶ According to the 1980 Census, the total population was 14,666—39.04% of whom were African-American and 60.69% of whom were white.²⁰⁷ The five-member board of supervisors was elected from single-member districts for four-year terms.²⁰⁸ Despite the substantial African-American population, the supervisor districts had been drawn so that none contained an African-American majority.²⁰⁹

In its analysis of the vote dilution claim, the court noted the extensive history of discrimination in Virginia and how its lingering effects on socio-economic conditions of African-Americans contributed to the lack of opportunities for African-Americans to effectively participate in the political process.²¹⁰ Thus, "[t]he Court [found] that the political processes in Nottoway County [had] been largely under white control and associated with white political dominance. . . . As a result of past official discrimination and continuing segregation, blacks . . . still feel intimidated by the white domination of local politics."²¹¹ Moreover, the court found significant evi-

²⁰⁰ *Id.*

²⁰¹ *Id.* at 591.

²⁰² *Id.* at 593.

²⁰³ *Id.* at 596.

²⁰⁴ *Id.*

²⁰⁵ 689 F. Supp. 1426 (E.D. Va. 1988).

²⁰⁶ *Id.* at 1427.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1428.

²¹¹ *Id.* at 1430.

dence of racially polarized voting, noting that “whites generally have not supported or voted for black candidates, nor will they.”²¹² The court ultimately ruled that the plaintiffs had satisfied their burden to prove a Section 2 violation and ordered adoption of the plaintiffs’ proposed remedy.²¹³

Neal v. Coleburn is typical of many voting rights cases at the local level because the plaintiffs filed a companion case challenging the method of electing the town council for the county’s largest town, Blackstone. In *Neal v. Harris*,²¹⁴ the defendants initially fought any change in the at-large method of electing the seven-member town council. Although African-Americans constituted almost 45% of Blackstone’s population, no African-American had won election to the town council until 1984. On the eve of trial, the town agreed to settle the case, and the district court adopted a remedial plan that provided for five single-member districts and two at-large seats, with three of the five single-member districts having a majority African-American population.²¹⁵

In a recent Section 2 case, *Hall v. Virginia*,²¹⁶ plaintiffs challenged the Virginia General Assembly’s congressional redistricting plan enacted following the 2000 Census because it failed to draw a second district that would have allowed African-American voters to elect a candidate of their choice in combination with reliable crossover votes from non-African-American voters, even though the second district would not have been majority-African-American. Virginia’s congressional redistricting plan, adopted in 2001, changed the boundary lines of the Fourth District so as to shift a number of African-American citizens out of the Fourth District and into the Third and Fifth Districts.²¹⁷ Before the redistricting, African-Americans comprised 39.4% of the total population and 37.8% of the voting-age population.²¹⁸ After the redistricting, they constituted 33.6% of the total population and 32.3% of the voting-age population.²¹⁹

Plaintiffs, nine registered voters who resided in the Fourth District or were shifted out of the district as a result of the redistricting, filed suit in district court, “alleging that the reconfiguration of the Fourth District dilute[d] minority voting strength in violation of Section 2 of the Voting

²¹² *Id.* at 1431.

²¹³ *Id.* at 1437–39.

²¹⁴ 837 F.2d 632 (4th Cir. 1987) (per curiam).

²¹⁵ *Id.* at 633–34.

²¹⁶ 385 F.3d 421 (4th Cir. 2004).

²¹⁷ *Id.* at 424.

²¹⁸ *Id.*

²¹⁹ *Id.*

Rights Act.”²²⁰ Specifically, they claimed that in the newly-drawn Fourth District, African-Americans “are too small in number to form the same winning coalition with ‘crossover’ white voters that existed before the enactment of the 2001 Redistricting Plan.”²²¹ According to the plaintiffs, “the first *Gingles* precondition is satisfied not only when a minority group constitutes a numerical majority in a single-member district, but also when minorities are sufficiently numerous to form an ‘effective’ or ‘functional’ majority in a single-member district by combining with voters from other racial or ethnic groups.”²²² The district court rejected this argument, however, concluding that African-Americans would not form a population of voting-age majority in the Fourth District, even if the district was restored to the original boundaries.²²³ The Fourth Circuit affirmed, holding,

when minority voters, as a group, are too small or loosely distributed to form a majority in a single-member district, they have no ability to elect candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates. . . . [They] cannot claim that their voting strength—that is, the potential to independently decide the outcome of an election—has been diluted in violation of Section 2.²²⁴

This issue was recently addressed by the Supreme Court in a Texas redistricting case.²²⁵

IV. CONSENT DECREES

Courts have also approved numerous consent decrees in Virginia, whereby local jurisdictions have agreed to adopt electoral reforms to come into compliance with the provisions of the VRA. One of these cases demonstrates one important way that Section 5 reinforces the remedies available under Section 2. Prince Edward County is a jurisdiction where a combination of district and at-large seats was implemented following a consent decree. When a subsequent redistricting plan was enacted in 1993, the DOJ raised concerns about its fairness to minority voters, and the submission was withdrawn before being put into effect.²²⁶

²²⁰ *Id.* at 424–25.

²²¹ *Id.* at 425.

²²² *Id.* at 427.

²²³ *Id.* at 430–31.

²²⁴ *Id.* at 429.

²²⁵ *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

²²⁶ *See* Appendix A.

These brief summaries demonstrate the changes accomplished by settlements in Section 2 cases:²²⁷

— *Harris v. City of Hopewell*:²²⁸ Issuing a consent judgment in which Hopewell agreed to create a mixed ward/at-large electoral system to replace its all at-large method of electing city council members.

— *Eggleston v. Crute*:²²⁹ Consent decrees changed the methods of election for the Prince Edward County Board of Supervisors and the Farmville Town Council. The supervisors would be elected from a combination of single-member districts for county residents and a three-seat, at-large district for city residents. The seven-member town council would be elected from five single-member districts, two of which were majority-African-American, and two at-large seats.

— *Carr v. Covington*:²³⁰ Consent decree established a new method of election for the town of Halifax, where no African-American had been elected to the town council since the town's incorporation in 1875. Replacing an at-large system, the seven-member council would be elected from four single-member districts and three at-large seats, resulting in the election of one African-American to the town council in 1986.

— *Person v. Ligon*:²³¹ Establishing a new method of election for the city of Emporia, just north of the North Carolina border in Brunswick County. The decree reduced the size of the city council from nine to eight members and created an election system with three single-member districts and two multi-member districts. Following implementation of the plan, three African-American candidates were elected to the city council.

— *Taylor v. Forrester*:²³² Expanding the Lancaster County Board of Supervisors from three to five members, to be elected from five single-member districts.

— *United States v. City of Newport News*:²³³ Issuing consent judgment enjoining the city of Newport News from conducting future elections under the at-large method and establishing three two-member districts and one at-large seat for the Newport News Town Council. Currently the vice-mayor and one other council member are African-American.

²²⁷ This is an illustrative list. Consent decrees also were entered in the following cases: *Watkins v. Thomas*, No. 87-0709-R (E.D. Va. May 20, 1988); *King v. Blalock*, No. CA-88-0811-R (E.D. Va. June 6, 1989); *Feggins v. Horne*, No. CA-88-0865-R (E.D. Va. June 19, 1989); *Brunswick County League of Progress v. Town Council of Lawrenceville*, No. 3:91cv00091 (E.D. Va. Nov. 5, 1991).

²²⁸ No. 82-0036-R (E.D. Va. Jan. 5, 1983).

²²⁹ No. 83-0287-R (E.D. Va. 1984).

²³⁰ No. 85-0011-D (W.D. Va. 1986).

²³¹ No. 84-0270-R (E.D. Va. Jan. 12, 1988).

²³² No. 89-00777-R (E.D. Va. May 17, 1990).

²³³ No. 4:94-cv-00155 (E.D. Va. Nov. 4, 1994).

V. ADDITIONAL NOTABLE VOTING RIGHTS LITIGATION

A. REDISTRICTING CASES

After the 2000 Census, the Virginia General Assembly enacted new state legislative districts to comply with constitutional requirements.²³⁴ Shortly after adoption of the redistricting scheme, a group of citizens initiated suit in state court, claiming that certain districts failed to comply with the “contiguous and compactness requirements” of article II, section 6 of the Virginia Constitution and that other districts violated article I, sections 1 and 11 because the General Assembly subordinated traditional redistricting principles to race in drawing district lines.²³⁵ The trial court ruled in favor of the plaintiffs and enjoined the defendants from conducting any elections under the redistricting scheme.²³⁶ On appeal, however, the Supreme Court of Virginia reversed.²³⁷

With respect to the contiguous and compactness claim, the court noted that where in a redistricting case, “the validity of the legislature’s reconciliation of various criteria is fairly debatable and not clearly erroneous, arbitrary, or wholly unwarranted, neither the court below nor this Court can conclude that the resulting electoral district fails to comply with the compactness and contiguous requirements” of the Virginia Constitution.²³⁸ The court also stated that physical access from one part of a voting district to all the other parts is not necessary for exercising the right to vote and is not an undue impediment to forming communities of interest or disseminating information in today’s world of mass media and technology.²³⁹ The court held that the evidence in this case was “wholly insufficient to support a conclusion that [the districts at issue] clearly violate[d] or [were] plainly repugnant to the compactness and contiguity requirements.”²⁴⁰

With respect to the racial gerrymandering claim, the court noted at the outset that *Hunt v. Cromartie*²⁴¹ provided the framework for its analysis— “[a] party asserting that a legislative redistricting plan has improperly used race as a criterion must show that the legislature subordinated traditional redistricting principles to racial considerations and that race was not merely

²³⁴ *Wilkins v. West*, 571 S.E.2d 100, 104 (Va. 2002).

²³⁵ *Id.*

²³⁶ *Id.* at 105.

²³⁷ *Id.* at 119.

²³⁸ *Id.* at 108.

²³⁹ *Id.* at 109.

²⁴⁰ *Id.* at 110.

²⁴¹ 532 U.S. 234 (2001).

a factor in the design of the district, but was *the* predominant factor.”²⁴² Significantly, the court held that race clearly was a consideration in drawing district lines because this was required under the VRA, “which mandate[s] that a redistricting plan not dilute African-American voter strength . . . and that there be no retrogression.”²⁴³ The court concluded, however, that race was not the predominant factor used by the General Assembly.²⁴⁴ In fact, race was considered “along with traditional redistricting principles of retaining core areas, population equality, compactness and contiguity, partisan voting behavior, and protection of incumbents.”²⁴⁵ The significance of this case, however, is that it demonstrates the vulnerability of African-American voters to being “packed” and “cracked” for political purposes when race correlates highly with partisan affiliation. Without the protection of Section 5 of the Voting Rights Act, Virginia’s state legislative districts may be redrawn without protecting minority voters.

The creation of a majority-minority congressional district in Virginia following the 1990 Census was the subject of a racial gerrymandering challenge in the late 1990s.²⁴⁶ When State Senator Bobby Scott was elected in Virginia’s Third Congressional District in 1992, he became only the second African-American to be elected to Congress from Virginia and the first since Reconstruction.²⁴⁷ The case went to trial in September 1996. The district court invalidated the district in February 1997, finding that race predominated in drawing the districts and that the state could not adequately justify its use of race.²⁴⁸ The defendants appealed, but the Supreme Court affirmed without an opinion.²⁴⁹ On remand, the General Assembly redrew the Third Congressional District, making it more compact. It remained a majority-African-American district, however, and voters have continued to re-elect the incumbent Congressman Bobby Scott.

²⁴² *Wilkins*, 571 S.E.2d at 111.

²⁴³ *Id.* at 112.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 117.

²⁴⁶ *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), *aff’d mem.*, 521 U.S. 1113 (1997).

²⁴⁷ *See Scott Cast in Sweeping Role*, RICHMOND TIMES-DISPATCH, Nov. 2, 1992, at B5.

²⁴⁸ *Moon*, 952 F. Supp. at 1150.

²⁴⁹ *Meadows v. Moon*, 521 U.S. 1113 (1997) (mem.).

B. OTHER VOTING RIGHTS CASES AFFECTING THE ABILITY OF MINORITY VOTERS TO REGISTER AND VOTE

In *Howard v. Gilmore*,²⁵⁰ a *pro se* plaintiff raised Voting Rights Act, constitutional and other claims concerning Virginia's felony disenfranchisement laws. His case was dismissed in a short, unreported opinion for failure to state a claim for relief.²⁵¹ Virginia is one of only three states that permanently disenfranchise all people with felony convictions unless they receive clemency.²⁵² "[E]very individual convicted of any level or grade of felony is permanently disenfranchised unless the individual requests to have his or her rights restored."²⁵³ Ex-felons who wish to vote must petition the circuit court, and even if the court approves the petition, they must obtain the approval of the governor.²⁵⁴ "The Governor of Virginia, however, has the sole discretion to grant or deny any such restoration and is not required to provide an explanation to anyone regarding how he reached his decision."²⁵⁵ The decision of the governor cannot be appealed, and the applicant must wait two years before re-applying.²⁵⁶ Furthermore, only those who have been out of the system for five years (seven years for felony drug offenses) may apply.²⁵⁷ Convictions for certain felonies can exclude individuals from eligibility altogether.²⁵⁸

As with poll taxes and literacy tests, evidence shows that the "ostensibly race-neutral" felony disenfranchisement rule was adopted in a segregated, Jim Crow Virginia to exclude African-Americans from the political process.²⁵⁹ According to a transcript of proceedings from the Virginia Constitutional Convention of 1901–1902, Carter Glass, a delegate to the convention, stated that the plan that included the felon disenfranchisement

²⁵⁰ 205 F.3d 1333 (4th Cir. 2000) (unpublished table decision, text available at 2000 U.S. App. LEXIS 2680) (holding that in order to state a claim under the Fourteenth and Fifteenth Amendments, the plaintiff must establish that the Commonwealth's decision to disenfranchise felons was motivated by race, which he cannot do because the felony disenfranchisement provisions predated African-Americans having the right to vote).

²⁵¹ *Id.*

²⁵² The Virginia Constitution provides that "[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority." VA. CONST., art. II, § 1.

²⁵³ ADVANCEMENT PROJECT, ACCESS DENIED: THE IMPACT OF VIRGINIA'S FELONY DISENFRANCHISEMENT LAWS 3 (2005), available at <http://www.advancementproject.org/pdfs/VAdisencosts.pdf>.

²⁵⁴ VA. CODE ANN. § 53.1-231.2 (2007).

²⁵⁵ ADVANCEMENT PROJECT, *supra* note 253, at 3–4; *see also* VA. CODE ANN. § 53.1-231.2.

²⁵⁶ ADVANCEMENT PROJECT, *supra* note 253, at 4; *see also* VA. CODE ANN. § 53.1-231.2.

²⁵⁷ VA. CODE ANN. § 53.1-231.2.

²⁵⁸ *Id.*

²⁵⁹ ADVANCEMENT PROJECT, *supra* note 253, at 1.

provision, as well as the literacy test and poll tax, “will eliminate the darkey as a political factor in this State in less than 5 years, so that in no single county . . . will there be the least concern felt for the complete supremacy of the white race in the affairs of government.”²⁶⁰ Less than ninety days after the adoption of the constitutional amendments “more than 125,000 of the 147,000 black voters in the state had been stricken from the rolls.”²⁶¹

Today, nearly 6% of the voting-age population in Virginia has lost the right to vote because of a felony conviction, barring as many as 310,000 citizens from the ballot box.²⁶² And, despite the fact that African-Americans make up only 20% of Virginia’s total population, approximately 52% of those disenfranchised (160,000) are African-American.²⁶³ In fact 16% of all adult African-Americans in Virginia cannot vote because of a felony conviction.²⁶⁴

Virginia’s disenfranchisement scheme “strips away the political power of communities of color.”²⁶⁵ For example, 7% of all Virginians released from prison in 2002 were originally committed by Richmond City Court.²⁶⁶ Of those returning to the Richmond community, nearly half returned to neighborhoods where the population was between 46.6% and 98.9% African-American.²⁶⁷ Another 8% of those released from prison were originally committed by Norfolk City Court, one-third of whom returned to communities that are 79% to 100% African-American.²⁶⁸ The significance of Virginia’s practice of felony disenfranchisement is that it continues to deny African-Americans their fair share of political power, yielding governments less responsive to their concerns.

During its 1999 session, the General Assembly authorized the state board to “conduct a pilot program requiring mandatory voter identification

²⁶⁰ *Id.*

²⁶¹ Virginia Historical Society, Voting Rights, The Civil Rights Movement in Virginia, <http://www.vahistorical.org/civilrights/vote.htm> (last visited Mar. 2, 2008).

²⁶² ADVANCEMENT PROJECT, *supra* note 253, at 2.

²⁶³ *Id.*

²⁶⁴ *Id.* Virginia’s Department of Corrections does not collect data on Latino or Hispanic persons; thus, it is difficult to assess the impact of the felony disenfranchisement law on Latino or Hispanic populations. See MEXICAN AM. LEGAL DEF. & EDUC. FUND, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES 12 (2003), available at <http://www.maldef.org/pdf/LatinoVotingReport.pdf>.

²⁶⁵ ADVANCEMENT PROJECT, *supra* note 253, at 2.

²⁶⁶ *Id.* at 2–3.

²⁶⁷ *Id.* at 3.

²⁶⁸ *Id.*

at the polling place.”²⁶⁹ Pursuant to that authority, the board selected ten jurisdictions as participants in the pilot of the I.D. program.²⁷⁰ The Department of Justice precleared the pilot program.²⁷¹ The Virginia Beach Democratic Committee subsequently sought to mail its own identification cards to persons with Democratic Party leaning.²⁷² The board rejected the Democratic Committee’s proposal.²⁷³ The Committee, along with eleven individual voters, filed suit in state court seeking an injunction preventing the board from implementing the pilot program.²⁷⁴ The court granted the injunction because “[g]iven the importance of the right to vote, the complainants’ claims raise the spectre of having different eligibility standards for some voters in Virginia and, moreover, for some voters voting in the same legislative district in different precincts for the same candidate.”²⁷⁵

In 1995, Virginia unsuccessfully sued the federal government, claiming that the National Voter Registration Act²⁷⁶ (NVRA) violated the Tenth Amendment.²⁷⁷ Several public interest groups immediately filed suit as well, seeking to require the state to implement the NVRA.²⁷⁸ Ultimately, the State was required to follow federal law and allow voters to register to vote by mail and at DMV offices.

VI. SECTIONS 4(F)(4) AND 203

Virginia is not currently subject to Section 203 of the VRA.²⁷⁹ That does not mean that language minorities do not experience voting difficulties in Virginia. On November 2, 2004, the Asian American Legal Defense and Education Fund and the Asian Pacific American Legal Resource Center conducted an exit poll at five poll sites in two counties in Northern Virginia with significant numbers of Asian-American voters.²⁸⁰ Although

²⁶⁹ Democratic Party of Va. v. State Bd. of Elections, 1999 Va. Cir. LEXIS 551, at *1 (Va. Cir. Ct. Oct. 19, 1999).

²⁷⁰ *Id.* at *1–2.

²⁷¹ *Id.* at *2–3.

²⁷² *Id.* at *3.

²⁷³ *Id.*

²⁷⁴ *Id.* at *1.

²⁷⁵ *Id.* at *4–5.

²⁷⁶ 42 U.S.C. § 1973gg (2006).

²⁷⁷ Virginia v. United States, No. 3:95CV357 (E.D. Va. 1995).

²⁷⁸ Richmond Crusade for Voters v. Allen, No. 3:95CV531 (E.D. Va. 1995); League of Women Voters of Va. v. Allen, No. 3:95CV532 (E.D. Va. 1995).

²⁷⁹ See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872 (July 26, 2002).

²⁸⁰ Letter from Glenn D. Magpantay, Staff Attorney, Asian Am. Legal Def. & Educ. Fund, and Nicholas Rathod, Language Access Project Dir., Asian Pac. Am. Legal Res. Ctr., to Michael Brown, Chairman, Va. State Bd. of Elections, Barbara Hildenbrand, Vice Chairwoman, Va. State Bd. of Elec-

their findings indicated that the 2004 general election proceeded mostly free of major incident in Northern Virginia, they did document at least nine complaints of the general lack of interpreters at poll sites.²⁸¹ According to their poll statistics, they found significant limited-English proficiency rates for Vietnamese-American voters in Falls Church and Annandale.²⁸² In Falls Church, 55% of poll respondents had limited-English proficiency.²⁸³ Of these, 29% needed an interpreter and 24% needed translated materials.²⁸⁴ In Annandale, 43% had limited-English proficiency, 29% needed an interpreter and an additional 29% needed translated materials.²⁸⁵

VII. CONCLUSION

Virginia's electoral processes at the state and local level have opened up somewhat for African-American voters. It is not a state where other minority groups currently live in large enough numbers to be a major factor in the political life of the state, although in future decades, and in some local instances, Hispanic and Asian voters will become more of a political force in years to come.

However, on virtually all measures of political empowerment, African-American voters remain at a significant disadvantage to their white counterparts. Racially polarized voting continues to dominate elections in Virginia and, with a few notable exceptions, most successful candidates of choice of African-American voters are elected in districts that are majority-African-American. Virginia residents themselves believe that retrogressive changes in districting and other aspects of elections will occur if the protections of the Section 5 preclearance process are removed at this time.

Local jurisdictions in Virginia have demonstrated that the bailout process works well in those areas of the state where it is justified and that other areas wish to remain subject to preclearance. Virginia's experience also demonstrates the importance of Section 5 as a back-up to Section 2 litigation, ensuring that gains won in litigation are not eroded when districts are redrawn to comply with "one-person, one-vote" principles. Virginia

tions, Jean Jensen, Sec'y, Va. State Bd. of Elections, Allen H. Harrison, Jr., Chairman, Arlington County Electoral Bd., Charlene N. Bickford, Vice Chairwoman, Arlington County Electoral Bd., Fred G. Berghoefer, Sec'y, Arlington County Electoral Bd., Nancy Krakover, Chairwoman, Fairfax County Electoral Bd., Larry E. Byrne, Vice Chairman, Fairfax County Electoral Bd., & Margaret K. Luca, Sec'y, Fairfax County Electoral Bd., at 1 (May 9, 2005) (on file with authors).

²⁸¹ *Id.* at 2.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

remains an important argument for the need to keep Section 5 in place for the time being.

APPENDIX A: VIRGINIA SUBMISSIONS WITHDRAWN, 1982–2005

Table 1.¹

Sub. #	County	Type of Change	Date of Withdrawal
1993-2632	Cumberland, Prince Edward	Redistricting	Nov. 22, 1993
2001-1838	Henrico	Poll Place (changed)	Aug. 28, 2001
1989-3822	Lunenburg	Poll Place	May 1, 1989
1987-4154	N/A (Statewide)	Poll Place (changed) (3)	Mar. 9, 1988

¹ Department of Justice, Freedom of Information Act Request (on file with authors).

APPENDIX B: SUMMARY OF VOTING RIGHTS LITIGATION IN VIRGINIA, 1982 TO 2005

*McDaniels v. Mehfoud*¹

Plaintiffs, African-American citizens and registered voters of Henrico County, Virginia, brought suit in district court claiming that the county's 1981 redistricting plan impermissibly denied their right to vote on account of race, in violation of Section 2 of the Voting Rights Act, and was adopted and maintained purposefully to dilute African-American voting strength. Henrico County is an urban and suburban county bordering Richmond, Virginia. According to the 1980 Census, the total population of Henrico County was 180,735, of which 15% were African-Americans. In analyzing the plaintiffs' Section 2 claim, the court found that the African-American population in Henrico County was sufficiently large and geographically compact to constitute a majority in one or more single-member districts. Further, voting patterns in the county revealed a severe and persistent pattern of racially polarized voting, a legacy of official discrimination in voting matters and, to a lesser extent, continuing effects of discrimination in education and employment. These factors, combined with the single-member districting scheme, impeded the ability of a geographically compact and politically cohesive group of African-Americans to participate equally in the political process and to elect their candidates of choice, in violation of the VRA.

*Neal v. Coleburn*²

Plaintiffs, African-American citizens and registered voters of Nottoway County, Virginia, initiated suit in district court, alleging that the method for electing the board of supervisors for Nottoway County impermissibly diluted the voting power of the county's African-American voters, in violation of Section 2 of the VRA and the U.S. Constitution. The county was predominantly rural, located in Southside Virginia. According to the 1980 Census, the total population was 14,666—39.04% of whom were African-American and 60.69% of whom were white. The county was governed by a five-member board of supervisors; each supervisor was elected by a plurality vote for a four-year term from a single-member district. The terms were not staggered. Despite the fact that the county's population was nearly 40% African-American, the districts were not drawn such that any

¹ 702 F. Supp. 588 (E.D. Va. 1988).

² 689 F. Supp. 1426 (E.D. Va. 1988).

of them contained an African-American majority. In its analysis of the vote dilution claim, the court noted the extensive history of discrimination in Virginia and how its lingering effects on socio-economic conditions of African-Americans contributed to the lack of opportunities for African-Americans to effectively participate in the political process. Thus, “[t]he Court [found] that the political processes in Nottoway County [had] been largely under white control and associated with white political dominance. . . . As a result of past official discrimination and continuing segregation, blacks . . . still feel intimidated by the white domination of local politics.” Moreover, the court found significant evidence of racially polarized voting, noting that “whites generally have not supported or voted for black candidates, nor will they.” The court ultimately ruled that the plaintiffs had satisfied their burden to prove a Section 2 violation and ordered adoption of the plaintiffs’ proposed remedy.

*Collins v. City of Norfolk*³

Plaintiffs, seven African-American citizens of Norfolk, Virginia and the Norfolk Branch of the NAACP, initiated an action in the district court, alleging that the at-large system of electing members of the Norfolk City Council unlawfully diluted African-American voting strength and that the system had been maintained for racially discriminatory purposes. Since 1952, the council had consisted of seven members elected at-large. Council members served four-year, staggered terms, so every two years, three or four of the seven seats were contested. From 1918 until 1968, every member of the City Council was white. In 1968, an African-American citizen was elected to the Council and from that time until the filing of the initial action, the Council had one African-American member. Thus, although the city’s population was 35% African-American and the rate of African-American participation in the electoral process was high, African-Americans were unable to elect more than one African-American member to the seven-member City Council.

Despite this evidence, the district court entered judgment in favor of the defendants, finding that African-Americans were able to elect representatives of their choice because some white candidates had received more than 50% of the African-American vote. The district court’s holding was affirmed by the Fourth Circuit. The U.S. Supreme Court, however, vacated and remanded. On remand, the district court again entered judgment for the defendants. This time, the Fourth Circuit reversed. Specifically, the court held that the presumption that successful white candidates who re-

³ 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

ceived more than 50% of the African-American vote were not “representatives of their choice” where candidates who received much higher percentages of the African-American vote were defeated was not overcome by testimony that successful candidates were endorsed by African-American political organizations and had African-American support greater than some of the African-American candidates. Instead, the critical factor was the difference between the African-American support for the candidate who received the most African-American votes, yet lost, versus the candidates who won with fewer African-American votes.

The court cited statistics showing that from 1968 until 1984 all of the minority-preferred candidates for a second seat on the Council were defeated by candidates preferred by white voters, and statistics showing that before 1984, white voters were able to defeat the combined strength of African-American voters and white crossover voters to deny the African-American community a second seat on the Council. Furthermore, the court held that recent re-elections of African-American incumbents did not negate the existence of white bloc voting. Thus, the court reversed the district court’s judgment and held that Section 2 was violated. The case was remanded with instructions for the district court to enjoin at-large elections for the City Council, allow the city a reasonable time to prepare a remedial plan and submit the plan for Section 5 clearance.

*Hall v. Virginia*⁴

In 2001, the Virginia General Assembly adopted a redistricting plan, changing the boundary lines of the Fourth District so as to shift a number of African-American citizens out of the Fourth District and into the Third and Fifth Districts. Before the redistricting, African-Americans comprised 39.4% of the total population and 37.8% of the voting-age population; after the redistricting, these numbers dropped to 33.6% and 32.3%, respectively.

Plaintiffs, nine registered voters who resided in the Fourth District or were shifted out of the district as a result of the redistricting, filed suit in district court, alleging that the reconfiguration of the Fourth District diluted minority voting strength in violation of Section 2 of the VRA. Specifically, they claimed that in the newly-drawn Fourth District, African-Americans “are too small in number to form the same winning coalition with ‘crossover’ white voters that existed before the enactment of the 2001 Redistricting Plan.” According to the plaintiffs, “the first *Gingles* precondition is satisfied not only when a minority group constitutes a numerical majority

⁴ 385 F.3d 421 (4th Cir. 2004).

in a single-member district, but also when minorities are sufficiently numerous to form an ‘effective’ or ‘functional’ majority in a single-member district by combining with voters from other racial or ethnic groups.” The district court rejected this argument, however, concluding that African-Americans would not form a population of voting-age majority in the Fourth District even if the district was restored to the original boundaries. The Fourth Circuit affirmed, holding:

[W]hen minority voters, as a group, are too small or loosely distributed to form a majority in a single-member district, they have no ability to elect candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates. . . . [They] cannot claim that their voting strength—that is, the potential to independently decide the outcome of an election—has been diluted in violation of Section 2.

CONSENT DECREES

— *Harris v. City of Hopewell*⁵

— *Eggleston v. Crute*⁶

— *Watkins v. Thomas*⁷

— *Person v. Ligon*⁸

— *King v. Blalock*⁹

— *Feggins v. Horne*¹⁰

— *Taylor v. Forrester*¹¹

— *Brunswick County League of Progress v. Town Council of Lawrenceville*¹²

— *United States v. City of Newport News*¹³

⁵ No. 82-0036-R (E.D. Va. Jan. 5, 1983).

⁶ No. 83-0287-R (E.D. Va. 1984).

⁷ No. 87-0709-R (E.D. Va. May 20, 1988).

⁸ No. 84-0270-R (E.D. Va. Jan. 12, 1988).

⁹ No. CA-88-0811-R (E.D. Va. June 6, 1989).

¹⁰ No. CA-88-0865-R (E.D. Va. June 19, 1989).

¹¹ No. 89-00777-R (E.D. Va. May 17, 1990).

¹² No. 3:91-cv-00091 (E.D. Va. Nov. 5, 1991).

¹³ No. 4:94-cv-00155 (E.D. Va. Nov. 4, 1994).