National Commission on the Voting Rights Act

FEBRUARY 2006

PROTECTING MINORITY VOTERS

The Voting Rights Act at Work 1982-2005

A Report by:

The National Commission on the Voting Rights Act

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005

A Report By The National Commission on the Voting Rights Act

February 2006

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FOREWORD

When the Lawyers' Committee, in conjunction with the civil rights community, first conceived of a National Commission to study the impact of the Voting Rights Act and the state of discrimination in voting today, we could not have anticipated the overwhelming response from experts, citizens and advocates to the Commission's work. Responding to this demand, the Commission held ten hearings. During the hearings we heard from over 100 witnesses. We are very touched by all who responded enthusiastically to our invitations to share their expertise and stories.

We could not ask for a better or more committed group of Commissioners. They volunteered their time and expertise and ensured that the record of discrimination in voting was thoughtfully and thoroughly examined. Over a year ago, Commissioner Chandler Davidson was charged with the enormous task of leading the effort to review the record and draft the Report for the National Commission. With considerable input and insight from all the Commissioners, the Commission has produced a Report that captures the triumphs and challenges that remain for the Act.

As the Report demonstrates, the Act has been instrumental in improving minority voters' access to the ballot and their ability to elect the candidates of their choice. Unfortunately, the Report also shows, in great detail, that those who would deny these rights to minority voters have also been hard at work undermining the promise and potential of the Act. One cannot help reading the Report without concluding that the Act cannot simply be dismissed as a relic of our past. Its protections are still needed. The promise of our constitution is still a work in progress.

Barbara Arnwine
Executive Director
Lawyers' Committee for Civil
Rights Under Law

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Honorary Chair, Charles McCurdy Mathias, Jr., is a former Representative and Senator from Maryland. Before serving in Congress, Mathias served a year in the Maryland House of Delegates from 1959–1960, was a city attorney of Frederick from 1954-1959 and an assistant attorney general of Maryland from 1953-1954. He served for four terms in the United States House of Representatives (1961-69). As a three-term Senator from January 1969 through January 1987, Senator Mathias served as Chairman of both the Special Committee on Termination of the National Emergency and the Committee on Rules and Administration and as Co-chairman of both the Joint Committee on Printing and the Joint Committee on the Library. Mathias currently practices law in Washington, D.C.

Chair, Bill Lann Lee, is a partner with the law firm Lieff, Cabraser, Heimann & Bernstein, LLP in San Francisco. Lee is the former Assistant Attorney General for Civil Rights of the U.S. Department of Justice. Lee was an attorney for 17 years with the NAACP Legal Defense and Educational Fund, the law firm founded by Justice Thurgood Marshall. He headed the Legal Defense Fund's Western Regional Office in Los Angeles. Lee is the recipient of numerous honors and awards, including the ABA Spirit of Excellence Award (2004), the Anti-Defamation League Pearlstein Civil Rights Award (2002), the U.S. Department of Justice John Randolph Distinguished Service Award (2001), and the Pioneer Award from the Organization of Chinese Americans (2000).

Hon. John H. Buchanan is an ordained Baptist minister who served churches in Alabama, Tennessee, Virginia, and Washington, D.C. Buchanan also represented Birmingham, Alabama, in Congress for sixteen years. As a senior member of the House Education and Labor Committee, Buchanan was instrumental in the writing and passage of Title IX. From the outset of his career, he worked for and was a strong proponent of full voting representation in Congress for the District of Columbia. After leaving Congress, he chaired the board of the civil liberties organization, People For the American Way, for ten years.

Chandler Davidson is the Radoslav Tsanoff Professor of Public Policy Emeritus and Research Professor of Sociology and Political Science at Rice University. Dr. Davidson has written or edited several books and articles on race, politics, and inequality. He was the co-editor of *Quiet Revolution in the South*, a definitive work on the impact of the Voting Rights Act in the South.

Dolores Huerta is the co-founder and First Vice President Emeritus of the United Farm Workers of America AFL-CIO (UFW) and President of the Dolores Huerta Foundation. She helped form the National Farm Workers Association (NFWA), the predecessor to the UFW, with Cesar Chavez. In addition to organizing, she has been instrumental in the passage of legislation allowing voters the right to vote in Spanish and in lobbying efforts for the unemployed, underemployed, and farm workers.

Elsie Meeks is the Executive Director of First Nations Oweesta Corporation, a national financing intermediary that offers technical assistance and capital to help Native communities establish community development financial institutions. She is an enrolled member of the Oglala Lakota Tribe and was appointed by Senate Majority Leader Tom Daschle to the U.S. Commission on Civil Rights in 1999 as the first Native American to serve on the Commission.

Charles Ogletree is the Harvard Law School Jesse Climenko Professor of Law and Vice Dean for the Clinical Programs. He is the co-author of the award-winning book, *Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities*, and the author of last year's *All Deliberate Speed: Reflections on the First Half-Century of Brown* v. *Board of Education*. Before becoming a professor, Ogletree was the Deputy Director of the District of Columbia Public Defender Service and worked in private practice. Ogletree also has a long record of commitment and service to public schools and higher education.

Joe Rogers is a national speaker, lecturer and practicing attorney in Colorado. In 2003, Rogers completed his term as the Lieutenant Governor of Colorado, where he held the distinction of serving as America's youngest Lieutenant Governor and only the fourth African American in U.S. history ever to hold the position. He has served as Founding Chairman of the Republican Lieutenant Governors' Association and served on the executive committee of the National Conference of Lieutenant Governors.

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From 1997-2003, Mr. Greenbaum was a trial attorney in the Voting Section of the Department of Justice, Civil Rights Division, where he enforced the Voting Rights Act to protect the rights of minority citizens throughout the country.

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Executive Summary

The National Commission on the Voting Rights Act was established by the Lawyers' Committee for Civil Rights Under Law, a nonprofit, nonpartisan civil rights organization, in conjunction with the civil rights community. Its purpose is to determine whether serious and widespread vote discrimination has continued since the Act's last major reauthorization in 1982. To this end, the Commission held ten hearings across the nation from March through October 2005, at which more than 100 witnesses spoke. After examining testimony from these hearings, as well as documents entered into the record and information obtained from governmental, legal, media and scholarly sources, the Commission prepared the following Report of its findings.

The Commission is composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders. The honorary chair is Charles Mathias, former Senator and Representative from Maryland who played a crucial role in the initial passage and subsequent reauthorizations of the Act. The chair is Bill Lann Lee, former Assistant Attorney General for Civil Rights. Other members are John Buchanan, Chandler Davidson, Dolores Huerta, Elsie Meeks, Charles Ogletree, and Joe Rogers. Their biographies are included in the preface to this Report. Guest Commissioners—men and women with experience in voting rights, the electoral process, and/or civil rights—were also invited to participate in several of the hearings.

A summary of the proceedings of the Commission, entitled *Highlights of Hearings of the National Commission on the Voting Rights Act, 2005,* is set forth as a supplement to this Report.

2

The Voting Rights Act was signed into law at the end of a tumultuous period of civil rights struggles in the South. The Civil Rights Act of 1964 had abolished the Jim Crow system but failed to adequately address black voting rights. Following the brutal attack in Selma, Alabama, by local law enforcement officers on civil rights demonstrators crossing the Edmund Pettus Bridge in March 1965, President Lyndon Johnson asked Congress to pass legislation guaranteeing the voting rights of all citizens. Bipartisan majorities in both houses swiftly complied, and Johnson signed the Act in early August.

Amended and reauthorized on a bipartisan basis four times, the Act consists of both permanent and nonpermanent features. The most important permanent provision is Section 2, which applies nationwide and prohibits any voting qualification or practice that results in denial or abridgement of voting rights on the basis of a citizen's race, color, or membership in one of the language-minority groups identified in Section 4, described below. The nonpermanent provisions are scheduled to expire August 6, 2007, unless Congress renews them. They include the following:

- *Section 5*, which requires covered states and political subdivisions to submit all proposed electoral changes for approval ("preclearance") either to the Attorney General or the U.S. District Court for the District of Columbia. Unless precleared, the changes cannot be implemented.
- Parts of *Sections 6-9 and 13*, which permit the Justice Department to send federal examiners and observers to polling places in covered political subdivisions that the Department has reason to believe will engage in electoral discrimination based on race or color.
- *Section 4*, which contains the formula for preclearance and examiner/observer coverage, and also requires certain jurisdictions falling under that coverage to provide language assistance to speakers of Spanish, as well as of Native American, Native Alaskan, and Asian languages.
- *Section 203,* which also requires certain jurisdictions to provide language assistance to speakers of Spanish, Native American, Native Alaskan, and Asian languages under a different coverage formula.

The focus of the Act historically has been twofold: (1) to guarantee racial or ethnic minorities access to the ballot, by prohibiting the many "tests and devices" that had been used to impede that access, as well as more subtle disfranchising measures developed by states and localities; and (2) to ensure that, once minority voters have access to the ballot, their votes are not diluted through electoral devices that prevent them from electing candidates of their choice. Congress has reauthorized the nonpermanent provisions several times because of the continuing existence of both kinds of discrimination: in 1970, for five years; in 1975, for seven years; and in 1982, for twenty-five years, except for Section 203, which was renewed in 1982 for ten years, and then for an additional fifteen years in 1992.

When necessary, Congress has also expanded the Act to respond to new evidence of disfranchisement and dilution. For example, in 1975, Congress recognized the needs of certain language minorities for federal protection against both disfranchisement and vote dilution, and they, too, were brought under the aegis of the Act through Sections 4(f)(4) and 203.

With respect to disfranchisement, the efforts of white southerners to prevent African Americans from voting are well-documented in history texts. Going back to the nineteenth century, these efforts consisted of a host of devices that were designed to frustrate the purpose of the Fifteenth Amendment while appearing racially neutral: literacy tests; the "grandfather clause"; good-character and understanding tests; and the poll tax. In addition, throughout the South, violence and harassment were directed at blacks who tried to vote.

Less well-known are the techniques of vote dilution. They, too, initially were employed by whites in the nineteenth century when southern blacks could still vote, and they were widely employed once again by southern officials in the twentieth century, particularly after the Supreme Court outlawed the white primary in 1944. They continued to be adopted in numerous jurisdictions after passage of the Act. The standard dilutive techniques, still used in many places today, include racial gerrymandering, at-large (as distinct from district) election systems, anti-single-shot rules, staggered terms, the majority run-off requirement, annexing predominantly white suburbs while excluding minority areas, as well as other practices. All of these techniques rely on racially polarized voting—a pattern of white voters preferring different candidates than minority voters—as the necessary underpinning of vote dilution; and they were most often used in majority-white venues.

3

The Commission examined enforcement of the nonpermanent provisions of the Act by the Department of Justice, finding that most federal enforcement efforts had occurred after the 1982 reauthorization rather than before.

One important measure of the extent of vote discrimination is the number of Section 5 objections interposed by the Department. Of the 1,116 objections from the Act's passage through 2004, 626, or 56 percent of the total, occurred after August 5, 1982. The largest number of post-1982 objections occurred in Mississippi, followed by Texas, Louisiana, Georgia, South Carolina, and Alabama. Sixty-three of those objections in the six states were statewide objections, typically interposed to prevent racially discriminatory redistricting plans. The overwhelming majority of the objections occurred in counties within the southern states having a sizable non-white voting-age population (VAP). The same general pattern holds for results adverse to jurisdictions that filed declaratory judgment Section 5 actions in the U.S. District Court for the District of Columbia: the majority of such unsuccessful actions occurred after 1982.

Another measure of vote discrimination is a jurisdiction's withdrawal of a proposed voting change as a result of Department of Justice requests for more information before granting preclearance. Such a withdrawal suggests that, at least in many instances, officials in the jurisdiction concluded that the change would be objected to as violating the Act if it were not withdrawn. While complete data on submission withdrawals prior to 1982 were not available for the Commission's analysis, the post-1982 data revealed at least 206 withdrawals.

Yet another indicator of actual or potential vote discrimination is an event known as an "observer coverage," whereby the Attorney General sends federal observers on Election Day to a locale because racial tensions are high and efforts to discriminate may occur. The Act allows observers to be sent either because the jurisdiction is covered under Section 4, or pursuant to a federal court order. Post-1982 data reveal 622 such coverages, involving several thousand federal observers. There were 520 coverages in the earlier period. There were 250 coverages in Mississippi alone after 1982, involving over 3,000 observers. Five of the six Deep South states originally covered by Section 5 accounted for 66 percent of all post-1982 coverages.

Between passage of the Act and 2004, the Department of Justice filed or joined as *amicus curiae* or plaintiff intervenor in 107 enforcement actions against Section 5 jurisdictions to force them to

submit proposed changes that had not been precleared. Of these, the majority—61—occurred after 1982, although it is unknown how many of these were successful. Private parties are also permitted to file enforcement actions, and some have. Research by the Commission staff discovered 105 successful Section 5 enforcement actions after 1982, filed either by private citizens or the Department. In the case of minority language enforcement actions in which the Department was involved since 1975, while few were filed, all were successful and the overwhelming majority of them—19 of 21—were filed between 1982 and 2004.

An analysis of vote-related Department of Justice trends on a one-year and five-year basis was also conducted in order to discover whether more fine-grained patterns emerge. This analysis revealed that Section 5 objections interposed by the Department of Justice reached a historic peak in the early 1990s, followed by a significant decline since. While some commentators have taken this decline as evidence that discrimination against minority voters is rapidly disappearing, an examination of the activities by the Department of Justice and the D.C. District Court to enforce the temporary provisions of the Act demonstrates that there is appreciably more evidence of attempted vote discrimination during the past ten years than a focus on objections alone would suggest.

4

Data regarding Section 2 of the Act also point to widespread and continuing vote discrimination. Section 2 suits may be brought either by the Department of Justice or private plaintiffs in order to enforce the Act's prohibitions against disfranchisement and vote dilution. A high level of successful Section 2 litigation would demonstrate that violations persist.

A study limited to reported Section 2 suits filed anywhere in the nation since 1982, conducted by Professor Ellen Katz and the University of Michigan Voting Rights Initiative, revealed in late 2005 that 117 of these cases led to favorable outcomes for plaintiffs, a majority of whom were African Americans. (Fifty-seven percent of the successful cases were filed in jurisdictions covered by Section 5.) Katz and her colleagues concluded from their findings that serious racial discrimination in voting is still widespread nationally.

However, successful reported suits represent a small fraction of all successful Section 2 suits, as Katz has pointed out. The Commission staff compiled a non-comprehensive list of both reported and unreported Section 2 cases resolved in a manner favorable to minority voters since 1982 in eight of the nine states entirely covered

by Section 5, as well as North Carolina. This research identified 653 successful cases. Obviously, the number would be greater nationwide.

5

Racially polarized voting, a necessary precondition for vote dilution to occur, continues in many venues across the country, with the result that qualified minority candidates often have difficulty winning election outside of majority-minority districts. Candidates sometimes make appeals to voters' racial prejudice, increasing the polarization. Racially polarized voting plays an important role in depressing the number of minority elected officials relative to their group's proportion of the citizen VAP.

Testimony at the hearings brought home how widespread this phenomenon is. Data were cited from court findings and expert testimony in numerous voting rights cases. South Dakota, Texas, Mississippi, North and South Carolina, Louisiana, Maryland, New York—these are only some of the states where racially polarized voting occurs that were mentioned by witnesses or in judicial opinions. According to other witnesses, it exists not only in many general (partisan) elections but in nonpartisan local ones and in some Democratic primaries.

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In addition to the data taken from academic studies or developed and analyzed specifically for the Report, the Commission was able to draw on testimony and information entered into the record during its ten hearings in 2005. People from many walks of life with a wide variety of experience and expertise took the time to present their views. The Commission accepted testimony from lawyers and activists, some of whom have been involved in voting rights struggles in the South from the 1960s onward; election officials; scholars with a specialty in racial politics; expert witnesses in voting rights cases; participants in election protection programs; former key officials in the Voting Section of the Department of Justice; current members of the U.S. Senate and House of Representatives, as well as other state and local elected officials; and ordinary citizens who simply spoke of their life histories and their hopes. Because the hearings were widely dispersed across the nation, testimony shed light on voting problems in varied locales affecting a broad spectrum of racial and ethnic groups.

Taken as a whole, the evidence presented at the hearings strongly suggests that the two major problems which have been the focus of the Act—restricted ballot access and minority vote dilution—continue in twenty-first century America. Several people who gave testimony stressed that problems encountered by minorities are the work of both white Democrats and Republicans.

The Commission found that while massive systematic disfranchisement has been overcome by the provisions of the Act, efforts to suppress the minority vote, while not as systematic and pervasive as those of the pre-Act South, are still encountered in every election cycle across the country. The location of polling places for minority voters is changed, often on short notice. Citizens with English-language difficulties are sometimes discouraged from voting. Requirements to register and vote, ostensibly to protect against ballot fraud, are sometimes unduly burdensome to minority voters.

Moreover, many jurisdictions continued to adopt or employ vote dilution techniques after the Act was passed. As the Latino civil rights movement has gained strength in the Southwest, Latinos are the victims of vote dilution techniques as well, given that there is often bloc voting among non-Hispanic whites and Latinos. Native Americans face the same problem.

Nonetheless, the hearings also provided substantial evidence of the important role the Act has played in protecting against and remedying discrimination. The Commission heard several examples of the deterrent effect that Section 5 has had in preventing discrimination, as well as the positive effect the language-minority provisions have had on voters and their ability to elect candidates of choice.

The Commission also assessed the situation of the four major groups who have benefited from the Act's nonpermanent provisions: African Americans ("blacks"), Latinos ("Hispanics"), Native Americans (including both "American Indians" and "Alaska Natives"), and Asian Americans (including "Pacific Islanders").

With regard to *African Americans*, the following facts are relevant:

- In 2000, African Americans made up 11.9 percent of the VAP nationally, and 11.7 percent of all citizens who reported voting in the presidential election. Fifty-five percent of African Americans lived in the South.

- The gap in reported voter turnout between African Americans and non-Hispanic whites ("Anglos") in 2000 was 6.9 percentage points, down from 12.2 in 1964. In 1964, most of the difference in black-white turnout was due to the severely depressed voter registration rates among southern blacks, which in turn resulted largely from disfranchising tests and devices the Act outlawed a year later.
- Because of continuing racially polarized voting, it is harder for African Americans to win office in majority-Anglo venues than in majority-minority ones. Black candidates have a harder time winning statewide offices such as governor or U.S. Senator than they do winning congressional and state legislative seats, because in these latter cases the Voting Rights Act has been effectively used to create majority-minority districts. Data presented in Chapter 7 indicate that the continuing under-representation of blacks in majority-Anglo jurisdictions and districts is in large measure the result of racially polarized voting.

Some of the salient facts regarding *Latinos* related to voting are:

- A rapidly growing population (12.6 percent of the total in 2000), Latinos now outnumber African Americans. As of 2000, non-citizens composed 39.1 percent of the Latino VAP, which partly explains why Latinos make up a much lower proportion of actual voters than blacks. Even among the citizen VAP, however, Latinos vote at a much lower rate than Anglos (non-Hispanic whites)—in 2000, for example, only 45 percent of Latino voting-age citizens reported voting, compared to 62 percent of Anglos.
- Latino candidates have had to contend with racially polarized voting and numerous vote dilution schemes employed by Anglos.
- Latino candidates are much more likely to win election from venues that are majority-minority.
- Latinos continue to face problems when trying to register and vote, sometimes because they cannot get the language assistance the law requires, sometimes because of impediments imposed by statutes or election administrators.

Concerning *Native Americans*, these facts are noteworthy:

- In 2000, Native Americans represented a very small proportion of the nation's population (0.9 percent), but in some counties of various states, they are a significant proportion. In Arizona, for example, Native Americans composed 6 percent of the state's population and 78 percent of the population in Apache County. In South Dakota, they made up 8 percent of the population, but 94 and 86 percent, respectively, in Shannon and Todd Counties.
- In the aggregate, Native Americans suffer high rates of poverty and disease, much of it resulting from the violence and discrimination they have historically suffered at the hands of whites.
- Until recently, the Act was enforced on behalf of Native Americans infrequently. However, beginning in the 1990s, they have filed and won several important suits that have drawn attention to disfranchising efforts and vote dilution against Native Americans.
- The Voting Rights Act has contributed substantially to Native Americans' ability to participate in the electoral process and elect candidates of their choice.

The following facts are germane in describing *Asian Americans*:

- In 2000, this group comprised 4 percent of the nation's population, and 49 percent lived in three states: California, New York, and Hawaii. Their population is quite diverse, embracing over 25 nationality groups.
- The Asian American population has grown rapidly, from 1.5 million in 1970 to 12 million in 2000. Much of the growth is the result of immigration. Voter turnout is relatively low for this group. Only 43 percent of Asian VAP citizens reported voting in November 2000, as compared to 62 percent of Anglo citizens.
- Like the other groups described above, Asian Americans have long experienced discrimination by whites, and considerable hostility towards them exists today, as detailed in reports compiled in recent elections.

- The number of Asian American elected officials (AEOs) remains small. It increased modestly from 120 in 1978 to 346 in 2004, in spite of an eight-fold increase in Asian American population between 1970 and 2000.

8

The Commission's Report briefly reviews the history of the denial and curtailment of minority voting rights following Reconstruction and continuing well past the midpoint of the twentieth century, as well as the more recent history of electoral discrimination since the Act was passed (Chapter One). It then describes the two main types of voting discrimination the Act was fashioned to prevent: disfranchisement of minority voters, and, when these voters are enfranchised, dilution of their vote (Chapter Two). It explains the mechanisms of the Act and how these work to prevent disfranchisement and vote dilution (Chapter Three). The Report then describes the demography and current political status of the major racial or ethnic groups who have been the primary beneficiaries of the Act (Chapter Four). It then presents data from many sources on the enforcement of the Act's nonpermanent features (Chapter Five) and of the most important permanent feature, Section 2 (Chapter Six). Next, it surveys evidence of the continuing problem of racially polarized voting, which is an essential feature of minority vote dilution (Chapter Seven). Finally, the Report offers a summary of the findings and a conclusion (Chapter Eight).

CHAPTER ONE

Introduction: The Climax of the Second Reconstruction

The Voting Rights Act was the last of four major civil rights laws passed by Congress in the late 1950s and early 1960s as the southern civil rights movement gradually crested. The earlier laws—those of 1957, 1960, and 1964—were ineffective measures with regard to minority voting rights, placing the burden of protecting them on individual victims of discrimination, who were required to pursue justice through courts in the South on a case-by-case basis, with very limited success.[1] After the famous events in Selma, Alabama, in March 1965, culminating in what became known as "Bloody Sunday," President Lyndon B. Johnson told his Attorney General, Nicholas deB. Katzenbach, to draft the "goddamnedest toughest" voting bill he could write, which Katzenbach proceeded to do.[2] Passed by Congress with unusual swiftness and strong bipartisan support, it was signed into law by Johnson on August 6, 1965.

There was deep symbolism in the fact that Johnson chose the President's Room in the nation's capitol as the site for the signing. One hundred five years earlier, in 1861, Abraham Lincoln, in the same room, had signed the first Confiscation Act, by which the Union had taken control of all slaves whom the Confederacy had coerced into service. Lincoln's action was the first legal step toward full emancipation of slaves. After signing the Voting Rights Act, Johnson then met in the Cabinet Room with several African American leaders, including the Rev. Martin Luther King, Jr., and Rosa Parks. An aide to Johnson later recalled: "There was a religiosity about the meeting, which was warm with emotion—a final celebration of an act so long desired and so long in achieving."[3] After the ceremony, Dr. King said the new Act "would go a long way toward removing all the obstacles to the right to vote." A few years later, at the end of his presidency, Johnson pointed to the Act as his greatest accomplishment.[4]

The new law would later be seen as the climax of what historian C. Vann Woodward called the Second Reconstruction. By giving the post-World War II civil rights movement that name, Woodward called attention to the fact that the nation had undergone not one but two tumultuous efforts to establish basic citizenship rights, including voting rights, for African Americans. The first one, following the Civil War, had been undermined, at great cost in life and freedom to the recently enfranchised former slaves and their children. The second, following World War II, was fueled in part by the anger and frustration of black soldiers who, returning from that war after having defended American democracy from the Axis powers, confronted a Jim Crow

system in the South which denied blacks fundamental democratic rights, including the right to vote—the most fundamental right of all.

Forty years after its passage the Voting Rights Act is widely considered to be the most successful civil rights law in American history. It resulted from the epochal movement for racial equality that played out most intensely in the eleven states of the former Confederacy. It was meant to sweep away racial barriers to voting that previous congressional acts, passed as the civil rights movement gained momentum, had not. In many respects the Voting Rights Act succeeded dramatically.[5] Even so, it is well to ponder the sobering observation of Alexander Keyssar, whose work, *The Right to Vote*, is an authoritative history of American voting rights:

> [T]he very structures and rules of electoral politics periodically become touchstones and lightning rods of conflict. This lesson drawn from the history of suffrage should lead us to expect recurrent skirmishing once universal suffrage has been achieved. . . . History offers no examples of political institutions that can permanently guarantee genuine political equality. Democracy therefore must remain a project, a goal, something to be endlessly nurtured and reinforced, an ideal that cannot be fully realized but always can be pursued.[6]

In light of this admonition, those who celebrate both the Act's passage by Congress and its broad impact over four decades must take a close look not only at what it has achieved but at what it has not. In particular, it is useful to take stock of the degree of voting discrimination on the basis of race and ethnicity in the United States today, especially in the jurisdictions covered by the Act's temporary features. The extent to which such discrimination still exists, as reflected in answers to the following questions, is the primary focus of this Report.

Have the nonpermanent features of the Act, in combination with the permanent ones, accomplished the goal of fully incorporating racial and ethnic minorities into the American body politic, and if so, is this incorporation secure? With respect particularly to the period between 1982 and 2005, are ethnic and racial minorities—especially African Americans, Latinos, Native Americans, and Asian Americans and Pacific Islanders, who are the primary concern of the Act—no longer faced with barriers to voting? Do they participate with whites at the voting booth with equal ease? Are they still subject to the efforts of individuals, groups, or political parties to threaten, intimidate, or misinform them with regard to voting? In comparison

with the white majority, are they reasonably able to elect their candidates of choice? Have all the "tests and devices," the subterfuges such as literacy tests and poll taxes designed to frustrate their rights guaranteed under the Fourteenth and Fifteenth Amendments to the Constitution, been completely abolished?[7] *In short, do race, language, and ethnic heritage per se no longer make a significant difference in the ability of American citizens to participate equally in the political system?*

This question is all the more germane given the findings of a major survey of the nation's politics published in a leading political science journal devoted to scholarly reviews of academic research. Entitled "The Centrality of Race in American Politics," its authors, Vincent L. Hutchings and Nicholas A. Valentino, take a searching and measured look at race as a factor in political partisanship, voting behavior, public policy, the media, and campaigns for public office. After surveying over 150 works by social scientists and other writers, they conclude:

> We have reviewed a wide range of studies that try to answer a fundamental question: What role does race play in contemporary American politics? Conclusions have been tentative in some cases, and complex in others, but overall we have found that, even 50 years after the *Brown* decision, race remains a fundamental component of the American political system. Racial divisions, racial resentments, and group loyalties influence the form and content of the political party system, the nature and distribution of public opinion, and the behavior of political elites in and out of office. In 1903, [W.E.B.] Dubois warned that the "problem of the twentieth century is the problem of the color line." In many areas of politics, his statement is as true today as it was 100 years ago.[8]

If the color line of which these political scientists speak is still the fundamental line of demarcation across the American political landscape today, then Keyssar's warning must be taken seriously indeed by everyone who believes voting rights is the foundation of the American democracy. It is a concern with these rights that has animated the investigation reported here.

Certain kinds of evidence were given special consideration in this inquiry: data from the U.S. Department of Justice provided through the Freedom of Information Act; facts collected during the public hearings of the National Commission on the Voting Rights Act

held in ten cities across the country between March and October 2005; data collected, analyzed, and made public by Professor Ellen D. Katz and her students at the University of Michigan Law School; data from the electronic federal court dockets known as PACER; and information from numerous civil rights organizations, voting rights lawyers, and electoral experts who generously provided counsel or made their files available. This Report also cites findings in the scholarly literature and in the news media when appropriate. Because the transcripts, written testimony, and other documents from the hearings comprise thousands of pages, the appendix from the hearings containing these documents can be found at the National Commission's website, www.votingrightsact.org.

CHAPTER TWO

The Two Problems Addressed by the Act

Any adequate consideration of voting rights cannot help but convey the great degree of human ingenuity that has gone into devising methods to abridge or deny them. These methods are many and complex. Nonetheless, they can be classified under two headings: disfranchisement and vote dilution. The Act was designed to prohibit both kinds. In order to elucidate the distinction between them it is useful to review, in very brief compass, the history of vote discrimination against African Americans in the South, particularly in the first two-thirds of the twentieth century.

Disfranchisement

Following the Civil War, passage of the Fourteenth and Fifteenth Amendments gave to black males a constitutional right to vote and take part in the civic life of the nation, and they took full advantage of that right during the Reconstruction period. Large numbers of African Americans were elected in the early years of the First Reconstruction, when they composed 15 percent of all southern officeholders.[9] However, following the Compromise of 1877, the Republicans agreed to refrain from using federal troops to protect black voting rights in the South, and white Democrats in that region embarked on a generation-long effort both to disfranchise blacks and remove them from office. By the time the National Association for the Advancement of Colored People was founded in 1910, the black franchise in the South had been severely restricted, and black officeholders in the region had virtually disappeared.[10]

In addition to violence and fraud, all manner of legal devices were used to keep blacks, as well as various other minorities, from casting a ballot, including the poll tax, the literacy test, the grandfather clause, the good-character test, the understanding test, and the white primary. These disfranchising devices, taken together, were measures to limit ballot access—i.e., to keep minorities from actually voting, or, in the case of the white primary laws, from casting a meaningful vote by prohibiting them from participating in the most important elections in the South during this period of Democratic Party hegemony.

Limiting ballot access accomplished two important goals of whites. First, it kept anyone from getting elected—black or white—who would feel a responsibility to enact legislation benefiting blacks, for the simple reason that there would be no black voters to answer to in the next election. Second, and equally important, limiting ballot

access solely to whites prevented the election of black candidates in particular. Not only would there be no elected officials to publicly espouse and work for the interests of blacks, but blacks would be denied the important symbolic achievement of having people of their own race hold public office and engage in the give-and-take of policy making. This symbolic importance is often overlooked, even today, by those who argue that ethnic minority voters are overly concerned with electing people of their own kind to office. For groups long denied full citizenship rights, seeing people of their own race or ethnicity in the corridors of power is an extraordinarily important reminder of their status as citizens of good standing in the American democracy.

As this Report will demonstrate, disfranchisement has been significantly reduced in the forty years since the Voting Rights Act was passed. However, the problem has by no means been completely eradicated by the Act, and efforts to suppress the votes of ethnic and language minorities continue into the present century. The September 2005 report by the Election Assistance Commission (EAC)—a nonpartisan federal organization—is suggestive in this regard. The Commission made public the findings of the first comprehensive national survey of election administrators ever carried out regarding a presidential election.[11]

The EAC was created by the Help America Vote Act of 2002, which Congress passed to address some of the many problems besetting the 2000 presidential election. The EAC's report on the 2004 election indicated that problems were far from solved four years later, and that, as in 2000, racial disparities on Election Day were still widespread. Based on responses from 6,568 local election administrators in the fifty states, the District of Columbia, and four territories—Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands—the survey revealed "different levels of service, staffing, ballot counting and even registration accuracy among racial and ethnic groups in the United States."[12] Several of the report's findings are summarized in the newsletter for election specialists, *electionline Weekly*:

- Voters in predominantly Hispanic jurisdictions reported the highest rate of provisional ballot use in the country.[13] Native American districts were next, followed by the more general "urban and high-population density areas."
- In the jurisdictions that reported registration rates, those "with higher education, higher income, election-day registration, more rural and small town in nature" had the highest numbers of registered voters.

> Conversely, areas covered under Section 203 of the Voting Rights Act, often predominantly Hispanic jurisdictions, had higher rates of inactive voters.[14]
> - Native American voters had the highest rate of presidential drop-off, or ballots with no vote for the office. Hispanic voters had the second highest rate. In congressional races, voters in predominantly African American districts had a drop-off rate of almost 23 percent, a figure that could be influenced by "the noncompetitive nature of congressional races" in those districts, the survey stated.
> - The contrasts extended to poll workers as well. Jurisdictions with a greater percentage of African American voters had the highest number of precincts with staffing problems. Hispanic and Native American precincts followed.[15]

The EAC report also identified "common" patterns, two of which were:

> - "Jurisdictions with low education and income, compared with other jurisdictions, tend to report more inactive voter registration, lower voter turnout, higher numbers of provisional ballots cast, higher drop-off and associated components of over-votes and under-votes, lower average number of poll workers per polling place and a greater percentage of inadequately staffed polling places...."
> - "Jurisdictions covered by Section 203 of the Voting Rights Act report more inactive voter registration, lower voter turnout, fewer returned absentee ballots and much greater numbers of provisional ballots cast..."[16]

Nothing in the EAC report either alleged or discounted the possibility of disfranchising efforts directed against minority voters as one cause of the difficulties described. The report does, however, indicate that those voters, and ones who rank low in socio-economic status generally, typically confront more problems in voting than do the rest of the population. Evidence from other sources, moreover, indicates that intentional vote suppression is one type of such problem.

Data surveyed by the National Commission on the Voting Rights Act, testimony from its 2005 national hearings, and published studies

point to attempts since 1982 in many parts of the nation to suppress the vote in minority neighborhoods.[17] While some charges of vote suppression are based on rumor and false information, notable instances where efforts at minority disfranchisement have been documented indicate that efforts to disfranchise are ongoing. The following examples of complaints regarding vote-suppression efforts are taken from testimony at the Commission hearings.

At the Southern Regional Hearing in Montgomery, Alabama, Dr. Gwen Patton, a long-time Alabama voting rights activist and teacher, mentioned recent instances of polling places being relocated in Black Belt counties without voters knowing where the new sites were, as well as charges filed against people at the polls who "were simply assisting elderly people with the right to vote."[18]

At the same hearing, Vernon Burton, a historian at the University of Illinois who specializes in southern history, relied on his expert testimony in a 2003 congressional redistricting case in Texas to remark on "how overt some racial appeals" are in that state.[19] He mentioned hearings held by the NAACP in Texas regarding the 2000 and 2002 elections, in which various kinds of intimidation of and misinformation directed at blacks were reported, as well as "late change of polling places; dropping individuals from poll lists without cause; not allowing individuals to file challenge ballots," as well as "a hate crime in Wharton [Texas]," where the home of a campaign staff treasurer for a black candidate for sheriff was burned. "[H]er husband, a former county commissioner," was inside, "and got [out] only because the dog was barking. And she had just received threatening calls saying what would happen to her if she did not get [that]—and we won't use the N word—sign out of her yard."[20]

Burton also referred to other forms of anti-black discrimination of which a judge took note in a recent Charleston, South Carolina, voting rights case, including "people making it hard for African-Americans to vote."[21] He introduced his expert witness reports in that case and another recent one in South Carolina that, he said, "echoed—and recently—the very things that Dr. Patton was telling . . . about in Alabama." These, he said, "can be documented [in the 1990s and 2000s], including "poll watchers, who make it hard for people [to vote]," among other things.[22]

Victor Landa, representing the Southwest Voter Registration Education Project, described "strategic" efforts in the 2004 Texas election cycle to prevent some citizens from registering to vote. "In one county in South Texas, some of our Spanish-speaking volunteers were denied the eligibility to be deputized as registrars," he said, adding that in Texas only deputized registrars can register voters in the field. "Some officials who are employed by law to deputize

registrars deliberately set obstacles to deputization for people who may have belonged to an opposing political party."[23] He also mentioned a San Antonio election in which Section 5 was used to prevent the shifting of early-voting sites out of predominantly Latino areas, as had been planned by officials.[24]

Testifying at the Southwest Regional hearing in Phoenix, Claude Foster, national field director for the NAACP National Voter Fund, summarized complaints voiced at a Voter Irregularity Hearing held by the Houston Coalition for Black Civic Participation in Harris County (Houston) Texas on December 12, 2001, shortly after a nonpartisan mayoral run-off election. Among those attending, he said, were the county tax assessor-collector, a U.S. Department of Justice official, and an official from the county clerk's office, as well as representatives of black and Latino organizations.[25] A problem in the 2001 election, he said, was that "over 166 precincts were changed without the African-American community being notified . . . until the civil rights community challenged election officials under Section 5 . . ."[26]

The Southwest Regional hearing testimony of Nina Perales, regional counsel of the Mexican American Legal Defense and Educational Fund (MALDEF), included examples of past ballot access problems in Colorado: "Voting registration branches being placed in Anglo homes, limited hours for farm workers to register to vote, and a system where Anglo county commissioners tapped their friends for election judge, resulting in an all-Anglo election judge pool."[27]

Ms. Perales also testified about voter harassment in November 2004, when Anglos standing outside polling places in Dona Ana County (Las Cruces), New Mexico, videotaped the license plates of Mexican Americans as they went to vote. According to the voters who complained, "it is very intimidating . . . to be videotaped and to have their license plates videotaped by Anglos standing outside the polling place."[28] Such videotaping sometimes occurs in minority precincts in other places in the nation, and the Department of Justice discourages videotaping when it is called to the Department's attention, pointing out that videotaping could violate Section 11(b) of the Voting Rights Act, which forbids intimidation of voters.[29]

Exit polls conducted in 2004 by the Asian American Legal Defense and Education Fund (AALDEF) in several cities revealed numerous complaints of discourteous or hostile behavior by poll workers, incorrect directions to polling sites or election districts, missing names from the lists of registered voters, and many other kinds of Election Day problems as well.[30]

The Midwest Regional hearing held in Minneapolis received both testimony and written reports on a wide range of vote-

suppression incidents in that region. One of the most remarkable incidents involved discrimination against Arab American voters in a 1999 mayoral election in Hamtramck, Michigan—almost two years before 9/11. Poll challengers accosted Arab American and other dark-skinned voters in the city's general election. Because of the challenges, election officials required many Arab American voters to take a citizenship oath as a requirement for voting. Some Arab Americans apparently decided not to vote after they heard of the harassment. Criminal charges were brought against two election officials, who were convicted of delaying voters and fined. The Department of Justice sued the city, alleging that its failure to stop challenges against Arab American and other dark-skinned voters violated Section 2 of the Voting Rights Act. The Department and the City ultimately entered a consent decree, providing for bilingual, Arabic- and Bengali-speaking inspectors at all polling stations and for federal observers to monitor elections. In 2003, a Bangladeshi American resident was elected to the city council for the first time.[31] Even so, in 2004, "several Bangladeshi voters" at one polling station complained that they were given incorrect information about poll sites. According to Margaret Fung of AALDEF, "Bangla interpreters are still needed in this location."[32]

Other examples of techniques falling under the heading of vote suppression or harassment include but are by no means limited to the following: voters in Saginaw, Michigan being asked in 2000 if they were felons; a Republican Michigan state legislator telling supporters in July 2004 that their party would have a tough time in November unless they "suppress[ed] the Detroit vote," referring to the predominantly black city; a 2004 complaint "that a police officer outside a polling location in Cook County [Illinois] asked voters for photo identification and told them they could not vote if they had ever been convicted of a felony"; and complaints from several Minnesotans that they had received telephone calls instructing voters to go to the wrong precinct or giving an incorrect election date.[33] These examples are only a few of the many allegations of vote suppression efforts in recent years in the Midwest. Hundreds of such complaints were reported.[34]

At the South Georgia regional hearing in Americus, Tisha Tallman, regional counsel for MALDEF, mentioned an event in Alamance County, North Carolina, in which a sheriff obtained a list of Latino registered voters and "publicly stated that he was going to go door-to-door to the house of every single registered Latino voter and determine whether or not they were U.S. citizens and to systematically arrest every single person he did not believe to be a U.S. citizen." Resulting publicity and MALDEF's notification of the

Department of Justice, however, caused the sheriff not to carry out his plan.[35]

These accounts represent only a sampling of information obtained through testimony and written documents submitted at the ten Commission hearings. They strongly suggest that while the mechanisms of yore for massive disfranchisement are gone, there is a continuing pattern of disfranchisement occurring on a smaller scale. Such behavior by individuals or groups acting on their own, or by election officials acting on behalf of the jurisdictions they represent, are just as illegal today as the "tests and devices" of an earlier epoch.

Vote Dilution

Even before the Voting Rights Act was passed in 1965, blacks had gradually made progress in abolishing some of the devices whites had used to prevent them from voting. Officials responded by adopting new measures to minimize the impact of black re-enfranchisement. These measures are forms of vote dilution, defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among a majority group to diminish or cancel the voting strength of a minority group, even if the latter votes as a bloc in favor of its preferred candidates. Put differently, if a racial or ethnic minority group votes in a unified fashion for its preferred candidates, it can, under some voting rules, elect those persons even if the white majority votes cohesively for white candidates. Where both the white majority and the ethnic minority vote as blocs—what is referred to as racially polarized voting—whites have a better chance of preventing the election of minority candidates under some electoral rules than others. The rules that make the election of minority candidates more difficult are forms of vote dilution.

These arrangements are well-known. They include efforts that ensure that in a multi-district election system no district will contain a majority of minority voters—districting plans, in other words, that "crack" minority neighborhoods and spread their voters among several districts. They include the equally pernicious efforts to "pack" more minority voters than necessary into a district, so as to decrease the number of districts from which minority representatives can be elected. They also include, in majority-white jurisdictions, the abolition of multi-district elections entirely so that all candidates are elected at large, thus ensuring that all winners are elected from a majority-white constituency. Other dilutive schemes involve annexing predominantly white suburbs in order to increase the white percentage of the electorate, or de-annexing predominantly black

suburbs to accomplish the same result. Another scheme—the numbered place requirement—forbids a practice by which minority voters, in an at-large, multi-seat election, can increase the value of the votes going to their candidates by voting only for one candidate (a practice known as "single-shot" or "bullet" voting). This is impossible when candidates have to declare for a particular numbered place. Single-shot voting can also be thwarted by introducing staggered terms for elected officials. Another dilutive tactic is to switch from a plurality-win to a majority requirement, thus making it less likely in a majority-white venue that in an election where the white vote is initially split between two or more white candidates, a black candidate, say, with strong black support will win without getting a majority of the total vote.

Finally, various stratagems are sometimes employed when dilutive mechanisms fail and minorities are elected to office. One is to enact laws that diminish the authority of the officeholders—such as abolishing a strong mayor form of government and replacing it with a city manager form. Another takes the authority of filling an office out of the hands of the voters altogether, by replacing an elective post with an appointive one, where those in charge of the appointments are members of the white majority. While these latter gambits are not examples of vote dilution in the strict sense, they nonetheless serve the same purpose as dilutive laws in that they diminish the power of enfranchised minorities.

The political impact of vote dilution has long been understood by white lawmakers. In 1876, a Texas newspaper described districts in heavily black areas of the state as "elongated most absurdly." Thanks to white domination of the districting process, "districts were 'Gerrymandered,' the purpose being, in these elections, and properly enough, to disfranchise the blacks by indirection," so they would not constitute more than "a third of the voters in each district."[36]

Disfranchisement by indirection—a term which nicely captures the purpose of vote dilution—was widely employed during the Second Reconstruction as well, although usually it was not so honestly described by those who employed it. Following the 1954 school desegregation decision in *Brown* v. *Board of Education*,[37] Texas increasingly adopted the numbered-place system in city and school board elections. Required by court order in the mid-1960s to redistrict its malapportioned legislative and congressional districts, the legislature racially gerrymandered its districts in Harris County, the state's most populous, to dilute black votes there. The legislature soon thereafter adopted a majority-vote requirement in elections for the Houston school board after two blacks and a white racial liberal had won election under the existing plurality requirement.[38]

In North Carolina, according to political scientists William R. Keech and Michael Sistrom, "after blacks were elected to public office in several cities in the 1940s and 1950s, concerned whites borrowed from the earlier strategies of the 1870s and 1880s to dilute black voting strength by changing district lines or electoral systems." They describe numerous examples of this both at the local and state legislative level.[39] In Alabama, officials began replacing district with at-large systems on a large scale not long after the Supreme Court, in *Smith* v. *Allwright* (1944)[40] ruled the white primary unconstitutional. By the time the Voting Rights Act was adopted, "most Alabama jurisdictions already used citywide or countywide elections designed, together with a 'numbered-place' requirement, to dilute black voting strength. The state could thus prevent black officeholding without having to change its election laws (and thus be subject to the preclearance provision of section 5). . . . Black officeholding in Alabama was [therefore] achieved, by and large, only as a result of successful voting rights litigation challenging the use of at-large elections," write scholars familiar with Alabama racial politics.[41] Similar events were occurring elsewhere:

> Various kinds of dilutionary responses to increased black voting developed in every southern state in the 1960s [writes another scholar]; but the boldest response, linked directly to passage of the Voting Rights Act, occurred in Mississippi. Convening in January 1966, the all-white legislature passed thirteen bills concerning the election process, with little floor debate and without public hearings. None of the bills directly denied blacks the vote; yet all seemed intended to diminish their voting strength, either through creating racial gerrymanders, switching from district to multimember election systems, changing public offices from elective to appointive, or increasing the qualifications for candidacy. The changes wrought by these bills were massive, affecting numerous state and local governments. For example, all county boards of supervisors and all county boards of education in the state—bodies having considerable public power—would now be elected at large in each county rather than from districts, as they had been since the nineteenth century. While the legislature was unusually reticent in explaining the motives behind this spate of laws, a few members were as forthright as their nineteenth century counterparts had been. One state senator, for example, opined that the switch to countywide elections would

> safeguard "a white board [of education] and preserve our way of doing business."[42]

The brazen effort by the Mississippi legislature to "disfranchise through indirection" even after the Act had been passed indicated the importance vote dilution had assumed for southern whites when the longstanding methods of "direct disfranchisement" were finally outlawed. Unfortunately, the new Mississippi laws (some of which the Department of Justice refused to preclear under the brand-new Section 5) were a harbinger of things to come, not only in Mississippi but in many other covered states, as well as in non-covered ones.[43]

The Senate report accompanying the Act's 1982 reauthorization paid special attention to the electoral changes in the covered states since 1965 that were designed to dilute minority votes. Quoting the Supreme Court in *Allen* v. *Board of Elections*, a decision announced four years after the Act's passage, the report noted that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[44] The Senate report continued:

> Following a dramatic rise in registration, a broad array of dilution schemes was employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.[45]

The 1982 Senate Report noted that findings of dilution were reported by Congress in the 1970 hearings on reauthorization of the Act, as well as in those in 1975. "Once again, Congress continued the preclearance requirement for the jurisdictions originally covered in 1965," the report stated, "not on the basis of some permanent stigma for events which had occurred before 1965, but rather on the basis of a careful review of the contemporaneous record of on-going voting rights discrimination in 1970 and 1975, respectively."[46] Then, speaking of the present as of 1982, the report added:

> A review of the kinds of proposed changes that have been objected to by the Attorney General in recent years reveals the types of impediments that still face minority voters in the covered jurisdictions. Among the types of changes that have been objected to most frequently in the period from 1975-1980 are annexations; the use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines.
>
> This reflects the fact that, since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute minority voting strength.[47]

In Chapters 5 and 6, the issue of vote dilution since the 1982 reauthorization is explored in depth.

The U.S. House of Representatives report on the 1982 reauthorization also discussed minority vote dilution, and pointed to the link between dilution and racially polarized voting.[48] Indeed, the link is a necessary one. Were there no racially polarized voting, none of these mechanisms would have a dilutive effect. In a community where racial bloc voting doesn't exist, i.e., where minority voters are free to vote and where their candidates of choice have regularly run for office and received wide support from white voters, then both the majority and the minority electorates have gotten beyond race as a divisive factor in that community's politics. There would be no reason to file a voting rights suit challenging vote dilution. As historian Peyton McCrary has observed with regard to "the hundreds of vote-dilution lawsuits tried or settled in the last quarter century . . . no court has ever found a violation . . . absent proof, typically presented through expert statistical analysis, that white or Anglo voters routinely defeat the candidates of choice of minority voters."[49] Thus any effort to measure the status of minority voters in American politics must address the question of how widespread and serious is racially polarized voting. Chapter 7 returns to this issue.

CHAPTER THREE

What The Voting Rights Act Does

As originally passed in 1965, the Act was designed primarily to protect the voting rights of African Americans in the southern states with a long history of disfranchisement. The Act was intended by Congress to enforce the Fifteenth Amendment, ratified after the Civil War, which had been egregiously violated by white supremacists who controlled the states of the former Confederacy. In enacting the new law ninety-five years after passage of the Fifteenth Amendment, Congress found that racial discrimination in voting was "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." In the words of the Supreme Court the following year, in a case testing the constitutionality of Section 5, in particular, Congress was responding to that defiance by shifting "the advantage of time and inertia from the perpetrators of the evil to its victims."[50] In its subsequent reauthorizations of the Act, Congress recognized the need to remedy discrimination against other racial and ethnic groups, particularly Latinos, Native Americans, and Asian Americans, and to combat vote dilution in addition to disfranchisement.

The Act, Congress's statutory scheme to remedy and prevent vote discrimination, contains both temporary and permanent provisions. The temporary ones, which apply to certain portions of the country based on coverage formulas, have been renewed multiple times, and are currently set to expire in August 2007. The general provisions are national in scope and permanent. [51]

Temporary Provisions: An Overview

The temporary provisions are found in Sections 4 through 9, Section 13, and Section 203. As described in detail below, states and political subdivisions that meet the coverage criteria under Section 4 are subject to the Section 5 preclearance provisions and the examiner and observer provisions of Sections 6 to 9 and 13. The need for these provisions has been considered so great that they have been renewed three times by Congress, after careful consideration of the extent of continuing vote discrimination in the covered jurisdictions—once for five years (1970), once for seven years (1975), and once for twenty-five years (1982). The other temporary provision is Section 203, which requires jurisdictions that meet another coverage formula to provide language assistance to minority language voters. Section 203 was added in 1975 and reauthorized in 1982 and 1992 based on findings

of continued discrimination against language-minority voters. Section 203 expires at the same time as the other temporary provisions.

Section 4 Coverage Formula

Any jurisdiction is covered under Section 4(a)-(c) if it meets one of these three criteria:

1) The jurisdiction maintained on November 1, 1964, any test or device as a precondition for voting or registering, and less than 50 percent of its total voting-age population were registered on November 1, 1964, or voted in the presidential election of 1964. (When the Act was first passed, this was the sole criterion.)
2) The jurisdiction maintained on November 1, 1968, a test or device as a precondition for voting or registering, and less than 50 percent of its total voting-age population were registered on November 1, 1968, or voted in the Presidential election of 1968. (This criterion was added in the 1970 amendment to the Act.)
3) The jurisdiction maintained on November 1, 1972 any test or device, as a precondition to voting or registering, and less than 50 percent of its citizens were registered on November 1, 1972, or voted in the Presidential election of 1972. (This criterion was added in the 1975 amendment to the Act.)[52]

For the third criterion, the meaning of "test or device" was amended in 1975 to include not only such things as literacy tests but any practice or requirement by which a jurisdiction, where more than 5 percent of its voting-age citizens were members of a single language-minority group, made available only in the English language registration or voting notices, forms, instructions, assistance, or other information relating to the electoral process, including ballots.[53] This addition brought under coverage three entire states with a history of discrimination against language minorities, as well as several political subdivisions elsewhere.

Where a state falls within the coverage criteria, all jurisdictions (counties, municipalities, school boards, special districts, or other governmental units) within the state are covered. *Political subdivision* refers to the main local unit for holding elections. In most states, that means the county; in some states, it is a municipality. Where a

political subdivision is covered, all political units within that subdivision are covered.

Today, nine states are entirely included under the Section 4 coverage formula. Six have been covered continuously since 1965—Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Virginia. Three others—Texas, Arizona, and Alaska—have been covered continuously since 1975. A tenth state, North Carolina, has had a significant number of its jurisdictions covered since 1965; today forty of its one hundred counties are covered. In addition, various counties or townships in the following states are currently subject to the Section 4 coverage formula: California (four counties), Florida (five counties), New York (three counties), South Dakota (two counties), Michigan (two townships), and New Hampshire (ten townships).[54] **(See Map 1.)**

Bailing Out From Section 4 Coverage

At the time the Act was first considered by Congress, it was noted by Attorney General Nicholas Katzenbach that the coverage formula was not perfect, as it would allow some jurisdictions guilty of discrimination to evade coverage.[55] However, it might also bring under special government oversight other jurisdictions which did not merit coverage. A provision was thus added which spelled out the means by which the latter jurisdictions could gain exemption, or "bail out," from coverage, by filing a declaratory judgment action in the U.S. District Court for the District of Columbia and demonstrating, in essence, a record of good behavior regarding voting rights. The provision did not, however, allow political subdivisions such as counties to bail out individually if the entire state to which they belonged was covered.

In its 1982 reauthorization, Congress enacted two important revisions to the bail-out procedure. Beginning in 1984, political subdivisions could bail out separately. Also, the criteria were changed to recognize and reward good conduct rather than making jurisdictions await a fixed expiration date without consideration of their record.

The Department of Justice has described the existing procedures for bailout as follows:

> The successful applicant for bailing out must now demonstrate that during the previous ten years:
>
> - No test or device has been used within the state or political subdivision;

- All changes affecting voting have been reviewed under Section 5 prior to their implementation;
- No change affecting voting has been the subject of an objection by the Attorney General or the denial of a Section 5 declaratory judgment from the District of Columbia district court;
- There have been no adverse judgments in lawsuits alleging voting discrimination;
- There have been no consent decrees or agreements that resulted in the abandonment of a discriminatory voting practice;
- There are no pending lawsuits that allege voting discrimination; and
- Federal examiners have not been assigned.

> Before being allowed to bail out, the jurisdiction must have eliminated those voting procedures and methods of elections that inhibit or dilute equal access to the electoral process. It also must demonstrate that it has made constructive efforts to eliminate intimidation and harassment of persons seeking to register and vote and to expand opportunities for voter participation, such as opportunities for registration and voting, and to appoint minority officials throughout the jurisdiction and at all levels of the stages of the electoral process. The jurisdiction must also present evidence of minority electoral participation.
>
> The failure to establish any one of these criteria may not prevent the jurisdiction from bailing out if the jurisdiction can establish the incidents that did occur "were trivial, were promptly corrected, and were not repeated." In addition, these requirements apply to all governmental units within the geographical boundaries of the jurisdiction. Thus, if a county is seeking to bail out, it must establish each criteria [sic] for every city, town, school district, or other entity within its boundaries. [56]

As a result of this change, nine jurisdictions in Virginia have bailed out, and the voting rights attorney who represented their case to the U.S. District Court for the District of Columbia believes many

more covered jurisdictions would have done so had they understood that the procedure was not onerous for those who had a good voting rights record.[57]

Section 5: Preclearance

Section 5 of the Act, another temporary provision, specifies the requirements governing those jurisdictions that are included by the coverage formula in Section 4(a)-(c). Section 5 gives the federal government special oversight in matters of voting rights enforcement. It requires all covered jurisdictions to submit any proposed changes in voting or electoral procedures either to the Attorney General or to a three-member panel of the U.S. District Court for the District of Columbia (referred to colloquially as "the D.C. Court") for preclearance before the changes can be implemented.[58] The changes may be minor—such as moving a polling place to another location—or they may be high-profile ones on the order of the decennial redistricting of a state's congressional seats. Other kinds of proposed changes include (but are not limited to) qualifications for voting, registration or voting procedures, candidate qualifications, length of term of office, or method of vote counting. Any time a covered jurisdiction plans to make one or more such changes, all must be submitted to the Attorney General or the D.C. Court for inspection before implementation is allowed. If the latter refuses to preclear a submission, the jurisdiction may appeal directly to the U.S. Supreme Court.

The purpose of the preclearance requirement is to ensure, as the statute puts it, that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[59] As a result of Supreme Court decisions, the standard for preclearance is now referred to as the "retrogression" standard, which means that the proposed change must not have the purpose or effect of making a racial or ethnic minority group's voting situation worse than before the change.[60] If the submission is made to the Attorney General rather than to the D.C. Court, the examination of these proposed changes, as well as the preliminary recommendation as to whether to approve them, has by long-standing tradition fallen to the Department of Justice staff in the Voting Section of the Civil Rights Division.

Covered jurisdictions in the great majority of cases make their submissions to the Department of Justice, which must either preclear or object within sixty days. (When the Department needs more information to determine whether submissions are discriminatory, it may take up to sixty days after that information is received before

making its decision.) If the Attorney General decides not to object to a submission, that decision is not subject to challenge in court under Section 5. [61] However, it may still be legally challenged by other means—for example, under Section 2.

If, on the other hand, the Attorney General decides to object to a submission, the jurisdiction may then appeal to the D.C. Court. However, just as few jurisdictions originally submit their proposed changes to the court instead of the Department of Justice, few appeals to the court of Department of Justice objections have been made over the years, as the Department's decisions in this regard are generally recognized as sound.

In general, the federal government's oversight of states and localities under Section 5 appears to have been extraordinarily efficient, both in preventing proposed changes that are discriminatory and in deterring jurisdictions from proposing such changes. The role of the preclearance requirement in preventing discrimination, and therefore the continuing need for it, was emphasized by Attorney General J. Stanley Pottinger during the 1975 hearings on reauthorizing the Act:

> The number of objections which the Attorney General has made to changes in voting laws submitted to him under section 5 shows that there is still a potential for the passage of legislation which has either as its purpose or effect the exclusion of black voters from their rightful role. This potential could become reality in the absence of some objective control at the Federal level.[62]

Sections 6-9 and 13: Examiners and Observers

Sections 6-9 and 13 enable the Attorney General to certify jurisdictions for examiner/observer coverage. Where there is reason to suspect that any type of unconstitutional racial vote discrimination exists in a covered jurisdiction, the Attorney General may assign federal "examiners" to help register voters in covered jurisdictions that are certified by the Attorney General or a court order, and assign federal "observers," trained and supervised by the Office of Personnel Management, to monitor Election Day activities. The Attorney General's authority to certify jurisdictions under Sections 6-9 and 13 is temporary [63]

Few examiners have been needed in recent years. However, many federal observers continue to be assigned when racial vote discrimination, including a lack of legally mandated language assistance, seems likely.[64] The observers write reports—often lengthy

and detailed—of what they have seen. They are also in contact on Election Day with Department of Justice lawyers who, in the event of voting irregularities, can contact the official in charge of the election. If the official does not solve the problem, the Department of Justice may file a civil action under the Voting Rights Act after the elections are over.[65] Since 1966, roughly 25,000 observers have been deployed in over 1,100 elections.[66]

Sections 4(f)(4) and 203: Minority Language Assistance

Another set of temporary provisions concern the needs of certain citizens who are limited-English proficient. In 1975, when Congress amended the Act for the second time, it concluded that

> through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. . . . The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices. [67]

The language-minority groups specifically mentioned in the Act are "persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage."[68]

Consequently, as mentioned above, Congress included in its definition of "tests and devices" the use of English-only election materials under certain conditions, bringing three entire states and numerous other jurisdictions under Section 5 coverage in 1975, as shown in Map 2. **(See Map 2.)** These jurisdictions were described in the congressional debates over reauthorization that year as areas where more severe kinds of discrimination against language minorities occurred, including "physical, economic, and political intimidation when they seek to participate in the political process." [69] Jurisdictions covered under Section 4(f)(4) must provide assistance in the language that triggers coverage, in addition to meeting the requirements of Section 5 and being subject to the examiner and observer provisions.

In 1975, Congress enacted another provision with a different formula that required covered jurisdictions to provide minority language assistance: Section 203. This section was extended in 1982 and amended in 1992. It is yet another important part of the Act that will expire in 2007 if not renewed.

A jurisdiction is covered under Section 203 where "limited-English-proficient" U.S. citizens of voting age in a single language group within that jurisdiction number more than 10,000 or are more than 5 percent of all voting-age citizens (or on an Indian reservation, exceed 5 percent of all reservation voting-age citizens), and the illiteracy rate of the group is higher than the national illiteracy rate.[70] The states of California, New Mexico, and Texas are covered by Section 203 (for Spanish heritage). Also covered are jurisdictions in twenty-six other states, for twenty-nine languages in one of the four major language groups.[71] (**See Map 3.**)

The requirements of Section 4(f)(4) and Section 203 as they relate to minority language material and assistance are essentially identical.[72] The minority language provisions are comprehensive, applying to every stage of the election process for all types of elections. The minority language provisions were designed to ensure that people who do not speak or read English well and are either American Indian, Asian American, Alaska Native, or of Spanish heritage are supplied with assistance in their own language, including "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process," to enable them to vote without hindrance.[73] Generally speaking, however, it is not necessary to supply printed material to those American Indians and Alaska Natives without written languages, for which oral assistance is required.[74]

Permanent Provisions

A key permanent provision is Section 2, which provides the primary means to remedy voting discrimination against racial and language minorities through litigation. The substance and language of the Fifteenth Amendment in particular is reflected in this section which states, in its entirety:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by

> members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population.[75]

Congress added Section 2(b) as an amendment in 1982 to address a 1980 Supreme Court decision in a case originating in Mobile, Alabama seven years earlier.[76] The amendment makes clear that not only is denial of the right to vote prohibited but denial of a protected class of citizens' right to have an equal chance to elect their preferred representatives. Moreover, the amendment speaks in terms of results, not intentions. The Court interpreted the Constitution to say that African Americans in Mobile, who invoked the Fourteenth and Fifteenth Amendments to challenge the system preventing the election of blacks to city council, must show that the whites who instituted the system in 1911 had intended thereby to discriminate against black voters. Congress, in amending Section 2, created a route—statutory rather than constitutional—for making a showing of intent unnecessary. From thence forward, evidence of discriminatory effect would be sufficient.

Section 3(a) also enables a federal court as part of a voting rights action to certify a jurisdiction for examiner and observer coverage to prevent unconstitutional racial vote discrimination.[77] As discussed below, Section 3(c) has been used with some regularity. Section 3(c)—a permanent provision—allows a court which has found a voting rights violation under the Fourteenth or Fifteenth Amendment to require a jurisdiction not subject to Section 5 to submit certain future election changes to the Attorney General for preclearance for an "appropriate" period of time.[78] This so-called "pocket trigger" of preclearance coverage has been applied to the state of New Mexico, for example, leading to a Department of Justice objection while the coverage was in effect. The pocket trigger has also been applied, for example, to the state of Arkansas; Escambia County, Florida; Buffalo County, South Dakota; and Cicero, Illinois.[79] While this section has been used sparingly, it nonetheless is thought to have served as an important deterrent to discrimination where it has been used.[80]

Certain other permanent provisions of the Act that apply nationally are worth noting. Section 10 bars jurisdictions from using

a poll tax.[81] Section 201 prohibits the use of "tests or devices" in voting.[82] This section targeted the array of barriers such as literacy tests, "understanding" tests, and "good-character" tests that, when administered by whites prior to 1965, prevented blacks from voting. Section 208 is short and to the point. It says:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.[83]

Section 11(a) prevents election officials from refusing to count a legitimate vote, and Section 11(b) prohibits intimidation, threats, or coercion in the voting process.[84] Section 4(e) requires jurisdictions to provide language assistance to United States citizens who were educated in Puerto Rico.[85]

Interpretations and Debates

A substantial body of case law has arisen in the years since the Act was first passed specifying the rules for applying Sections 2 and 5, especially regarding vote dilution, and these have become more complex as a result of Supreme Court decisions beginning in the 1990s round of redistricting. Moreover, there is controversy among both political actors and scholars over whether, as the law is applied to redistricting, there is a necessary trade-off for minority voters between "descriptive representation" (representation by a person of one's own ethnic group) and "substantive representation" (representation in terms of achieving one's policy goals, whatever the ethnicity of one's representatives), and, if so, whether the creation of majority-minority districts to increase descriptive representation of groups who, for example, tend to vote heavily Democratic, may not decrease their substantive representation by decreasing the number of Democratic seats overall. This is not an easy question to resolve, even though political scientists have spilled much ink on the subject. The answer almost certainly depends on the specific circumstances surrounding the adoption of a redistricting plan.[86] Whatever the answer, however, the Act today continues to prohibit attempts to prevent minorities of color from voting or from having an equal chance to elect their preferred candidates. As such, it remains true to the Fourteenth and Fifteenth Amendments it was designed in 1965 to enforce.

CHAPTER FOUR

The Primary Groups the Voting Rights Act Has Helped

The Voting Rights Act has so far focused primarily on protecting the rights of four major American ethnic groups. African Americans will be described first, because their long history of slavery and disfranchisement, followed by their intense struggle in the modern era for full citizenship, was the reason the Act was passed. Then Latinos, currently the largest ethnic minority group in the nation, will be described, followed by Native Americans,[87] whose history of mistreatment by the dominant white majority goes back as far as that of blacks. Last, the experiences of Asian Americans and Pacific Islanders, a relatively small, heterogeneous, and rapidly growing population, will be considered.

African Americans

There were 36.4 million African Americans in the United States in 2000,[88] 55 percent of whom lived in the South.[89] (**See Map 4A** for their geographical distribution.) African Americans composed 11.9 percent of the United States voting-age population (VAP).[90] This compares to 9.2 percent in 1960.[91] In the 2000 presidential election, African Americans were the largest minority group among citizens who reported voting, constituting 11.7 percent. This compared with 80.7 percent for non-Hispanic whites (Anglos). Latinos made up 5.4 percent of the voters; Asian Americans, 1.8 percent; and "other" (including Indians and Alaska Natives), 0.4 percent.[92]

The Census Bureau estimated that 53.5 percent of the black citizen VAP, compared to 60.4 percent of comparable Anglos, cast a ballot for president in 2000.[93] To be sure, these figures are based on the self-reported behavior of respondents and probably understate the racial gap, as previous studies have found that while both blacks and whites tend to over-report their voting behavior, a somewhat higher percentage of blacks do so.[94] The census figures represent significant progress in closing the voter turnout gap since the 1960s. In 1964, one year before the Act's passage, 58.5 percent of voting-age blacks nationwide reported voting, as compared to 70.7 percent of comparable whites. In the North and West, 72.0 percent of blacks voted, as did 74.7 of whites.[95] In the South, on the other hand, 44.0 percent of blacks voted, as compared to 59.6 percent of whites. In other words, in the South there was almost a 16-point racial gap in turnout, while in the North and West, about a 3-point gap. In some

southern states the gap was even greater than the regional figure would suggest.

In large measure, this regional difference in voter turnout was the result of drastic differences in registration rates. In 1964, the black registration rate in the eleven states of the former Confederacy was 43.1 percent.[96] In South Carolina it was 38.7 percent; in Louisiana, 32.0 percent; in Alabama, 23.0 percent; and in Mississippi, 6.7 percent. The reason was obvious. As late as 1960, nine of the eleven states of the former Confederacy still had a literacy test, a poll tax, or both. Much, though by no means all, of the registration gap in the southern states disappeared within a few years of the Act's passage. The black registration rate in those states jumped from 43.1 percent in 1964 to 62.0 in 1968.[97] Twenty years later, in 1988, the average black-white registration gap in those same four states of South Carolina, Louisiana, Alabama, and Mississippi was a mere 4 percentage points. In Mississippi, where the gap in 1965 had been 63.2, it was 6.3 by 1988.[98]

A central aspect of a minority group's political incorporation is how successful its members have been in holding elective office and thus having a chance to directly affect policy. The above discussion of white officials' efforts to dilute minority votes underscores the importance of this issue. In terms of sheer numbers, blacks have made striking progress since the Joint Center for Political and Economic Studies first began tracking black elected officials (BEOs). In 1970, there were only 1,469 in the entire nation. In the six southern states originally covered entirely by Section 5, there were 345 at all levels of government.[99] By 2000, the number nationally had increased to 9,040—a gain of over 600 percent, and in the same six states, 3,701—a gain of over 1,000 percent.[100] Seen differently, in the six states, BEOs as a proportion of the national total of BEOs rose from 26 to 41 percent in thirty-one years.[101] Without a doubt, this represents great progress.

However, the fact remains that black candidates are unlikely to be elected when non-Hispanic whites are the majority of the electorate. Further, the higher the office, the steeper the grade of difficulty. Both of these factors come into play when blacks run for statewide office. No African American has been elected president or vice-president of the United States, of course. Douglas Wilder of Virginia is the only one to have been elected governor of an American state. Edward Brooke of Massachusetts, and Carol Moseley-Braun and Barack Obama of Illinois, are the only three African Americans to have been elected to the U.S. Senate since the First Reconstruction.[102] Today the Senate is a hundred-member body that would have ten blacks as members were blacks elected in proportion to their

percentage of the VAP. Instead, Senator Obama stands alone in that regard. A fourth African American, Harvey Gantt, former mayor of Charlotte, was ahead in some polls during his 1990 challenge of North Carolina Senator Jesse Helms until Helms's campaign aired blatantly racist TV ads and, in cooperation with the state Republican Party, systematically mailed registered black voters false information about state voter qualifications. (The latter action led to a post-election suit by the Department of Justice, charging both the state Republican Party and the Helms campaign with violating the Voting Rights Act by intimidating and interfering with black voters. Both defendants signed a consent decree agreeing not to engage in such tactics in the future.)[103]

At the statewide level, numerous blacks hold office, although their percentage is still significantly below the black proportion of the VAP. (**See Table 1**.)[104] As of 2000, thirty-five BEOs held offices filled by a statewide vote—less than one per state.[105] As blacks are a minority of the VAP in all fifty states, even thirty-five represents progress. Nonetheless, BEOs make up only 5 percent of all such offices, and often it is only after blacks have first been appointed to a vacancy that they are able to win election to a statewide office as incumbents. Moreover, in order for a black to win statewide election, a prior appointment to fill a vacancy is not always sufficient. Congressman Melvin Watt, testifying before the National Commission on the Voting Rights Act, noted the case of Judge Allyson K. Duncan, an African-American Republican woman appointed to the North Carolina Court of Appeals, a statewide office, who was then defeated by a white challenger when she ran for election as an incumbent. Her qualifications were such that she was later appointed to the U.S. Fourth Circuit Court of Appeals.[106]

With regard to Congressional seats, the percentage of BEOs in that body was almost twice as high as for those holding statewide office—9 percent. The reason for this larger proportion is obvious. The geographical concentration of blacks within some areas of certain states makes it possible to draw majority-minority districts, thus enabling black candidates to overcome the effects of racially polarized voting. Sections 2 and 5 of the Act play an important role in this process. As Table 1 indicates, the median Anglo (non-Hispanic white) VAP in districts electing black Representatives was just 31 percent in 2000. In fact, only four of the thirty-eight black Congressmen were elected from majority-Anglo districts that year.[107]

The impact of district racial composition is also obvious in Table 2, which compares the number of Anglo districts electing black state legislators with the number of majority-minority districts doing so. (**See Table 2**.) As the table indicates, in 2000 only 8 percent of

black U.S. representatives holding office in the fifty states were elected from majority-Anglo districts. Sixteen and 18 percent, respectively, of black state representatives and senators who were officeholders that year were elected from majority-Anglo districts in the forty-one states for which data are available. In light of the findings of racially polarized voting presented below, Tables 1 and 2 provide support for the continuing need for majority-minority districts if minority voters are to continue to be able to elect candidates of their choice. In the South and other jurisdictions covered by Section 5, that provision of the Act has played a very important role in ensuring that that is the case.

African-American underrepresentation is, of course, the result of several factors. Running for office typically takes time and money, and blacks are far less well-off, on the whole, than whites. Research has shown that minority candidates for state legislatures, and blacks specifically, have less campaign financing on average than do whites.[108] This is almost certainly true in races for other types of office as well. To a large degree, however, the continuing underrepresentation of BEOs is the result of two factors that may be connected but are not identical—strong anti-black attitudes that continue to find expression in virtually every aspect of American life, and racially polarized attitudes on a host of policy questions that loom large in the American political universe.

Anti-black attitudes lead to discrimination in housing, education, law enforcement, health care, and a multitude of other areas of everyday life, including voting.[109] Racially polarized attitudes toward public policy questions are often connected with anti-black attitudes and blacks' response to them, but disagreements between racial conservatives and racial liberals cannot always be reduced to white racism and its opposite. In any case, the fact that blacks and whites often disagree sharply over policy is beyond dispute.

Two research reports published in 1997 underline the sharp racial differences in policy preferences. Scholars at the University of Georgia surveyed scientifically selected segments of the adult population, asking their opinions on "various kinds and degrees of government intervention to improve the life chances of African Americans." They found that whites in the non-South were far more favorably inclined to support government intervention on behalf of blacks than were whites in the South, and that whites in the Deep South were far less likely to do so than those living in the South as a whole. In the sample, 67 percent of whites in the Deep South sample believed government was spending "too much" on assistance to blacks, as compared to 33 percent of whites in the South as a whole and 18 percent of whites in the remainder of the nation. (Less than 3

percent of a national sample of blacks felt the government was spending "too much.") The Deep South as defined by the authors consists of five states covered in their entirety by Section 5—Georgia, Alabama, Louisiana, Mississippi, and South Carolina.[110] They conclude that "Southerners in general—and Deep Southerners in particular—are the least likely to endorse policies intended to ameliorate racial inequality."[111] Very similar findings on attitudes toward government spending on behalf of African American drawn from longitudinal data obtained from several survey organizations, are reported in another study on racial attitudes published the same year.[112]

Some of the reasons behind blacks' strong support for government help is suggested in a 2005 report by the National Urban League documenting the inequality African Americans still face in the first decade of the current century. A set of indices created to measure the relative position of blacks in terms of economic well-being, health, education, social justice, and civic engagement dramatically underscored the plight of the average African American in the United States today as compared to the average white.[113]

Whoever is right on the various policy issues related to race, the social science data point to serious differences of opinion between the races, on average, in many parts of the nation, particularly the Deep South—differences that contribute to racial polarization at the voting booth.

Latinos

With the exception of Puerto Ricans in the continental United States and Latinos in general in a few other locales, people of Hispanic heritage were not included, as such, under the protections of the nonpermanent features of the Voting Rights Act until 1975, when Congress passed Sections 4(f)(4) and 203 to aid citizens who lacked English proficiency and also extended the reach of Section 5 to include the entire states of Alaska, Texas, and Arizona as well as other political subdivisions. Sizable populations of Latinos lived in the latter two states.[114] While litigation challenging Latino vote dilution was already well under way in Texas by the late 1960s, Section 5 coverage in Arizona and Texas changed the political landscape in significant ways.[115] As two scholars have noted, "it is only in the modern era—since the extension of the Voting Rights Act to Latinos in 1975—that it is possible to speak of a national 'Latino' as opposed to Mexican American or Cuban American politics that has a predictable impact on candidates' strategies and electoral

outcomes."[116] There were 5,205 Hispanic elected officials (HEOs) nationwide as of 2000.

The Latino population has grown rapidly in recent decades, both absolutely and as a percentage of the total population. In 1970, there were 9.6 million Latinos residing in the United States, representing 4.7 percent of the total population. In 2000, there were 35.6 million, and their percentage of the total had grown to 12.6.[117] Of the 26 million person increase during this thirty-year span, immigrants accounted for 45 percent.[118] Latinos are concentrated in the American Southwest but significant populations are found in the East, and there are sharp increases in the South as well. (**See Map 4B.**) Most Latinos are of Mexican descent (more than 26 million), but many from other countries in Latin America have immigrated to the United States in recent years, either in search of work or to escape war, terror, or civil unrest in their home countries. Puerto Ricans living stateside (as distinct from the Island of Puerto Rico) have long resided in the United States, but immigration from the island continues, and in 2003 they numbered almost 4 million by census estimates.[119] The existence of literacy tests into the 1960s which affected Puerto Ricans in New York played a role in the coverage of three counties in that state under Section 5.[120]

An estimated 8.5 million undocumented persons lived in the United States in 2000, of which about three-fourths were of Hispanic origin. Their influx has created growing concern among many citizens and led to considerable hate-related violence.[121] This concern sometimes expresses itself in behavior that threatens the rights of Latino citizens who are registered to vote, as recent events in Arizona illustrate. Proposition 200, a popular Arizona referendum passed in 2004, requires anyone registering to vote to present proof of citizenship, and anyone voting must present a photo identification or two pieces of identification with the voter's name and address. According to election officials, these requirements will prevent "thousands" of citizens from voting.[122]

In 2000, non-citizens composed 39.1 percent of the Latino VAP nationwide, which meant that far fewer Latinos actually voted than their proportion of the VAP would suggest. Moreover, even among Latino citizens of voting age, only 45 percent reported voting in the 2000 elections, compared to 62 percent of Anglos.[123] Recent research suggests that part of that difference is the result of difficulties some Hispanic citizens have with English-only ballots in areas not covered by Section 203.[124] Moreover, some advocates of Latino voting rights believe that incompetently translated ballots in jurisdictions covered by Section 203 discourage Latino voting.[125]

As is true for blacks, Latinos as a group are poorer and less well educated than are non-Hispanic whites, on average. Also like blacks, Latinos, many of whom trace their roots in the United States back centuries, have long been victims of racial prejudice and violence. In Texas, for example, Latinos ranked above blacks but below whites on the racial caste hierarchy for generations, and were subject to some of the same politically exclusionary laws as blacks. In the 1960s, Latinos in the Southwest mounted a highly visible and effective civil rights movement, challenging discrimination in public schools, on the job, and at the ballot box. They also fought to overcome subordination within the Anglo-dominated Democratic Party.[126]

At the time Section 5 was extended to the entire states of Texas and Arizona, the Latino civil rights movement in Texas had already begun to challenge control by Anglo Democratic bosses along the Rio Grande border, and activities by various civil rights organizations such as the Southwest Voter Education Project (SWVEP) and the Mexican American Legal Defense and Educational Fund (MALDEF), collaborating with voting rights lawyers, filed suits attacking electoral arrangements such as multi-member districts. Section 5 made their task much easier. For example, blacks and Latinos in Houston, one of the nation's largest cities, had gone to court in the early 1970s challenging the city's at-large election system as diluting their vote. Only one black city councilman had been elected since Reconstruction, and no Latinos had been, although the city by 1970 was 26 percent black and 12 percent Latino. The city's huge land area made an at-large council campaign costly. Elections were highly polarized. The plaintiffs lost the case and had begun trying to raise money for an appeal when, in 1975, Congress extended Section 5 coverage to Texas. Soon thereafter, the city annexed some territory south of the municipal boundary. The population was predominantly white and would thus add to the white percentage of the city. But Houston now had to get approval from the Department of Justice, and the Department required the city to change its council election method to include at least some single-member majority-minority districts. As a result, the city got its new territory, the minority communities got an election plan they were satisfied with—nine single-member seats and five at-large seats—and the plaintiffs in the earlier voting rights case were spared the expense and time of mounting a challenge to the court's decision. The city soon had several minority members on council.[127]

When Latino candidates oppose Anglos, the pattern is often one of racial polarization (as discussed in Chapter 7), and in constituencies with Anglo majorities, the ability of Latino voters to elect their preferred candidates is diminished. Table 3 indicates the

extent to which HEOs holding office in 2000 had been elected from majority-Anglo state legislative districts. (**See Table 3.**) It suggests the presence of ethnically polarized voting, as well as the need for Latinos to have majority-minority legislative districts to enable them to elect their candidates of choice. Indeed, there were no Latino U.S. Representatives holding office in 2000 who had been elected from majority-Anglo districts.

Native Americans

Native Americans, described by the Census as American Indians and Alaska Natives, composed 0.9 percent of the total United States population in 2000, or 2,475,956 persons, and were concentrated in the West and Alaska.[128] (**See Map 4C**.) Many of the political subdivisions in states such as Arizona, New Mexico, and South Dakota are covered by Section 203 for one or more Native American languages. Moreover, the entire state of Alaska is covered by Section 4(f)(4), as are subdivisions in other states. In 2003, Native Americans composed 19 percent of the population in Alaska, 11 percent in New Mexico and Oklahoma, 9 percent in South Dakota, and 8 percent in Montana.[129] In Arizona, where Native Americans composed about 6 percent of the population, they made up approximately 78 and 30 percent, respectively, in Apache and Coconino Counties.[130] In some other states as well—South Dakota, for example—Native Americans make up a considerably large proportion of certain counties than of the state as a whole.

Native Americans have long suffered high rates of disease and social problems resulting from their treatment at the hands of whites. According to a recent report, they are

> 670 percent more likely to die from alcoholism, 650 percent more likely to die from tuberculosis, 318 percent more likely to die from diabetes, and 204 percent more likely to suffer accidental deaths than members of other groups. Although the average life span of Native Americans has increased from 51 years in 1940 to 71 years today, it is still six years below that of other Americans.[131]

Without elected representatives to advocate solutions to these particularized needs, it is unlikely that such problems will be adequately addressed by government policy.

There is no comprehensive list of Native American elected officials, and so it is difficult to make general statements about their numbers and the conditions of their election. Moreover, given their

small numbers nationally, the census does not provide post-election data on their turnout rates. It is nonetheless true that many Indian candidates for office face the same types of problems as do other minority candidates, including racially polarized voting when they oppose whites.[132] Dan McCool of the University of Utah has compiled a list of sixty-six lawsuits filed between 1966 and 2005 in which the voting rights of Native Americans were at issue. Plaintiffs achieved some measure of success in sixty-two of them, according to McCool. South Dakota and New Mexico tied for the highest number filed in their jurisdictions—seventeen each. But lawsuits targeted jurisdictions in several states, including Arizona, North Carolina, Minnesota, Nebraska, Maine, Wisconsin, Utah, Montana, Colorado, and North Dakota. Twenty-one of the cases involved Sections 5 or 203.[133]

The extent of discrimination against Native Americans has been described by civil rights lawyer Laughlin McDonald, executive director of the ACLU Voting Rights Project, in a recent law review article. He points to the testimony regarding discrimination against Native Americans in the 1975 House Judiciary Committee hearings on reauthorization of the Voting Rights Act, as well as to statements on the issue made in the Senate debate.[134] He notes, however, that "despite the application of the Voting Rights Act to Indians, both in the enactment in 1965 and extension in 1975, relatively little litigation to enforce the Act, or the constitution, was brought on behalf of Indian voters in the West until fairly recently."[135] Significant cases were filed by Native American plaintiffs in the 1990s, and others were brought in the present century. Findings in these cases revealed a high level of racially polarized voting when Native American candidates appeared on the ballot, as well as the standard vote dilution schemes enacted by white lawmakers that have long been used by their counterparts elsewhere, most notably in the South.[136]

A significant judicial finding of vote discrimination against Native Americans appears in *Bone Shirt* v. *Hazeltine*,[137] a case brought in 2001 by Alfred Bone Shirt and three fellow Indians, represented by the ACLU, against the state of South Dakota for failing to submit a legislative redistricting plan for preclearance. The district judge in 2004 invalidated the plan, which diluted Native American voting strength, and issued a 144-page opinion that contained a detailed history of South Dakota's discrimination against Native American voters, including several instances since 1999. Among these recent instances were illegal denials of the right to vote in certain elections, dilutive voting schemes in elections for county commissioners and school board members, barriers to voter registration, intimidation and unsubstantiated charges of vote fraud, non-compliance with the

Voting Rights Act's language assistance provision, and lack of access to polling sites. Legislators engaged in debate over an unsuccessful bill to make it easier for Indians to register were quoted in the opinion as expressing prejudice against Indians. Alluding to Indians, one legislator said, "I'm not sure we want that kind of person in the polling place."[138]

On the positive side of the ledger, there appears to be a notable increase in Native American voter turnout in recent years, which traditionally has been quite low.[139] Moreover, largely as a result of prolonged voting rights litigation, eight majority-Native American legislative districts were recently created in Montana.[140] (Eight Native American legislators now serve, as well.) The redistricting was conducted by a bipartisan committee appointed by the state Supreme Court, with a Native American tie-breaker.[141] This success in Montana brought the number of Native American legislators nationwide in 2005 to 37 in 13 states.[142] Native Americans composed 13.7 percent of Alaska's VAP in 2000. In 2006, both U.S. Senators and the state's U.S. Representative are white. However, there are seven Alaska Natives in the sixty-member state legislature.[143]

Despite these advances, Indians continue to face numerous obstacles to full political participation, a fact underlined by an election protection project carried out in twelve states with a significant Indian population in 2004. Among the complaints listed on Election Day were 182 regarding registration problems, 22 regarding poll judges, 3 regarding poll watchers, 29 regarding voting machines, 14 regarding provisional ballots, 37 regarding absentee ballots, 8 regarding intimidation, and 8 of a miscellaneous nature. There is no way to know how large a universe of actual voter problems besetting Native Americans these registered complaints represent, and they are not easy to summarize. However, a few examples suggest the kinds of difficulties Native Americans continue to face at the dawn of the twenty-first century.

- "Several poll workers made comments on how everybody should have to speak English in order to vote, or were questioning people based on their speech patterns." (Washington)
- "Native voters were not as consistently offered provisional ballots as White voters were." (Montana)
- "Man taking photographs of voters was not asked to stop or leave." (Michigan)

- "Female went to go vote and was told by three men that she could not vote there, but instead had to 'go vote on the reservation'." (Washington)
- "A poll watcher photographed 4 Native voters at least two of whom cast provisional ballots." (Washington)[144]

Similar complaints were voiced by several persons from several states in Indian Country who testified at the Commission's hearing in South Dakota in Rapid City. Among the numerous discriminatory practices mentioned there were intimidation by polling officials, racial gerrymandering, and gross malapportionment of districts—a practice outlawed by the Supreme Court in 1964.[145]

Professor McCool testified at the South Dakota hearing that among the problems Indians face are the false but "widespread perception" that Indians are not taxpayers, and thus shouldn't be allowed to vote, "especially in state and local elections"; the long distance from place of residence to polling stations, "especially over bad roads; polls that are not located conveniently or not on Indian reservations; hostility among election workers and public officials; the purging of voter lists; a poor understanding of election laws and procedures; difficulties and resistance when attempting to register to vote; and efforts to dilute the impact of Indian voting."[146]

McCool's concluding opinion was that while Indians are achieving "remarkable gains" in some places, the "Voting Rights Act, . . . including Sections 5 and 203, has played a pivotal role in providing American Indians with an opportunity to vote and elect candidates of their choice. The impact is enormous."[147]

Asian Americans

Asian Americans alone in 2000 composed 3.6 percent of the population and 2.6 percent of its citizen VAP; Asians in combination with one or more other races (including Native Hawaiian and other Pacific Islanders) composed 4.2 percent, or 11.9 million people. Of these, 49 percent lived in the West, 20 percent in the Northeast, 19 percent in the South, and 12 percent in the Midwest. (**See Map 4D**.) Slightly more than half lived in three states: California (4.2 million), New York (1.2 million), and Hawaii (0.7 million). New York City and Los Angeles ranked first and second in terms of the size of their Asian population, followed by San Jose and San Francisco. Chicago and Houston ranked seventh and eighth, respectively. Seattle ranked tenth. The Asian population is quite diverse in terms of national heritage, embracing over twenty-five groups. The five largest are

Chinese (except Taiwanese), followed by Filipino, Asian Indian, Vietnamese, and Korean.[148]

Like the other minority ethnic groups described in this Report, Asian Americans have a history of subjugation and discrimination by the white majority spanning centuries and continuing, in attenuated form, into the present. Vicious anti-Chinese sentiment in nineteenth century California led to the Chinese Exclusion Act of 1882, the first time in American history an entire ethnic group was singled out and legally forbidden entry. Gradually expanded to include other Asian groups, it continued in force until 1943.[149] Much more recently, more than 110,000 West-Coast Japanese, 64 percent of whom were citizens, were imprisoned during World War II, solely on the basis of their ethnic heritage, losing much of their property in the process—an act approved by the U.S. Supreme Court in 1944 and later repudiated by Congress.[150] Recent studies show continued hostility toward Asian Americans on a wide scale.[151] A recent Gallup poll on discrimination in the workplace, cited by the U.S. Equal Employment Opportunity Commission, found that 31 percent of Asian-American workers perceived that they had been subjected to discriminatory or unfair treatment—the highest percentage for any group. (African Americans were second, with 26 percent.)[152]

There has been a sharp increase in Asian-American immigration over the past generation. From 1970 to 2000, the population of this group increased from 1.5 million to its current 12 million, much of it as a result of immigration.[153] While the proportion of Asians among the continuing influx of immigrants from all continents to America is relatively small, it has provoked some nativist prejudice. Race crimes and hate incidents against Asian Americans have received attention in the media and by scholars.[154] Anti-immigrant attitudes undoubtedly account for some of the difficulties Asian voters face at the polls—difficulties described in detail at various hearings by the National Commission on the Voting Rights Act.[155]

It may also make the election of Asians to office more difficult than it would otherwise be. The number of Asian Elected Officials (AEOs) has increased very modestly from 120 in 1978 to 346 in 2004, in spite of an eight-fold increase in the Asian population between 1970 and 2000. Seventy-five percent of AEOs in 2004 were local officials, as distinct from state or federal ones.[156] It is true that six AEOs currently serve at the national level, most notably U.S. Senator Daniel Inouye of Hawaii, a veteran of World War II, where he was a member of the famous Japanese-American 442nd Regimental Combat Team—the most highly decorated unit of its size in American history. Another, California Representative Mike Honda, was elected in 2000.

He spent his early childhood in an internment camp (as did fellow California Congresswoman Doris Matsui), and today is one of five vice-chairs of the Democratic National Committee. But there is indirect evidence, at least, that Asian Americans, like other minorities of color, face racially polarized voting in many elections. James S. Lai, pointing to the relatively low number of AEOs, suggests the lack of Asian-American population concentration in most jurisdictions as an explanation, and he notes that where there is such concentration, particularly in California suburban communities, the number of AEOs rises.[157]

In recent years, civil rights groups have mounted extensive election protection programs, and their findings yield insights into some of the reasons there are relatively few AEOs. Glenn D. Magpantay, a staff attorney with the Asian American Legal Defense and Education Fund (AALDEF), has reported on election problems these citizens confronted on Election Day 2000 in New York City; and his organization more recently has reported on such problems in a study of eight states and twenty-three cities in 2004. New York City is particularly interesting in that its Asian population grew by 71.1 percent in the decade of the nineties, compared to the city's total growth of 9.4 percent, such that, by the turn of the century, Asians composed 10.9 percent of New York City's population.[158] (Several of the city's boroughs are covered for Chinese and/or Korean languages under Section 203.) Among the problems discovered in 2002 were faulty translations of bilingual ballots, signs, and voting materials; an absence of translators at polling sites; poorly trained, rude, threatening, or hostile poll workers; numerous omissions of Asian American voters from voter lists; confusing changes in poll sites; and breakdowns in voting machinery.[159] AALDEF's far more comprehensive investigation of the 2004 election revealed many of the same problems, and provided a quantitative classification of them. The authors concluded that "more must be done to ensure that Asian Americans can fully exercise their right to vote."[160]

The AALDEF findings were corroborated by those of the National Asian Pacific American Legal Consortium (NAPALC), now known as the Asian American Justice Center, resulting from that group's intensive monitoring and exit polling during the 2004 presidential election of eight counties across the nation with significant Asian American populations. NAPALC listed both "good practices" and problems that came to light as a result of their investigations. The problems were by and large the same type as those uncovered by AALDEF.[161] These may partly account for the significantly lower turnout among Asians as compared to Anglos and blacks. According to the Census Bureau, only 43.3 percent of Asian

voting-age citizens reported voting in November 2000, as compared to 61.8 percent of Anglo citizens.[162]

In summary, this brief overview of the demography and electoral status of these four major ethnic groups indicates that, in spite of their differences, they share many politically relevant similarities. All of them have been treated badly by the dominant white population for many generations. All have suffered violence, humiliation, and various forms of disfranchisement. Unfortunately, discrimination arising from racial prejudice is far from disappearing. Significant numbers of citizens among three of the groups continue to face problems at the polling place because they are not proficient in English, even though they wish to exercise their basic right to vote. All four groups are protected by the permanent features of the Voting Rights Act, and many of their members are also protected by one or another of its nonpermanent features.

CHAPTER FIVE

Enforcement of the Act Through Its Temporary Provisions

Responsibility for enforcement of the Voting Rights Act rests in large measure with the Department of Justice and, more specifically, the career attorneys and other staff in the Voting Section and their administrative superiors. Thus, a logical way to begin an inquiry into the extent of continuing vote discrimination is to examine records kept within the Department's files. The Act also gives private parties an important role in enforcement, and while there are no recent systematic studies of which the Commission is aware that try to determine the extent of such enforcement efforts by non-government personnel, this question will also be briefly examined.

The Section 5 Objection Process

As the result of forty years of experience, the Department has developed an efficient, practical, and sensible way of handling the thousands of submissions for preclearance it receives every year. The Section 5 unit of the Voting Section handles the bulk of the submissions, with assistance from the section's litigators when necessary. The Section 5 unit comprises attorneys, civil rights analysts, and support staff who are specially trained to analyze the submissions, and they have developed specific protocols for processing them through each step of the process.[163]

The Department has also issued detailed guidelines relating to the substance and procedure of Section 5 review.[164] The guidelines set forth the elements that each submission should contain, including clear references to the voting change or changes in each submission, the date each change was adopted and will take effect, and a statement of the anticipated effect of each change on racial or language-minority groups.[165]

The importance of a Section 5 objection bears remarking on. An objection is a legal finding that originates when the staff—lawyers and civil rights analysts in the Voting Section assigned to a particular submission—spots possible problems in it. For submissions that are potentially objectionable, the staff becomes extremely familiar with the racial and political dynamics of the jurisdiction. They write or telephone both officials and minority leaders in the community, including elected officials, candidates, or other minority citizens involved in the electoral process. For redistricting submissions, the Voting Section statistician performs a racial bloc voting analysis.

Moreover, any citizen may initiate contact and meet with Department staff, either to call attention to problems or express support for changes.[166]

There has been a long-standing process in place for making a determination on a submission. The Section 5 staff assigned to it makes a written recommendation to object or preclear a submission and sets forth the reasons therefor. Decisions to preclear routine submissions have been delegated to the Chief of the Voting Section, and jurisdictions are notified by letter that the change or changes have been precleared. If the recommendation is to object or to preclear any statewide voting change, the Chief of the Voting Section reviews the recommendation and, in writing, either indicates agreement or disagreement with the recommendation. The Assistant Attorney General for Civil Rights, acting under the authority of the Attorney General, then makes the ultimate decision about an objection.[167] Subject to a caveat below, an objection letter implies that *at least one proposed change in the jurisdiction's submission would violate, on the basis of race or color or membership in a language-minority group, legally guaranteed voting rights of citizens.* The targets of discrimination are virtually always racial minorities and language-minority citizens. An objection, in other words, is an instance of vote discrimination that would have been perpetrated by local government officials were it not foiled by Section 5.

A single submission by a covered jurisdiction may contain more than one proposed change in election procedure, and an objection letter may, in one stroke, prevent several discriminatory measures from being enacted. Indeed, quite a few of the submissions over the years each included three or more proposed discriminatory changes that were not precleared. In the data on objections that follows, the term *objection* refers to an objection letter, not the change or changes objected to in the letter. Overall, the average objection letter denied preclearance to 1.4 proposed changes.[168]

The caveat is that some objections are later withdrawn. Sometimes these withdrawals are made because objectionable changes are compensated for by ameliorative ones. A common reason for the Department's withdrawing an objection to a proposed dilutive annexation, for example, is the jurisdiction's agreement to change their election system from at-large to single-member districts. In such a case, even a withdrawn objection indicates a potentially discriminatory change which has been compensated for under Department supervision. But on other occasions, withdrawals may result from the Department's changing its mind after further communications with a jurisdiction. Because the data shown in our maps include objections that were later withdrawn as well as the

much larger number of those which were not, they slightly overstate the number of discriminatory changes. Until further research is conducted into the reasons for all withdrawals by the Department of Justice, the exact relationship between the number of objection letters and the number of discrete objectionable changes cannot be known.

Objections Interposed Over Four Decades

What are the facts regarding the number of objections? To answer this question, copies of all objection letters were obtained from the Department of Justice.[169] Between the issuance of the first objection in June 1968 and the last one for the year 2004, there were 1,116 objections interposed by the Department of Justice, prohibiting 1,589 distinct proposed election-related changes judged to be racially discriminatory. Second, the number of objections (626) interposed between August 5, 1982, when Section 5 was last reauthorized and December 30, 2004 was actually greater than the number before that date, constituting 56 percent of the total since 1968. To be sure, the two time periods are unequal as well—the post-1982 period comprises approximately 59 percent of the total period Section 5 has been in effect. Moreover, as Arizona, Alaska, and Texas only came under coverage in 1975, the percentage of objections in those states might well have been greater in the pre-1982 period than in the latter period if these states had been covered since 1965. Nonetheless, it is obvious that a considerable number of objections were interposed after 1982.

To put the matter in terms of averages, 268 months elapsed between August 6, 1982 and December 31, 2004. The number of objection letters in that period averaged more than four per month. Had it not been for the preclearance mechanism, therefore, considerably more discrimination would have occurred in the past twenty-three years than actually has occurred. Furthermore, the number of changes to which objections were interposed is probably not the total number of discriminatory changes in election procedures intended by covered jurisdictions. The Department has no means to systematically monitor all such jurisdictions to ensure that all changes are actually submitted for preclearance, and some probably were not submitted and were then enacted into law. In one troubling case it was discovered, in the words of a federal judge, "from . . . 1976 [when two counties in South Dakota were first subject to Section 5] until 2002, South Dakota enacted over 600 statutes and regulations that affected elections or voting in Shannon and Todd Counties, but submitted fewer than 10 for preclearance." Only after Indians in the

counties brought suit against the state in 2002 to enforce compliance with Section 5 did the state begin to submit the statutes to the Department of Justice.[170] The Department continues to examine these South Dakota submissions as this Report is being written. In the 1990s, private parties brought actions against at least nine Alabama jurisdictions found not to have submitted changes. All were then required to submit them.[171] One leading voting rights litigator, Joaquin Avila, believes many voting changes have not been submitted. In *Lopez* v. *Monterey County*,[172] seven different voting changes relating to electing judges in Monterey County, California, between 1972 and 1983 were not submitted for preclearance until the county and the state of California were compelled to do so as a result of litigation in the 1990s.

In circumstances where jurisdictions go years and sometimes decades without submitting voting changes and then the changes are submitted at one time, the Department of Justice is placed in an awkward position where, even if changes might be discriminatory, it is difficult to object for practical reasons. For example, even though Monterey County stipulated at one point during the *Lopez* litigation that voting changes at issue violated Section 5,[173] those same changes were eventually precleared by the Department of Justice.[174] Though the reasons for the preclearance are confidential, the *Lopez* cases discuss at length the difficulty of trying to undo a series of unsubmitted precleared changes.

It is unknown how many changes were not submitted for preclearance by covered jurisdictions, and of those, how many were discriminatory. This problem was described in 1984 by Drew Days and Lani Guinier, the former of whom served as Assistant Attorney General for Civil Rights in the Carter administration, and the latter as Days' assistant at the time. They attributed the absence of a systematic method for identifying unprecleared changes to underfunding by Congress. [175]

Map 5A shows, by state, both the total number of objections interposed by the Attorney General from 1966 through 2004 and the number from August 5, 1982 through 2004. **(See Map 5A**.) The states are color-coded to indicate the non-white proportion of the voting-age population (VAP).[176] The map shows that in nine of the sixteen Section 5-covered states, more objections were interposed after 1982 than before.[177]

The continuing pattern of proposed discriminatory changes that would have been implemented had they not been prohibited by the Department of Justice is also obvious in Map 5B, which shows only objections to statewide changes—primarily redistricting of legislatures or congressional delegations. (**See Map 5B**.) These are, as a type, the

most newsworthy objections, as they affect the most people in the state. The number of statewide objections in the covered jurisdictions before 1982 was eighty-six, compared to eighty-eight afterwards.

Objections in the Southern "Black Belt"

A noteworthy fact shown in Maps 5A and 5B is that all but two of the sixteen states covered entirely or partially by Section 5 are states with a large non-white population—Latino, black, and others. In Texas, Arizona, and California in particular, there are sizable Hispanic populations, which include many recent immigrants from Mexico.

The close link between large non-white populations and objections is also strikingly visible within individual states whose counties on the maps are color-coded by percent non-white VAP.[178] (**See Maps 5C-5K.**) These are maps of all states, except Alaska, that are completely covered by Section 5, as well as North Carolina, forty of whose counties are covered.[179] As can be seen, the objections were concentrated in the so-called "Black Belt" of most southern states, including the majority-minority counties—those areas V.O. Key, the pioneering scholar of twentieth-century southern politics, identified almost sixty years ago as being most resistant to black enfranchisement.[180]

On the other hand, in Texas, where the most heavily non-white counties (60-100 percent) are predominantly majority-Latino, located along the Mexican border, there were few objections in the post-1982 period. Even so, the 40-60 percent non-white Texas counties are far more likely than the remaining ones with smaller minority populations to have experienced objections. Numerous East Texas counties, whose minority population is largely black, are locales where numerous objections were interposed. This was the area in which most of the slave plantations were located before the Civil War. In Louisiana, Orleans Parish, which includes the city of New Orleans, is another majority-minority jurisdiction where there have been no objections in the post-1982 period. It is not surprising that there are areas with a predominant minority population where there have been none. In these, there may be enough minority officials to protect the interests of minority voters.

Nonetheless, Section 5 has helped prevent discrimination against those voters when statewide changes are at issue. For example, the Department of Justice objection to the Texas State House redistricting plan in 2001 was predicated on the state's attempt to eliminate effective districts for Latino voters in heavily Latino South and West Texas.[181] Orleans Parish has also been the

focus of voting rights litigation in statewide redistricting: the 1980s congressional redistricting plan was found to dilute minority voting strength there[182] and the post-2000 effort to eliminate a majority-minority state house district in Orleans Parish was thwarted by the Section 5 process. Louisiana elected to abandon its Section 5 declaratory judgment action when it became apparent that the court was going to rule against it.[183]

Examples of Section 5 at Work

Section 5 has proven to be effective and efficient in preventing discriminatory voting changes. Because the burden is on the covered jurisdiction to show that its proposed changes are not discriminatory, preclearance is efficient in a way that Section 2 often is not. For in a Section 2 case, the burden is on the plaintiff, and shouldering that burden can be costly. Some suits last for years, involve appeals to the Supreme Court, require numerous lawyers and experts, and then are often won by defendants. Section 5, on the other hand, typically involves a swift process in which an intended electoral change is submitted by letter to the Department of Justice, examined by government staff with expertise in voting, and either precleared or objected to within several weeks at most. If the Department objects, the proposed change cannot become law. On the other hand, if the change is precleared, it can quickly be put into effect.

The differences between Section 2 and Section 5 are exemplified by two very different legal remedies that were recently obtained in Charleston County, South Carolina. In one, the Department of Justice and private plaintiffs filed an action in 2001 alleging that the at-large method of electing the nine-member county council, in combination with racially polarized voting, diluted minority voting strength in violation of Section 2.[184] In a county that was more than one-third black, no black candidates preferred by black voters had been elected in a decade, despite a cohesive black vote for several of them. The court's opinion favoring the plaintiffs found a pattern of racially polarized voting. It also pointed to several instances in which African American voters were harassed and intimidated at the polls, and to political campaigns in which white candidates overtly or subtly raised the issue of race.[185]

The opinion was affirmed unanimously by the Court of Appeals for the Fourth Circuit,[186] and in the first election by districts, in 2004, black voters elected three black council members favored by black voters. The Section 2 suit responsible for this result was very expensive. Charleston County spent more than $2 million defending its discriminatory election system. The county was ordered to pay the

private plaintiffs' attorneys' fees, which amounted to several hundred thousand dollars. In addition, the Department of Justice expended substantial resources in attorney time, travel costs, expert fees, and deposition expenses.

Like the county council, the Charleston County School Board has nine members. At the time of the county council trial, a majority of the school board, elected by a different method from that used by the county council, was black.[187] In 2003, while the county council case was on appeal, the South Carolina General Assembly, led by legislators from Charleston County, enacted a law changing the method of electing the school board to that which had been successfully challenged in the county council case. The Department of Justice objected to the change on the ground that it would decrease minority voting strength.[188] The Section 5 process thus prevented the implementation of a discriminatory voting change that could have taken several years and millions of dollars to invalidate in a Section 2 lawsuit.

In addition, Section 5 also serves to maintain gains achieved through Section 2 suits. A dramatic example of this was given at the Commission's Mississippi hearing. As described by Brenda Wright, Managing Attorney at the National Voting Rights Institute, it concerned that state's dual registration system, which was a relic of the state's 1890 constitutional convention called for the purpose of disfranchising blacks. Following Congress's amendment of Section 2 in its reauthorization of the Act in 1982, Mississippi's system was finally challenged by a Section 2 suit, and in 1987, a federal court found that the system was adopted for a discriminatory purpose and had a discriminatory effect, accounting, in part, for the 25 percentage-point difference in the registration rates of blacks and whites.[189] However, following passage of the National Voter Registration Act (NVRA) in 1993, the state once more adopted a dual registration system, becoming the only state in the union to require people who registered to vote in federal elections at drivers' license offices and other NVRA-sanctioned offices to register yet again for state and local elections. In contrast, people who registered with the circuit clerk were allowed to vote in all elections. After at first refusing to submit the changed procedure to the Department of Justice for preclearance, Mississippi was forced to do so by a Section 5 enforcement action, with the U.S. Supreme Court unanimously ruling that the state was required to submit the change. When the state did so, the Department of Justice issued an objection, finding, just as the court had found in the 1987 Section 2 case, that the new dual system was racially discriminatory both in purpose and effect.[190]

Section 5 has also played a significant role recently in Alaska. During the last redistricting cycle, the Alaska Redistricting Board took special care to preserve existing "Native Districts"–districts which provided Native voters the opportunity to elect the candidates of their choice.[191] The board hired an expert, Lisa Handley, to determine whether the legislative plan it proposed complied with Section 5,[192] and she concluded that it did.[193]

Voting rights advocates in Alaska believe that the Act is vital in protecting Native interests. Native Alaskans for Fair Redistricting, a coalition seeking the implementation of "an equitable redistricting plan that will serve to provide the best representation to Alaskan voters," was involved in the 2001 redistricting process.[194] This group worked with Alaskan Native leaders to ensure compliance with the Act. According to Myra Munson, an attorney for Alaskans for Fair Redistricting, overall the Act "has had the effect of causing all parties to consider the need to protect Native districts in a way they might ignore" if the state were not covered. "This is important since it means substantial areas of the state are protected prior to the more partisan wrangling that occurs regarding the rest." [195]

Moreover, the deterrent effect of Section 5 is substantial. Once officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result. Conscientious officials, therefore, have a vested interest in submitting changes that will quickly be precleared. There was substantial hearing testimony about the deterrent effect of Section 5.[196]

Section 5 Declaratory Judgment Actions in the U.S. Court for the District of Columbia

So far the focus has been primarily on the best-known and most frequently used measure of a covered jurisdiction's efforts to pass discriminatory laws—Department of Justice objection letters. However, these are just one indicator of intended discriminatory changes. Another is *unsuccessful* Section 5 declaratory judgment actions brought by jurisdictions in the three-member U.S. District Court for the District of Columbia. As noted earlier, jurisdictions covered by Section 5 always have the option of bypassing the Department of Justice and going directly to the D.C. Court for preclearance. Jurisdictions' unsuccessful actions were relatively few compared to Department objections—there were a total of forty-two. [197] However, the same pattern exists, regarding the distribution

of these judicial "objections" since the 1960s, as exists for Department of Justice objections. The majority (twenty-five) occurred in the post-1982 period. (**See Map 6**.)

Section 5 Submission Withdrawals

There is yet another measure of discriminatory electoral changes proposed by covered jurisdictions, known as a *withdrawal letter*. This is not to be confused with a Department of Justice withdrawal of an objection described above. Rather, this is a jurisdiction's official notification to the Department that it is withdrawing one or more proposed changes submitted earlier, following inquiries by the Department.

When the Voting Section staff is considering submissions for preclearance, it often comes across one that seems potentially but not clearly discriminatory. When this occurs, it is standard procedure to send a letter to the submitting jurisdiction requesting more information before making an objection or deciding to preclear. Sometimes the language of the letter can signal that the Department is likely to object to the submission. In some cases, jurisdictions respond to "more information letters" by supplying the additional material requested and then receiving either a preclearance or an objection letter. But in other cases, jurisdictions decide to withdraw the proposed change or changes in question. Such a withdrawal letter is frequently a tacit admission of one or more proposed discriminatory changes and has the same practical significance as an objection letter—a proposed change is not put into effect.[198]

Jurisdiction withdrawals between August 5, 1982, and December 30, 2003 were calculated from data on submissions provided by the Department of Justice under the Freedom of Information Act.[199] There were at least 205 withdrawal letters during this period. This compares to 626 objection letters in approximately the same period. As with objections, withdrawals refer to submission letters that may contain more than one illegal change. The most common changes involved polling place location, as well as redistricting and precinct boundary alignment. However, they ran the gamut of electoral changes that were targeted by objection letters as well, including registration procedures, election administration, annexation, purging of voter rolls, term of office, type of elections adopted, number of elected officials, and qualifications of candidates. A comparison of Map 7, showing withdrawals, with Map 8, showing objections during the same period, indicates that the geographical distribution of withdrawals was similar to that of objections, although

Texas outranked Mississippi in the total number of withdrawals. (**See Maps 7 and 8**.)

Because these three phenomena discussed so far—objections, adverse declaratory judgment actions, and submission withdrawals—roughly measure the same thing, they can be summed to obtain a more accurate depiction of an estimate of covered jurisdictions' proposed discriminatory actions that failed to obtain preclearance since Section 5 was last reauthorized. The sum for each state from August 5, 1982 on is seen in Map 9. It is particularly useful to compare it with the previous map showing only objections during the same period. **(See Maps 8 and 9.)** The sum in most of the covered states is much higher than the number of objections alone. In Texas, for example, the sum of the three is 70 percent higher than the number of objections; in Georgia, 48 percent higher; in South Carolina, 31 percent higher; and in Mississippi, 29 percent higher. Overall, the sum (856) is 40 percent higher than the number of objections (626).

Procedure for Federal Observer Coverages

There are yet other indicia of actual and potential discriminatory behavior against voters that are not equivalents of Section 5 objections but which provide suggestive information about the status of minority voting rights. One of these is an observer coverage. As mentioned above, Sections 3 and 6 of the Voting Rights Act allow the federal courts and the Attorney General, respectively, to certify certain jurisdictions for the presence of federal examiners—officials who in the early days of the Act were empowered to help register minority voters in those certified jurisdictions, at a time when white registration officials prevented such registration. Today, the examiners do not play an active role, but Section 8 authorizes the Department of Justice to request that federal observers be sent to monitor polling places during elections in those jurisdictions which have been certified for examiners.[200] Typically, such a request results from communication among Voting Section lawyers and local officials, minority leaders, and U.S. Attorneys in various communities in the months before Election Day to determine whether voting rights violations are expected. In many cases, the message from these jurisdictions is that no problems are anticipated. But in other cases, racial tensions may be running high, or there may be threats of vote suppression efforts or perhaps inflammatory political rhetoric in a campaign involving minority candidates. Such situations indicate a federal presence is needed.

In a jurisdiction already certified by a court or the Department of Justice, the Assistant Attorney General for Civil Rights must give his approval before trained observers, usually employees of the Office of Personnel Management, are sent to the locales, where they take careful notes at polling places and vote-counting sites.[201] If the jurisdiction has not already been certified either by the Department of Justice or a court, the Attorney General must personally do so. Plans to send observers are usually made at least three weeks in advance of elections but decisions are sometimes made immediately beforehand.

On Election Day, the observers at the polling site are in contact with observer co-captains who travel between sites. In the event of a problem, the co-captains notify the captain and the Department of Justice lawyers present for the election, who then notify the jurisdiction's chief election official of the problem and attempt to resolve it on the spot. On the evening of the election, the observers are debriefed by the lawyers, and the observers then complete extensive written reports, known as observer reports. Some reports indicate that little or no discrimination occurred. At other times, efforts at vote discrimination are detailed. Even when nothing is reported, the presence of federal observers has a deterrent effect. Unlike ordinary poll watchers authorized by state or local laws, federal observers are allowed inside the polling place, as well as where the ballots are counted. In the words of a former Deputy Assistant Attorney General in the Civil Rights Division, "posting volunteers outside a polling place helps, but . . . you can't go in and face-to -face talk to election officials . . . . [As a mere election-protection worker] your hands are tied in a lot of ways."[202]

The Pattern of Observer Coverages

For purposes of analysis, each occasion when federal observers are detailed to a jurisdiction covered by Section 5 or by Section 203 is referred to as one *observer coverage*, even though several observers may have been present. (In the post-1982 period, for example, there were 250 coverages in Mississippi involving over 3,000 federal observers.) At the very least, such a coverage is related to potential vote discrimination: observers are sent because there are reasonable grounds in the opinion of the Department of Justice to expect discrimination on Election Day.[203] However, it is obvious that an observer coverage does not represent the same type of phenomenon as does an objection, a withdrawal, or a declaratory judgment, and so the number of such coverages was not added to the sum to produce Map 9 above. Nonetheless, as an indicator of at least potential (and sometimes actual) vote discrimination, the list of observer coverages is

an important data set. Their number (1,142 total) and geographical dispersion by state since 1966 are indicated in Map 10A. (**See Map 10A**.)

The more recent pattern of coverages among the states is somewhat different from patterns in previous maps, as seen in the next set of maps that focus on the post-1982 period. Map 10B shows a fairly high number in New Mexico, a state not covered by Section 5 but rather by Section 203. (Federal courts have approved settlement agreements providing for observer coverages in several of that state's counties.) On the other hand, there were relatively few in Texas. Significantly, however, Louisiana, Mississippi, Alabama, Georgia, and South Carolina—five of the six states originally covered by Section 5—accounted for 66 percent of all 622 coverages since 1982. **(See Map 10B.)**

Mississippi alone, long considered the most resistant of all states to black voting rights, accounted for 40 percent. Mississippi also ranks highest among the fifty states in terms of the proportion of African-American population. Maps of observer coverage since 1982, by county, in five of the six states originally covered entirely by Section 5 are shown in individual maps.[204] (**See Maps 10C-G**.) To the extent that coverages are indicia of continuing racial troubles on Election Day, these maps suggest that such troubles are ongoing. And the most intense battles, it would seem, are in those counties that are more than 40 percent nonwhite—the legendary Black Belt. In Alabama, for example, the great majority of the coverages in the post-1982 period occurred in counties that were over 60 percent nonwhite, and almost all of the rest in counties that were at least 40 percent nonwhite. In Georgia, Louisiana, and South Carolina, too, most coverages were in counties 40 percent or more nonwhite.

Mississippi, however, stands out among these states in the number of coverages in counties less than 40 percent nonwhite. True, a large number of the coverages are concentrated in heavily black Mississippi Delta counties. But others are liberally scattered among the 20-40 percent nonwhite counties, and some even in the 10-20 percent counties. The heavily black counties in the northwest part of the state, ten to be precise, accounted for 100 coverages in the post-1982 period alone—more in absolute numbers than in any entire state but Mississippi. In fact, those 100 coverages between 1982 and 2004 outnumber the entirety of coverages in any states but Alabama and the rest of Mississippi in the period between 1966 and 2004.

According to Barry Weinberg, an experienced former Department of Justice lawyer involved in the observer process since the 1960s, the need for observers is still great:

> Violations of the Voting Rights Act continue to happen in polling places throughout the United States. The need for federal observers to document discriminatory treatment of racial and language-minority voters in the polls has not waned. The use of a thousand or more federal observers at election after election beginning in 1965 decreased to the use of hundreds of observers at elections after the early 1980s as a result of the effective enforcement of the Voting Rights Act in Southern states. But the enforcement of the language-minority provisions of the Voting Rights Act, added in 1975, has required the use of hundreds more federal observers to disclose to Justice Department attorneys evidence of harassment of members of language-minority groups, and instances where ballots and other election material and procedures are not available to those voters in a language they can understand. The result is that between 300 and 600 federal observers continued to be needed annually from 1984 to 2000. The facts supplied by federal observers to Civil Rights Division attorneys are crucial and irreplaceable in the enforcement of the Voting Rights Act. Most parts of the voting process are open to the public, and the evidence of Voting Rights Act violations that are involved in the voting process can be obtained by Department of Justice lawyers through routine investigations. But most state laws limit access to polling places on election day, allowing only voters and polling place officials to remain in the polls (police are allowed too when called to deal with disturbances). Thus, unless an exception is made in these rules to allow federal investigators to get special access to the polls, the harassment of racial and minority language voters and other violations of the Voting Rights Act inside the polling places would go unseen and unchecked.[205]

Weinberg's point was brought home in some of the hearing testimony. Events in Hale County, Alabama, and its county seat of Greensboro, deep in the state's Black Belt, were discussed by State Senator Bobby Singleton. [206] The senator mentioned one especially tense situation in 1992, during the elections of the first blacks in the city:

> We had at that time, still, white minorities . . . in that community who were still in control of the electoral

> process, holding the doors, closing the doors on African-American voters before the . . . voting hours were over. I . . . had to go to jail because I was able to snatch the door open and allow people who was coming from the local fish plant . . . whom they did not want to come in, that would have made a difference in the . . . votes on that particular day. We've experienced that in the city of Greensboro . . . over and over again, and even in the county of Hale . . .[207]

The Department of Justice, Singleton added, was contacted many times to prevent efforts to change voting hours and to prevent "intimidation of black voters going to the poll." As a result of Department intervention and the presence of federal observers, he said, blacks in the county are now a majority on many if not most of the elected governments in Hale County—school boards, the county government, "most of the cities in the area," and, Singleton added, "we were able to elect a black circuit judge, black circuit clerk, myself as a state representative . . ."[208]

The impact observers can have in documenting problems at the polls is perhaps best illustrated by events in Reading, Pennsylvania, as related by Carlos Zayas, a lawyer and voting rights activist in that city who testified at the Northeast Regional hearing, and in the court's findings in *United States* v. *Berks County*.[209] In *Berks County*, the court allowed the Department of Justice to deploy observers to the city because of evidence that Latino voters were treated unfairly at the polls.[210] Subsequently, the observers documented what the court described as "substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials, including but not limited to asking Latino voters for identification although there was no identification requirement at that time."[211] Based on the evidence uncovered by the observers, the court issued a permanent injunction in favor of the United States that required Berks County to provide language assistance to Spanish-speaking citizens at all stages of the electoral process, and enabled the United States to continue to send observers.

In spring 2004, the Commission staff requested from the Voting Section all observer reports from 1982 on to the present. Citing concerns about protecting the identity of the observers and complaining witnesses and the lack of staffing to redact this information, the Voting Section produced observer reports from only twenty-five elections. None of the reports involved African-American voters.[212] As a result, the reports received do not constitute a suitable

sample to reach broad-based conclusions about what federal observers have reported.

However, reports from twenty-one of the twenty-five elections were reviewed. In the majority of precincts observed, there were either no problems or minor ones. But in others, several notable problems came to light, including the following:

- Observers in Reading, Pennsylvania, documented several instances of poll workers making unwelcoming statements about Hispanic voters, including the following:
  - "This is why we don't like you Hispanic people coming here, you get everything messed up."[213]
  - "I don't know why the ballot is in Spanish if Hispanics don't know how to read."[214]
  - Poll workers making fun of a Hispanic voter, shouting "Hip, hip, hooray" and then the voter's name while the voter was in the booth.[215]
  - A poll worker asking a Hispanic voter: "Why do you guys have such long last names?"[216]
- Several examples where election materials were not in the minority language or were poorly translated.[217]
- Examples where minority voters were required to provide identification information but not requiring the same of white voters.[218]

In summary, observers have played a major role for decades in deterring race-based discrimination on Election Day, and evidence in numerous cities across the nation indicates the observers have served a useful role in the current century. The continued need for them in various states was emphasized by Joseph Rich, former Chief of the Voting Section, in his testimony before the Commission. He noted that in 2004 alone, the Department of Justice had dispatched a total of 898 federal observers and monitors to 85 jurisdictions.[219] The presence of these observers on Election Day has "consistently . . . had a calming effect curing highly charged elections in which there have been allegations of possible Voting Rights Act violations and has helped deter discriminatory acts," he asserted. Rich cited the presence of observers at several elections in Passaic County, New Jersey, as an example of their importance:

> The county was under a consent decree which required specific actions to bring the county into compliance with

> Section 203 . . . On the basis of information gathered [by the observers], the Department took legal action to ensure full implementation of Passaic's court-mandated language assistance program.[220]

The result of federal involvement on behalf of language assistance to voters led to the first election of a Latino mayor in the city.[221]

Section 5 Enforcement Actions

In addition to its administrative jobs of determining preclearance and monitoring elections through observer coverages, the Department of Justice may file suit to enforce the Act. (Private parties may also bring such actions.) For example, if a jurisdiction attempts to implement a voting change that has not received preclearance, the Department, either alone or in concert with private parties, may file suit under Section 5. In private Section 5 enforcement actions, courts often seek the views of the Department of Justice.

Such an enforcement action, for example, was filed in Waller County, Texas, in 2004, in which the city of Prairie View is located. The county contains historically black Prairie View A&M University within the majority-black city of Prairie View. In the 1970s, the county registrar went to dramatic lengths to prevent most students from voting, on the alleged ground that they were not legal residents of the county. Only legal action under Section 5 prevented the registrar from doing so, in a case that went to the Supreme Court.[222] In the early 1990s a number of students were indicted for "illegal voting"; all of the charges were subsequently dropped.

Two Prairie View students decided to run for local office in the March 2004 primary, including one for Waller County Commissioners' Court, the county governing body. The white criminal district attorney, a former state judge, threatened the predominantly black Prairie View student body with felony prosecution for illegal voting if they voted in the election. Almost five weeks before Election Day, the university chapter of the NAACP and five students sued the district attorney, who shortly thereafter backed down.

The issue did not end there, however. Less than a week after the lawsuit was filed, and a month before the election, the Waller County Commissioners' Court voted to reduce the availability of early voting at the polling place closest to campus, from seventeen hours over two days to six hours in one day. This was particularly significant because the students would be on spring break during the

day of the primary and would have to vote early if they planned on leaving town for the break.

A Section 5 enforcement action was filed by the university student NAACP chapter to enjoin Waller County from implementing this change without Section 5 preclearance. County officials abandoned the change and restored the additional eleven hours, which technically mooted the lawsuit, although the objectives of the suit were fulfilled. About three hundred Prairie View students took advantage of the early voting period, compared to sixty who would vote on the day of the primary, and the Prairie View student running for a seat on the commissioners' court narrowly prevailed in his primary contest.[223]

Map 11 shows the number of such actions either filed by the Department or in which it joined as a plaintiff intervenor or *amicus curiae*—a total of 107 between 1966 and 2004.[224] (**See Map 11**.) Consistent with previous maps, this one indicates that the majority (61) of suits reflecting discrimination occurred in the post-1982 period.

However, it is not known how many *successful* Section 5 enforcement actions have been filed, either by the Department of Justice or private citizens. The Department apparently keeps no record of them, or, to the knowledge of the Commission, does anyone else. In order to at least partially remedy the dearth of information on this subject, the Commission staff, utilizing a number of sources, compiled a list of such cases (both reported and unreported) in eight of the nine fully covered states (Alaska was the exception) plus North Carolina.[225] More precisely, the list contains only those cases, filed either by the Department or private plaintiffs, which were resolved favorably to minority citizens in the post-1982 period. The list is presented in Table 4. (**See Table 4**.)

The comparison of this table with Map 11 is informative. Both data sets pertain to the post-1982 period. Whereas the data provided by the Department of Justice displayed in Map 11 indicate 61 enforcement actions in which it was involved, including some which may not have been successful, the Commission staff identified 105 successful enforcement suits alone—i.e., ones in which the plaintiffs won at trial or, more typically, convinced a jurisdiction to settle. There may well have been other such suits not captured in either data set in the nine states under investigation. There were probably others in the eight partially covered states that were not the subject of the Commission's inquiry, not to mention the remaining fully covered state, Alaska. Therefore, the number of successful enforcement actions both by the Department and by private citizens since the Act was last renewed was significantly higher than the figures in Map 11.

Language Assistance Requirements

As explained in Chapter 3, various parts of the Act either require language assistance for people of limited-English proficiency under coverage formulas in Sections 4(f)(4) and 203, or protect Puerto Rican citizens from literacy requirements. When a language-minority population is eligible under either coverage formula for language assistance, it is the duty of the election officials in those jurisdictions to ensure that all needed election material is provided in the specified language. (In the case of certain American Indian and Native Alaskan languages that do not have a written language, interpreters are required at the polling site.) More is required, however, than simply the provision of written material in the covered language at the polls. Federal guidelines say that Section 203 "should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including for example the issuance . . . of notifications, announcements, or other informational materials concerning the opportunity to register, . . . the time, places and subject matters of elections, and the absentee voting process."[226] How well do the jurisdictions measure up to this standard? Put differently, how often do they violate the law by failing to provide what the Act requires?

In the hearings held by the Commission during 2005, testimony was heard depicting prejudiced attitudes of poll workers and other officials toward language minorities on Election Day. Sometimes these attitudes found expression in harassment and intimidation, and sometimes in simply not providing the assistance and materials the Voting Rights Act requires. Various civil rights groups also presented systematically collected data, typically acquired through election protection programs in the last four years, indicating that language-minority voters encounter polling place problems across the nation.[227]

Language Assistance in Practice: Responses from Administrators

Nonetheless, what has been lacking until quite recently is a study adhering to social scientific standards that measures the success of covered jurisdictions in meeting their legal obligations under the Act's language-assistance provisions. Some of the results of such a study were recently made public. It was conducted by a former senior trial attorney in the Voting Section, James Tucker; political scientist Rodolfo Espino; and a group of honors students at Arizona State University, where both Tucker and Espino teach. The findings are based on a survey sent to 810 covered jurisdictions in 33

states.[228] Over half responded, and complete responses were received from 361 jurisdictions in 31 states.[229] The purpose was to update previous studies by the General Accounting Office on the costs related to the language-assistance provisions, and also to "determine the practices of public elections officials in providing oral and written language assistance." The survey assessed

> the availability and quality of assistance in several different areas: the use of bilingual coordinators who act as liaisons between the election office and the covered language groups; recruitment and training of election day poll workers; telephonic assistance; oral language assistance at every stage of the election process; written language materials provided to limited-English proficient voters; outreach and publicity; and the ability of voters to receive assistance from the person of their choice.[230]

Regarding the cost of administering language assistance in its many facets, the study concluded that the fears of critics of Section 203 that it imposes high costs on local election officials "have not materialized."[231] However, it is also true that there are fairly high rates of noncompliance with some of the language-assistance requirements:

> Of the jurisdictions responding to the survey, 80.6 percent . . . report providing some type of language assistance to voters: 60.4 percent report providing both oral and written language assistance, 14 percent . . . report only providing written language materials, and 6.2 percent report only providing oral language assistance.[232]

In other words, about one jurisdiction out of five surveyed was in total noncompliance with these two basic provisions of the law, and less than two-thirds provided both oral and written assistance. There were other problems as well. Only 39.0 percent of jurisdictions provided assistance to telephone inquiries in all the covered languages in their jurisdiction; 57.1 percent reported not having at least one full-time worker fluent in the covered language; only 38.2 percent reported having a bilingual coordinator who speaks a covered language; and although the Department of Justice requires covered jurisdictions to have "direct contact with language-minority group organizations," only 37.3 percent reported having such contact. In addition, 76.2 percent reported translating more than half of all election materials; 32.9 percent reported that they provide language

assistance for more than half of all election activities; 66.2 percent reported that their poll worker training does not include information on the languages covered in their jurisdiction.[233] Noncompliance with Section 208, which provides assistance for "blindness, disability, or inability to read or write," was even greater than noncompliance for language assistance: "Only 10.3 percent . . . reported voter assistance practices that are at least as protective as Section 208," the study found.[234] Finally, in spite of the low levels of language assistance to voters reported by Tucker and Espino, their report also found that 71.3 percent of responding jurisdictions sampled believed the language-assistance mandate should remain in effect for public elections.[235]

The unimpressive level of assistance is difficult to reconcile with the relatively high degree of expressed support for the provision. However, there is the suggestion in the report that much of the noncompliance can be attributed to ignorance of the extent of the provision's requirement.[236] If so, perhaps a larger part of the government's enforcement efforts should be educational.

In some cases, however, the "education" can only be accomplished through litigation. Jorge Sanchez, a staff attorney with the Mexican American Legal Defense and Educational Fund's Chicago office, testified at the Midwest Regional hearing that "MALDEF has found that even sympathetic county registrars and clerks have dragged their feet in . . . translating election materials." In Cook County, which he termed "fairly friendly" to both immigrants and Latinos, "it was only after litigation that the clerk of Cook County ordered all materials to be translated" for Latinos, who are covered there by Section 203. Other jurisdictions in Illinois, he said, were even more difficult to convince—King County, for example. From 2001 through 2004, the county did little to prepare for its obligations in providing language assistance. "Even after they agreed that they were covered, that they had the obligation to translate everything, we found them fighting about what needed to be translated: 'Well, does it really have to be everything?'" According to Sanchez, it was only after the threat of litigation that King County finally did what was required.[237]

Lydia Guzman, Policy Director of the Clean Elections Institute, who has been involved in several voter registration efforts in the Latino community, emphasized the importance of Spanish-language election materials. She described how Spanish-language registration materials and ballots empowered limited-English-proficient citizens. She also recounted the difficulty her mother had had in casting her first vote ever in the 2004 election because nobody at the polling site was able to assist her in Spanish. "There were no bilingual assistants

outside," and so Guzman explained the voting procedure to her mother. "I thought I did a wonderful job explaining to her for the first time. [However], I forgot one important thing. So when she went in, she was lost. The poll workers, they didn't deny her the right to vote, but they did deny her the opportunity of being properly instructed in how to vote. It was a terrible experience for her. She was heart-broken because she thought maybe her vote didn't count."[238]

On the same topic, Alberto Olivas, former outreach coordinator for the Arizona Secretary of State, stressed the difficulties faced by Indians because of the complexity of the ballot materials. He also doubted that the state's programs would continue without Section 203.[239]

Examples of Effective Language Assistance Programs

Testimony at the Commission hearings pointed to the willingness of some election officials to comply enthusiastically with both the letter and the spirit of the law. Three themes were interwoven in this testimony: the fact that the federal mandate ensured better assistance both to covered and, in some cases, non-covered language groups; the belief that the expiration of Section 203 would lead many jurisdictions to revert to their old ways; and the impact of language assistance on voter turnout.

Progress in turnout among Indians was described in the Commission's hearings by Penny Pew, Elections Director of Apache County, Arizona, since 2001. Pew discussed the difficulties of providing language assistance to the 35,000 Native American registered voters in a county of 11,000 square miles. She described the techniques her office has employed to ensure that these voters are able both to understand their rights and to vote easily, using ballots in Navajo. These means include training poll workers in bilingual assistance, translating English materials into Navajo—a "time-consuming" task, in her words—as well as constructing pamphlets, making power-point presentations to poll workers, ensuring that transportation is available to those who need it, sending out early-voting trailers to remote areas, clearly identifying the large precinct boundaries through the use of special mylar maps, and explaining issues on the ballot, when necessary.

Pew was nonetheless enthusiastic about the language assistance her office provided to Navajos, and assured the Commission that "reauthorization [of Section 203] will help us continue with our program." Included in her packet of materials submitted at the hearing was a graph indicating increased turnout in presidential elections among Apache County residents between 2000

and 2004, which she believes resulted in part from her staff's efforts.[240]

The importance of Section 203 was also underlined by Shirlee Smith, a Navajo who serves as the Voting Rights Act coordinator for Bernalillo County, New Mexico. Smith discussed her work, which provides assistance and outreach to four Indian tribes located in the county. She described how because of Section 203, and the creation of her position, elderly Indian voters were able to participate in the election process for the first time. "It's really touched my heart to see our people," Smith said, "not knowing what the process is and how much their voice can be [heard], it's important to them, and it's important to us, . . . that they can make a difference."[241]

Some of the most interesting testimony regarding language assistance came from two women on opposite coasts charged with administering the language-assistance requirements, Conny McCormack and Margaret Jurgensen. McCormack, Los Angeles County Registrar-Recorder/County Clerk, provided the Commission with a variety of "outreach instruments," which included an instructional DVD created by her office, entitled "An All American Polling Place"; a printed election guide explaining the various kinds of voting machines; an analysis of the general election ballot, with arguments for and against propositions on the ballot; special instructions concerning language assistance in six languages; a colored brochure entitled "Voters' Survival Guide," including specific instructions on language assistance and information on the voter Web site; information on multilingual targeting; information on the "voter outreach committee"; an instructional pamphlet entitled "Cultural Interactions: Precinct Coordinator Continuing Enhancement Program"; and, among other things, examples of multilingual signs used in polling places and ads in various non-English-language newspapers in the county, giving advice to voters on when and where to vote.[242]

In light of the numerous comments made during the Commission's hearings regarding the lack of enthusiasm for language assistance among voting officials in some venues, McCormack's advocacy for effective use of bilingual materials and language assistance in general is noteworthy. Indeed, her office went beyond the requirements of Section 203 in that poll workers were recruited who spoke the language of some groups not covered by the assistance provisions, including Russian and Armenian.[243] (However, she also made clear that she provides more assistance to the language groups covered by Section 203 because of the federal mandate.)[244] McCormack gave the Commission an overview of her office's three-pronged multilingual program—"provision of translated written

material; oral assistance; and collaboration with key community-based organizations." She also spoke about various measures of effectiveness of the program, which includes not only tallying multilingual voter requests received by her office per year (which requests have increased enormously from 6,227 in 1993 to 135,129 through August 2005). Most of the requests have come from Latinos, she said, followed in number by Chinese and Koreans.[245]

Another measure of effectiveness, McCormack said, was the relationship her office had with the Department of Justice:

> [I]n both pre- and post-election meetings with attorneys from the U.S. Department of Justice (USDOJ), L.A. County's ML [multilingual] services program has been described as very good and comprehensive. Indeed, from feedback from other counties covered by Section 203 of the VRA, we have learned that the USDOJ has held L.A. County's multifaceted program as a model for other jurisdictions to follow. Also, our commitment to the permanence of our extensive, successful ML program is demonstrated by assigning specified staff to this program including a designated ML Coordinator, an Executive Liaison Officer and several additional full- and part-time staff.[246]

Information on the impact of Section 203 in Maryland was provided by McCormack's counterpart on the East Coast, Margaret Jurgensen, who is election director for the Montgomery County, Maryland, Board of Elections. The county saw 518,000 registered voters participate in the 2004 election. "The multicultural voter empowerment community engaged over 100 community representatives and volunteers as election information guides and we designed the election judge training module to incorporate the legal and technical voting system requirements, and this program was unique as well as successful," she said. "Our election judge training was redesigned and delivered by experienced election-judge trainers. This program included hands-on experience, take-home videos, and a quick reference guide and open-the-door refresher."[247]

Like McCormack in Los Angeles and Pew in Arizona Indian Country, Jurgensen was strongly supportive of language-assistance measures and expressed enthusiasm for implementing them. "In the process of recruiting approximately . . . 3,200 election judges necessary to conduct the election on November of 2004," she said, "our goal was to make certain that we had at least one individual that spoke Spanish in every precinct." The results were noteworthy: "We

achieved that goal in all instances and it was the decision of our multicultural voter empowerment committee to also reach out to other members of our community that spoke other languages. And we ultimately represented seventeen different languages in our county . . ."[248] Like McCormack's program, Jurgensen's extended beyond what was required by Section 203, for only the Latino population in Montgomery County was large enough to meet the provision's threshold.[249] As is true in Los Angeles, the people whose language is covered by the threshold are given more assistance than those who are not, even though both election administrators were strong supporters of language assistance.[250]

When asked what would happen if Section 203 did not exist, Jurgensen said that because she had invested the money in the translation program she would keep it going. But she recalled her days as election commissioner in Nebraska "in the '80s, early '90s," where

> one of the very first things that I tried to do and [it] was very simple was to create a sample ballot in both English and Spanish. I was really met with a lot of resistance. That was considered not a good investment of the public money and all of the things that come with that. And so I think it would be harder on the local level to convince the public policy makers, your county commissioners, your town councils, that that is an important investment in public dollars.[251]

Rogene Calvert, former president of Houston Chapter of the Organization of Chinese Americans, spoke about the difference that Section 203 coverage of Vietnamese voters beginning in July 2002 has made in the Houston area. As a result of an agreement between the county and the Department of Justice, the county's ballot is now translated in Vietnamese; the county has hired a Vietnamese staff member in the county clerk's office; and it has staffed precincts having a significant number of Vietnamese voters with poll workers who speak the language.[252] These measures had a direct impact on the participation of Vietnamese voters and probably are responsible, in part, for the election of Hubert Vo, the first member of the Texas Legislature of Vietnamese descent, who in 2004 won election to the state house of representatives by 16 votes.[253]

Language Assistance and Voter Turnout

Victor Landa, representing the Southwest Voter Registration Education Project at the Southern Regional hearing, stressed the causal link he believes exists between effective language assistance and voter turnout. In particular, he noted the importance Latino citizens attach to having election materials, especially registration cards, in Spanish:

> I've found that citizens who prefer Spanish registration cards do so because they feel more connected to the process. They also feel they trust the process more when they fully understand it. Many older citizens, new citizens, and first-time voters whose primary language is Spanish would not have registered to vote if not for the access to registration cards in Spanish. Without materials in Spanish, those citizens whose eagerness . . . to participate . . . would compel them to register even using a form with registration instructions they did not understand, would run the risk of making errors on the registration card that could prevent them from voting if those errors made them wrongly appear ineligible. Without materials in Spanish, many citizens not fluent in English would find the process too difficult to navigate and would not vote or would not necessarily vote in the way that they had intended.[254]

Adam Andrews, an executive assistant with the Tohono O'Oodham Nation, stated at the Southwest Regional hearing that the elderly members of his tribe needed language assistance and that Pima County, because of the Section 203 requirements, has made affirmative efforts to work with the tribe, including hiring tribal members to serve as poll workers. He said that these efforts have resulted in unprecedented turnout of tribal members in the 2002 and 2004 elections.[255]

Eugene Lee, staff attorney for the Voting Rights Project at the Asian Pacific American Legal Center of Southern California (APALC), testifying at the Western Regional hearing in Los Angeles, attributed the extraordinary growth in both Asian and Pacific Islander American (APIA) registration and turnout rates to Section 203. The total turnout rate among APIA registered voters increased a phenomenal 98 percent between 1998 and 2004, according to his statistics.[256] The efficacy of Section 203, he believes, can partly be attributed to outreach efforts in some areas by election officials.[257]

In summary, the report on language assistance compiled by Tucker and Espino, as well as the testimony presented at Commission hearings, along with accompanying statistics and other materials, suggest that while Section 203 has had a positive impact on language-minority turnout across the nation, it is far from being fully implemented. If this important provision of the Act is to be continued, more thought must be given to means for making it work everywhere in the way it now works in a limited number of jurisdictions.

Language Assistance Enforcement Actions

If jurisdictions fail to meet language assistance requirements under Sections 203, 4(f)(4), or 4(e), the Department of Justice or individual citizens may file an action to ensure compliance, just as they are entitled to do with regard to Section 5. Map 12 shows the number of language-assistance enforcement actions taken by the Department of Justice over the years—most of them occurring after 1982, as was true for the Section 5 enforcement actions by the Department.[258] All of the language-assistance actions, moreover, were successful, as they were settled by defendants who agreed to ensure future compliance.[259] (**See Map 12**.) The number of these actions, while small in comparison with the number filed under Section 5, should not be taken as a sign that there is widespread compliance. Indeed, as Tucker and Espino found, the opposite is true. There is no doubt, however, that these suits have played an important role in changing the way voting officials do business in the jurisdictions where they have been filed. Some—Boston and Dade County, Florida, for example—are quite large, and Department of Justice intervention (even short of filing a suit) can have a big effect on the ability of many citizens who are not proficient in English to vote easily.

Overall enforcement trends in the Post-1982 Period

In the analysis so far, either two time periods have been compared —1966-1982 and 1982-2004—or the latter period has been focused on. In the comparison, the data have demonstrated more indicia of potential discriminatory activity by covered jurisdictions in the latter period than in the former. It is nonetheless important to examine trends *within* the post-1982 period.

To address this issue in more detail, two graphs have been created. Figure 1 shows, in five-year increments, three sets of activities.[260] **(See Figure 1**.) The red line, representing objections

only, demonstrates a striking decline since the early nineties. The number of objections per year reached historic highs in the later years of the first Bush administration and the first years of the Clinton administration, and then declined precipitously. In the five-year period between 1991 and 1995, the number of objections was 291; between 1996 and 2000, it was 32; and between 2001 and 2004, it rose slightly to 39.

The blue line indicates a similar trend, but with a noteworthy difference. This line represents the sum of objections, submission withdrawals, and declaratory judgments adverse to jurisdictions, which sum, as discussed above, is a measure of three variables that are roughly commensurable, in that all indicate voting changes that were first proposed by jurisdictions but not put into effect, thanks to Section 5. The sum of three variables declined from a peak of 399 in the early 1990s to a low of 59 in the latter half of that decade, followed by an increase to 91 in the first four years of the current century. The latter number indicates, however, that more than twice as many discriminatory changes were prevented than one might infer by focusing solely on the number of objections (39) in the same period.

The third line, a green one, also represents a sum, combining the three variables represented by the red line, but in addition two other components—Department of Justice enforcement actions related to Section 5 and to the language-assistance sections, and observer coverages. This latter sum combines apples and oranges, so to speak, but if it is taken to represent simply the number of different measures of federal behavior designed to prevent vote discrimination as proscribed by the Act, it is a useful indicator of government enforcement activity. The green line makes clear that objections alone are an inadequate measure of Act-related enforcement involvement. In the period between 1991 and 1995, the five-variable sum peaked at 550, as compared to the 291 objections. In the most recent period, the green line dropped to an average of 192, as compared with 39 objections.

In short, Figure 1 suggests that objections alone are not as good a measure of intended discriminatory voting changes that were frustrated by the federal government as the three-variable sum, and that neither of these measures is as good a measure of *general* federal activities designed to prevent vote discrimination, represented by the five-variable sum.

A more detailed picture of the situation is revealed in Figure 2, which shows, in one-year intervals, the various activities described above, separately plotted: objections, withdrawals, declaratory judgment actions, observer coverages, and Department of Justice

Section 5 and language-assistance enforcement actions. **(See Figure 2.)** Once again, the lesson to be learned is that more discriminatory activity is being prevented in any given year than is suggested by the number of objection letters alone. Most noteworthy in this graph is the fairly high level of observer coverages (indicated by the red line), which, except for withdrawals (green) in the year 2002, represents a higher level of activity since 1996 than any other type of activity plotted. It should be remembered that the Commission's research into successful Section 5 enforcement actions in a nine-state area revealed far more such actions than are plotted in the graph.

The Mystery of the Decline in Objections

Still, the fact remains that Department of Justice objections have declined sharply in recent years. Although the Act has been in effect forty years, it was only thirteen years ago—1993—that the number of objections interposed (79) was at a historic high. Some decline in objections during the latter part of the decade is to be expected because most jurisdictions have completed redistricting and making other voting changes often connected to redistricting, such as large-scale precinct and polling changes. The same cannot be said for the beginning part of the decade.

It should be noted that this decline has occurred while at least some other enforcement activities appear to be robust. As Figure 2 shows, in 2002, the number of withdrawals (30) was greater than at any time since 1982, the first year for which the Department of Justice has provided such data. The number of observer coverages in 1997 (45) was greater than at any time since 1985, and was the third highest number since 1970. The average number of enforcement actions since 1983 was 3.72, and that figure was twice exceeded (5 in 2002 and 4 in 2004) in the new century. How to explain the decline in objections?

One explanation with some currency is that since 2001 the Department of Justice has not been enforcing Section 5 as aggressively as it should be. In 2005, critics, including some former line attorneys in the Voting Section, have alleged that political appointees in the Department have made decisions during the current administration without appropriate consultation with the Section 5 Unit's professional staff, and that some line attorneys in the Civil Rights Division have been punished for aggressive enforcement of civil rights laws.[261] Unless the current administration has decided to weaken its enforcement of some provisions of the Act but not others, this explanation of the decline does not entirely square with the fact, as shown in Figure 2, that aside from objections, some other

indicators of Department enforcement of the Act in recent years are positive, especially observer coverages.

Whatever the facts regarding the dispute over aggressive enforcement, however, if Congress finds that Section 5 is still needed to protect voters against discrimination, the allegations of inadequate enforcement, even if true, do not argue for scrapping Section 5 but rather argue for ensuring that it is properly enforced in the future.

Another explanation for the decline in objections concerns the Supreme Court's interpretation of what that section means. Preclearance requires the jurisdiction to show that the submitted change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." In January 2000, the Court announced its decision in *Reno* v. *Bossier Parish School Board (Bossier II)*,[262] a Section 5 case involving a preclearance submission from a parish (county) in Louisiana. Following the 1990 census, the all-white school board in Bossier Parish had submitted to the Department of Justice a redistricting plan for the election of its twelve members. The parish of some 80,000 residents was approximately 20 percent African-American. No black had ever been elected to the school board, and the new plan contained no majority-black districts, which at the time appeared to have been necessary for the election of a black candidate, given the racially polarized voting in the parish. At trial the board admitted that a reasonably compact black-majority district could be drawn within Bossier City. Furthermore, according to undisputed testimony, at least one board member had said that the failure to draw a black district reflected the board's opposition to "black representation."[263] In other words, there was strong evidence that the plan submitted to the Department of Justice was designed to dilute black votes and prevent the election of a black school board member to office. Under the interpretation of Section 5's intent standard until *Bossier II* was announced—the same standard applied in constitutional cases involving the Fourteenth and Fifteenth Amendments—the school board's plan should not have been allowed. Indeed, the Department of Justice found it to be objectionable in the Section 5 submission process and so argued in the subsequent declaratory judgment action. Under the Supreme Court's new ruling, however, an intent violation now required showing not simply that the jurisdiction officials' purpose was to discriminate, but that it was to make the situation for minorities worse than before—i.e., that the officials intended to "retrogress." And as there had never been any blacks on the Bossier Parish School Board and there were no majority-black districts, the all-white board's efforts to prevent any

from being elected did not violate Section 5's intent standard, according to the Court's majority.[264]

The *Bossier II* decision, involving a 5-4 split on the Court, was a tremendous setback to minority voters. In the words of a former lawyer in the Voting Section, "the Court essentially read the purpose test entirely out of the statute by keeping the purpose inquiry within the narrow confines of the retrogression analysis"[265] As another voting rights lawyer noted:

> The *Bossier Parish* decision greatly weakens the anti-discrimination protections of the Voting Rights Act. To give one important example, if this interpretation had been applied during the first 35 years of Section 5's history, it would have required Justice Department approval of a Georgia congressional redistricting plan championed by a state legislator who openly declared his opposition to drawing a "nigger district" after the 1980 Census. Georgia's plan was not retrogressive, but because it was blatantly discriminatory the Supreme Court in 1983 affirmed a decision denying preclearance under Section 5. Because of the objection, Georgia redrew its districts to provide a better opportunity for black representation, with the result that Congressman John Lewis was able to win election from a majority-black congressional district in 1986. Under the *Bossier* decision, however, the courts would have been forced to approve Georgia's original, discriminatory plan.[266]

On its face, the Supreme Court's new interpretation of the intent standard would be expected to sharply depress the number of objections interposed by the Department of Justice. The evidence seems to bear out this hypothesis. In a paper whose first author is a historian in the Voting Section, a careful investigation of objection letters before and after *Bossier II* reveals that the proportion of objections based entirely on the intent requirement of Section 5 gradually increased from 2 percent in the 1970s to 25 percent in the 1980s to 43 percent in the 1990s. The authors point out that the number of objections after *Bossier II* decreased to 16 percent of the number in the comparable period in the 1990s.[267] The authors do not attribute the decline entirely to the new retrogressive intent standard, but it is reasonable to believe *Bossier II* could partially account for the low number of objections between 2001 and 2004 observed in Figure 2 above.

Another explanation is that covered jurisdictions have accepted Section 5 as a principle they *must* comply with whenever they make a voting change, like it or not, and they have developed procedures for substantially increasing the likelihood of preclearance. Such procedures may include negotiating agreement with the minority community before making voting changes and enlisting specialists, such as state and local governmental employees who work on voting and redistricting matters, and private consultants. Many of these specialists have developed substantial expertise in navigating the Section 5 process. In this respect, Section 5 may be no different from governmental regulation in other areas where a decrease in the number of violations over time results primarily from those who are subject to the regulation improving their procedures for ensuring compliance—as opposed to a lessening of the need for the regulation itself. A good example of this may be found in environmental regulation.

In summary, there were fewer objections interposed by the Department of Justice during the current administration's first term than in the first term of any president since Richard Nixon, and fewer objections by far in the first four years following a decennial census—a period when numerous redistricting submissions must be precleared. Is this decline the result of *Bossier Parish II*, or of the politicizing of the Voting Section under the current administration? Is it the result of jurisdictions having "learned their lesson" and finally deciding after several decades to comply with the law of the land as a matter of principle (or at least expediency)? Is it perhaps the result of a combination of these factors? An answer is impossible without more information than is now available. Yet, to repeat, despite a general decline in objections beginning in the early nineties, there continues to be an appreciable number of interventions of various kinds by the Department of Justice and by private plaintiffs to prevent vote discrimination. And in the period from 1982 through 2004, more of these interventions occurred than in the Act's earlier years.

CHAPTER SIX

Enforcement of Section 2

In its 1982 reauthorization of the Act, Congress amended Section 2 to prohibit vote discrimination on the basis of results alone, whether or not the discrimination was intentional (intentional discrimination also violates Section 2). It has since become a widely used weapon to attack minority vote dilution. In its report to accompany this amendment, the Senate listed a number of factors courts might consider in deciding whether plaintiffs have met their burden of proof. These were derived from various federal judicial decisions involving vote dilution and subsequently were identified by the Supreme Court as the "authoritative source" for interpreting Section 2 as amended.[268] These became known as "the Senate factors," and consist of the following:

1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2) The extent to which voting in the elections of the state or political subdivision is racially polarized;
3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4) If there is a candidate slating process, whether members of the minority group have been denied access to that process;
5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6) Whether political campaigns have been characterized by overt or subtle racial appeals;
7) The extent to which members of the minority group have been elected to public office in the jurisdiction.[269]

These factors, along with a growing body of case law, have provided specific guidelines to plaintiffs challenging vote

discrimination generally and vote dilution in particular, and as one scholar notes, "the 1982 amendments to Section 2 dramatically altered voting rights litigation nationwide. While prior to 1982 plaintiffs had rarely invoked Section 2 in its original form, most plaintiffs alleging racial vote dilution since 1982 have consistently brought their claims under Section 2."[270] This section was particularly useful in situations—even in states covered by Section 5—where Section 5 could not be used to challenge vote discrimination. For example, several dilutive laws in the southern states were enacted before the Voting Rights Act was passed, and therefore these laws did not require preclearance. Moreover, for states not covered, Section 2 is the primary means for challenging vote dilution.

Findings of the Michigan Voting Rights Initiative

There is no comprehensive account of Section 2 enforcement.[271] However, a major step forward in this regard was taken while this Report was being written. Professor Ellen Katz of the University of Michigan Law School and her students conducted a year-long analysis of all *reported* cases that addressed Section 2 claims since June 29, 1982, based on a large data base her group constructed. The project, called the Voting Rights Initiative (VRI), has made both its report and its data base available to the public.[272] The Katz study is important because it provides useful information about the extent of several kinds of vote discrimination challenged under Section 2 and found illegal since 1982. It also provides powerful evidence that serious discrimination against racial and ethnic minorities has continued into the first decade of the current century.

To briefly summarize the Initiative's findings, after June 1982 there were 322 reported cases in the United States in which a Section 2 claim was resolved in a manner that the researchers could determine. Of this total, 88 found a violation and another 29 resulted in a favorable determination for plaintiffs, typically a settlement, without finding a Section 2 violation. Thus 117 of the cases led to a reported outcome favorable to plaintiffs of various racial or ethnic groups asserting vote discrimination. The great majority of the 322 cases—including the 117 favorable to plaintiffs—challenged vote dilution. The vote dilution cases involved 145 challenges to at-large elections, 110 challenges to reapportionments; and 11 challenges to majority-vote requirements (A few more cases challenging dilution were included under other rubrics.) Of those cases challenging dilution, 108 had a favorable outcome for plaintiffs. [273] Katz's VRI research team also found that 57 percent of the successful cases were

filed in Section 5-covered jurisdictions, which in 2000 contained less than one-quarter of the nation's population, 39 percent of the U.S. African Americans, 31.8 percent of Latinos, and 25 percent of Native Americans.[274] Black plaintiffs filed the great majority (268) of Section 2 cases ending with a published opinion, followed by Latinos (96), Native Americans (12) and Asian Americans (7). Black plaintiffs also won the largest number of suits (103 or 88 percent of all favorable outcomes).[275]

The VRI team also measured the trend in case resolution. Of the cases ending with a finding of a violation, 60.2 percent were resolved in the first ten years after 1982, and 39.8 percent in the following thirteen years. Finally, Katz's VRI team measured judicial documentation of the Senate factors in these lawsuits, including 107 findings of a history of discrimination affecting the right to vote, 91 findings of racially polarized voting, 85 findings of minority-candidate difficulty getting elected, 42 instances of racial appeals in campaigns, and 10 findings of denied access to candidate slating, as well as recent examples of all other Senate factors. Katz's report also includes examples of official discrimination in voting that has occurred since 1982 in both covered and non-covered jurisdictions.[276]

The conclusions from the investigation most relevant to the Commission's Report are worth quoting at length:

> Four decades after the enactment of the Voting Rights Act, racial discrimination in voting is far from over. Federal judges adjudicating Section 2 cases over the last twenty-three years have documented an extensive record of conduct by state and local officials that they have deemed racially discriminatory and intentionally so. Judicial findings under the various factors set forth in the Senate Report reveal determined, systematic, and recent efforts to minimize minority voting strength.
>
> Examples abound. Last year's decision in the *Bone Shirt* litigation documents how county officials in South Dakota have purposely blocked Native Americans from registering to vote and from casting ballots. The Charleston County, South Carolina litigation reveals deliberate and systematic efforts by county officials to harass and intimidate African-American residents seeking to vote. The *North Johns* litigation in Alabama describes the town mayor's refusal to provide African-American candidates registration forms required by state law. The *Harris* litigation in Alabama tells of Jefferson County's refusal to hire black poll workers for white precincts—and

the blind eye state government turned to the voting discrimination perpetuated at local polls. A Philadelphia lawsuit describes a deliberate and collusive effort by party officials and city election commissioners to trick Latino voters into casting illegitimate absentee ballots that would never be counted. The *Town of Cicero* litigation categorizes an 18-month residency requirement deliberately designed to stymie Hispanic candidacies. Many more cases tell of state and local authorities drawing district lines for the express purpose of diminishing the influence of minority voters, or to protect partisan interests knowing that doing so will hinder minority voting strength.

Section 2 lawsuits also catalogue formal and informal slating procedures implemented by party officials and private associations that function to deny minority candidates meaningful access to the ballot—from the local Democratic party in Albany, NY and the Republican party in Hempstead, NY, to informal groups in Texas and Louisiana and the state-funded firefighters on the Eastern Shore of Maryland. Federal judges further have identified a host of campaign tactics nationwide designed to appeal to base racial prejudice, tactics that include manipulating photographs to darken the skin of opposing candidates, allusions or threats of minority group "take over," or imminent racial strife, and cynical attempts to increase turnout among voters perceived to be "anti-black."

Courts have also documented some instances of suspicious or "tenuous" policies—as when the legislature in Alabama removed the only majority-minority district from its reapportionment plan after the governor threatened a veto. Courts also carefully considered the ways in which local and state governments responded to minority needs—noting, for example, a Colorado school board's refusal to provide requested bilingual and Native American educational programs in order to keep the curriculum "ethnically clean."[277]

In Search of More Section 2 Cases in Nine States

If there is a limitation to this excellent study by Katz and her students, it is that it focuses exclusively on reported cases. The authors of the study readily acknowledge this fact and point to its

implications. They were given information by the ACLU on the number of both *reported and unreported* Section 2 cases filed in the post-1982 period in South Carolina and Georgia, and by the law firm of Rolando Rios on such cases in Texas. These lists were so large in comparison to hers that Katz concludes: "Insofar as these ratios of filings to reported decisions are at all representative, [our] study's compilation of 32[2] lawsuits suggests more than 1600 Section 2 filings nationwide with filings in covered jurisdictions possibly exceeding 800 filings."[278]

To obtain more information on this subject, the Commission staff constructed as comprehensive a list as possible of all Section 2 claims—reported and unreported—resolved in a manner favorable to minority voters since 1982 in eight of the nine fully covered Section 5 states plus North Carolina. (Alaska was excluded because of limited information available in the short time in which the research was conducted.) Commission staff contacted several voting rights attorneys and requested information about Section 2 plaintiffs they had represented, which was generously supplied. Added to these lists were other Section 2 cases obtained from published sources and Web-based search engines, and each suit listed was checked, to determine which ones had results favorable to minority voters. These lists of cases represent a "best effort" to obtain a comprehensive accounting of the total number of such cases, but some were no doubt overlooked. In addition, several cases were intentionally omitted. These were suits in which a Section 2 claim was stated but in which the primary thrust was a one-person, one-vote challenge. It was decided not to classify them as Section 2 cases.[279] Therefore, for both these reasons—the lists do not capture the entire universe of cases stating a Section 2 claim, and they exclude cases that were primarily one-person, one-vote suits in spite of stating a Section 2 claim—they are conservative measures of the degree of vote discrimination successfully challenged under Section 2.[280]

Measuring the Impacts on Counties of Section 2 Cases

The information thus obtained was analyzed in a way to overcome an important limitation on measuring the extent of vote discrimination solely by counting the number of Section 2 suits resolved favorably to minority voters. For it is well-known that sometimes a single lawsuit may affect numerous discriminatory mechanisms in many jurisdictions. A spectacular example is *Harris* v. *Graddick,*[281] filed on behalf of minority plaintiffs. This single Section 2 action in the 1980s ultimately forced 65 of Alabama's 67 counties to implement a non-discriminatory poll worker appointment

process that allowed African Americans to participate equally. The state was also a defendant in this case and, after a trial, was compelled to create several new statewide procedures to ensure non-discriminatory treatment of African American voters at the polls.[282]

Therefore, a more accurate measure of the extent of electoral discrimination would tally not only the number of successful lawsuits but the number of jurisdictions affected by their outcome. An even more accurate measure is suggested by this question: Within the counties of a state affected at least once by a racially discriminatory election procedure or practice that was found since 1982 to violate Section 2, how many distinct discriminatory practices were abolished? The answer to this last question provides yet another gauge of the extent of vote discrimination.

By this methodology, the unit of analysis is *the county (i.e., its voting population) affected by one or more successful Section 2 lawsuit's results*. Each affected county which has within its boundaries an entire governmental subdivision, or part of one, that was required since 1982 to change some aspect of its electoral system as a result of a Section 2 case is identified, and then the number of times a change was required by one or more successful suits is tallied. If County A is the site of a county board of commissioners, a school district, and a municipality, all three of which are required to change from an at-large to a district system as a result of one or more Section 2 suits, then the voters of County A will be affected three times, by this reckoning. Furthermore, if County B, along with Counties C and D, are part of a multi-county school district whose elective board is required by a Section 2 suit to abolish its at-large election method, each of the counties will be affected once. (However, if an entire state is required to modify its districting scheme, this methodology treats all counties as unaffected, simply because there is no way, without access to the old and new districting plans, to determine which counties were affected.)

To recapitulate, this procedure has the virtue both of demonstrating the impact of a single case such as *Harris* v. *Graddick* on voters in numerous counties as well as the impact of numerous cases on a single county's voters. The maps below therefore show not simply the number of cases resolved favorably to minority plaintiffs, or even the number of jurisdictions required to abolish a discriminatory voting procedure, but rather the number of times voters in the counties were affected by these lawsuits.

Map 13A shows the results of this analysis for Texas, the state with the largest number of Section 2 suits resolved on behalf of minority plaintiffs since 1982. In that state, 206 such suits, both reported and unreported, were identified. **(See Map 13A.)** This

compares with the 7 successful cases—reported ones only—identified by Katz in that state.[283] As a result of these 206 cases, 197 jurisdictions changed their discriminatory voting procedures. The map shows that 110 of Texas' 254 counties were affected at least once by the suits, for a total of 274 times. The map indicates that two counties—one that was 60 percent or more minority, the other between 40 and 60 percent—have each experienced eleven changes in voting procedure as a result of Section 2 cases since 1982.

Texas is in some respects unusual, in that it has both a large black and Latino population. As was true of Department of Justice objections interposed in the state, there were very few successful Section 2 cases resolved in the heavily minority counties along the Rio Grande border. Latinos are now fairly well-integrated into the political structure of that area. It is also interesting that most of the East Texas counties, whose minority populations are largely black, appear not to have witnessed much Section 2 activity—even those in the 20 to 40 percent minority range.[284] (In this respect, Texas differs from the other Section 5-covered states that also belonged to the Confederacy.) Rather, West and Central Texas are the locus of most of the litigation. These are counties where the Latino population is growing in size and political aspirations.

The situation in the other states where at least 50 cases were resolved in the post-1982 period—Alabama, Georgia, North Carolina, and Mississippi—is seen in Maps 13B-E. The number of cases in the remaining states of South Carolina, Louisiana, Arizona, and Virginia totals only 68, and their maps are not included. (**See Maps 13B-E**.) What stands out in these four states is not only the number of counties affected—many multiple times—but the fact that it is not just the heavily black counties that are affected. In Alabama, even most of the counties with black populations that are 10 percent or less black have been affected at least once. Indeed, all counties but one have been affected—one as many as 11 times. Mississippi has numerous counties that are less than 40 percent black which have been affected at least once, although the Delta Counties have been affected disproportionately, as they were by Department of Justice objections. Georgia and North Carolina have numerous counties affected that are less than 40 percent black. The latter state is interesting in that, while the majority of its Section 5-covered counties were affected, only about a fifth (13) of its 60 non-covered counties were.

The general findings of this methodology for the nine states are shown in Table 5. *Reported* Section 2 cases from 1982 onward that were successful for minority groups in the nine states is shown in the first column. (**See Table 5**.) There was 66 such cases altogether.

The second column shows that the sum of both *reported and unreported* successful cases—653—is almost ten times as great as the number of reported cases in those same states alone. Finally, the third column shows the number of times counties in the nine states were affected by the outcome of these same 653 suits. The figure is 825.

These are the states with the worst record of vote discrimination. Yet the Katz project discovered that while reported Section 2 cases resolved favorably to plaintiffs were found disproportionately in the sixteen states covered by Section 5 (which includes the nine in the sample), a significant minority of these cases—43 percent—occurred in non-covered states. If anywhere near that percentage of successful unreported cases were resolved outside the Section 5-covered states, the total number of reported and unreported cases since 1982 could reach 1,000.

Section 2's Impact: A Summing Up

To summarize the research on Section 2's impact, the following can be said. First, the number of reported Section 2 cases leading to favorable results for minority voters, identified by the Voting Rights Initiative (VRI), was 117 nationwide in the 23-year period following the 1982 reauthorization. Second, the cases analyzed by the VRI revealed judicial findings of widespread and serious vote discrimination by whites against minorities. Third, the majority of the 117 cases were filed in Section 5-covered jurisdictions, in spite of the fact that only about a quarter of the nation's population lived in them. Fourth, cases with black plaintiffs were the most numerous, followed by those with Latino plaintiffs. Fifth, the Commission's investigation in nine states of reported and unreported Section 2 cases resolved favorably to minorities, including those cases identified by the VRI, came to approximately ten times the number of reported cases identified by the VRI in these states. Sixth, the number of times counties in the nine states were affected by favorably resolved Section 2 lawsuits is larger than the number of such lawsuits. Specifically, 653 such lawsuits were favorably resolved in those states, while counties were affected by them a total of 825 times. These figures are all the more remarkable when it is remembered that the list of cases in the nine-state study is not comprehensive, and the definition of a Section 2 case is conservative, excluding the primarily one-person, one-vote suits even though a Section 2 claim was stated. Finally, the nine-state data on reported and unreported Section 2 cases forcefully underscore Katz's conclusion that there is still much serious vote discrimination against minorities in America today.

CHAPTER SEVEN

The Persistence of Racially Polarized Voting

Forty years after the Voting Rights Act was passed, the two problems it has principally addressed—the disfranchisement of ethnic minorities and the dilution of their votes—are still present in American politics. The massive disfranchisement of southern blacks through the notorious "tests and devices" of an earlier era has been overcome, thanks to the prohibition of these tactics and the aggressive use of federal registrars in the South in the latter half of the 1960s. The use of dilutive mechanisms has been more narrowly circumscribed through Department of Justice enforcement of Section 5 and the widespread filing of Section 2 claims both by the Department and private citizens. Still, both problems remain.

As described in Chapter 2, disfranchising efforts now typically consist of the sudden and unannounced moving of polling places in minority neighborhoods shortly before elections, the manipulation of early-voting hours, the harassment and intimidation of minority voters by polling officials and partisan actors, discriminatory hiring of poll workers, illegal purges of voter rolls, and the failure to provide election materials in the language of citizens of limited English proficiency.

The nature of vote dilution, on the other hand, is unchanged. It consists of mechanisms employed by whites since the First Reconstruction in the nineteenth century, including packing or cracking minority communities during redistricting, at-large or multi-member district elections, the use of the numbered-place system and staggered terms, the majority-vote requirement, and race-based annexations. As noted above, none of these devices would have any impact were it not for the existence of racially polarized voting.

Evidence from the Commission Hearings

How widespread is this phenomenon of racially polarized voting today? One answer was given at the Commission's first hearing in March 2005. Political scientist Richard Engstrom, a voting rights scholar at the University of New Orleans and expert witness in numerous vote dilution cases in several states for many years, testified about the extent and degree of racially polarized voting, which he called "a central concept which we deal with in Section 5 of the Voting Rights Act." His research, he said, revealed that much polarization still exists.[285]

> Today I want to tell you race remains the central demographic division in American politics. Don't trust me; read the literature. Read the recent books on southern politics. Race is still the major demographic division in southern politics and, indeed, politics across the country. And racially polarized voting persists. I know this because I study it.[286]

Since the 2000 census, Engstrom has worked in seven states conducting studies of racially polarized voting, "or at least what it takes to elect minority-choice representatives." As an example of his findings, he presented several data sets measuring polarization in different ways in various types of Louisiana elections. Specifically, he focused on ninety elections using three measures of polarization for each. "Almost every election analysis in those tables," he testified, shows "racially-polarized voting in that election. . . . There are a few exceptions, usually when African Americans themselves may not be supportive of the African-American candidate. But . . . rarely is that the case." Engstrom analyzed elections for at least ten types of office in his study—from governor to the recorder of mortgages. "It doesn't matter what office is at issue; it doesn't matter whether it's high profile or low profile; it doesn't matter whether it's top of the ballot or down on the ballot. Time, place, and office do not matter. What we find consistently in almost every instance," he testified, is racially polarized voting. Engstrom claimed there was nothing unique to Louisiana in this respect. He pointed to other states in which he had recently conducted polarization analysis—South Carolina, Georgia, Florida, Alabama, and North Carolina (regarding African Americans and whites), and Texas (regarding Latinos and Anglos). He also noted that he has worked as an expert for defendants and plaintiffs, for states, for civil rights organizations, and for the Department of Justice. He believes, as a consequence of his research, that Section 5 is still needed to protect against vote dilution.[287]

Polarization was a significant theme of the hearings. Corroborating Engstrom's views was attorney Sam Hirsch, a partner in the law firm of Jenner & Block, who testified at the Mid-Atlantic Regional hearing in October 2005. Hirsch's litigation practice focuses primarily on election law, redistricting, and voting rights. He said that in the last ten years he has worked in redistricting litigation in about twenty states, and many of his cases have involved Sections 2 or 5 of the Act. In his experience, "there are politically significant statistical levels of racial polarization between Anglos and Latinos, as between whites and blacks, in almost every locale which I have experienced." His focus was on two states—Texas and Maryland—and regarding the

latter he introduced into the record an expert report on polarization by Engstrom. The Maryland example was particularly germane in light of North Carolina Congressman Melvin Watt's earlier claim at the same hearing that racially polarized voting was not simply a function of partisan differences between blacks and whites in his state.[288] In Maryland, the voting patterns of those two racial groups had been analyzed for purposes of litigation in Democratic primary elections only, in the heavily Democratic Prince George's County. The data indicated that racially polarized voting was very much in play. In four of the five primary elections for state legislators, all since 1994, "the preferences of white voters and the preferences of black voters diverge in 80 percent of the instances," he said.[289]

Regarding Texas, Hirsch introduced reports on congressional elections by Jonathan Katz, a political scientist at Caltech. "Dr. Katz studied 113 different general elections in the U.S. House alone in the 1990s," he said. These were in districts with large black or Latino populations. Katz found "a virtually universal pattern of racially polarized voting with the Latino and black voters overwhelmingly preferring Democratic [candidates] . . . and Anglo [i.e., non-Hispanic white] . . . voters heavily preferring Republican candidates for Congress in Texas."[290]

But this polarization in Texas was not limited to partisan contests. A study by Allan J. Lichtman, a historian at American University, also found it to be common in numerous Democratic primary contests in which at least one black or Latino faced at least one Anglo. While acknowledging that in Texas the race of candidates alone was not always determinative of voting behavior, and that the states of Maryland and Texas "obviously . . . don't speak directly to the forty-eight [other] states," Hirsch nonetheless stressed the quality of the experts' reports, which were "comprehensive, . . . withstood the test of cross-examination . . . and are a rich source of very up-to-date and very carefully executed social scientific analysis and data gathering."[291]

At the Florida hearings held in Orlando, Brad Brown, Political Action Chair of the Miami-Dade NAACP, spoke of political conflicts and polarization between Cuban Americans and African Americans (including Haitians) in that area of the state—conflicts in which, he said, the rights of African Americans were often ignored regarding ballot access. Department of Justice intervention has sometimes been necessary, he said, to protect the rights of African Americans.[292] Brown's testimony pointed to the phenomenon of polarization between two minority groups which sometimes occurs—a subject that has yet to be given the attention it deserves.

At the same hearing, the situation of blacks in South Carolina was addressed by Meredith Bell Platts, an attorney with the Voting Rights Project of the ACLU Southern Regional Office. She spoke of "the high levels of racial polarization," with the result that "black voters are rarely able to elect their candidates of choice in majority-white districts." One result of this situation is the need for majority- or near-majority-black districts, which in some cases appears to depress the number of Democratic seats in the legislature. According to Bell Platts, a Democratic governor, Jim Hodges, argued that black percentages in such districts should be reduced, "to ward off further electoral failures for the Democratic party in senatorial elections." His reasoning was rejected by the three-judge court in the case of *Colleton County Council* v. *McConnell.*[293] As an illustration of the intensity of racial feelings regarding redistricting, Bell Platts noted that during the trial, "it was reported that a group of citizens in Lexington County . . . which is slightly outside the City of Columbia, informed one of their Republican representatives that they didn't want any, and they used a racial epithet, the 'n' word, on the Lexington County delegation, referring specifically to a plan that had drawn a black representative into portions of Lexington County."[294] The situation in North Carolina was described at the Florida hearing by Congressman G. K. Butterfield, one of the first black U.S. Representatives elected from that state since 1899. Butterfield asserted that "racially polarized voting continues to be a very, very serious problem in the rural South."[295]

Similar problems regarding Indians in South Dakota were mentioned by Dan McCool, a professor of political science at the University of Utah. At the South Dakota hearing, he testified "there is still a high level of racial polarization in a number of areas. . . . [While not true everywhere in the state] this is especially true when Indians run against Anglos . . ."[296]

Some of the most powerful testimony regarding the persistence of racial polarization was given at the Mississippi hearing by voting rights attorney Robert McDuff who, like several speakers at this and other hearings, acknowledged the undeniable progress in the number of minority elected officials, attributing it in large part to the Voting Rights Act, both its permanent and nonpermanent features. However, also like several of his fellow witnesses, McDuff argued that voter discrimination is ongoing. He recalled, as a law student in the 1970s, attending U.S. Supreme Court oral arguments in a Mississippi legislative redistricting case in which the late Frank Parker, a legendary voting rights attorney affiliated with the Lawyers' Committee for Civil Rights Under Law, was arguing on behalf of the state's black voters. McDuff continued, " . . . the attorney for the

State of Mississippi kept saying, you know, 'That's all ancient history. That's all ancient history.' And that was before we had an African-American member of Congress. That was before we had any black judges in the state . . . And so, it wasn't all ancient history in 1977, and it's not all history now. There are no statewide black elected officials in Mississippi."[297] He went on to elaborate on this last point:

> In 2003, there was an election for state treasurer. One of the candidates, African-American, had been the director of the State Department of Economic Development. He had a number of qualifications for the job that made him clearly the best choice, and he was defeated by a 29-year-old white man who had no relevant experience in the area in an election that was characterized by severe racially polarized voting. Until elections in Mississippi are not characterized by the extreme levels of polarization that exist here, Section 5 must remain in place.[298]

Another witness, Jackson attorney Carlton Reeves, secretary of the predominantly black Magnolia Bar Association, added his observation to McDuff's illustration of racially polarized voting in the 2003 race for state treasurer. It is true, he said, that the African American was a Democrat and the white who beat him, a Republican; and this fact might lead the uninformed observer to infer that the outcome was determined by partisanship, not race. However, Reeves pointed to another contest, for attorney general, in the same election cycle. This one was between two white candidates of roughly the same age and experience for the job, in which the Republican "lost resoundingly," suggesting that race rather than party was the operative factor in the contest the black lost for statewide office. Moreover, Reeves noted, even those races involving a Supreme Court judgeship that blacks have won have occurred after they were first appointed to the post. "All the black justices of the Supreme Court were first appointed. No justice has been elected first."[299] Reeves also pointed to the use of the phrase, "He's one of us," by white candidates opposing blacks. He added, "We know what those signals mean, 'being one of us'." [300]

Joaquin Avila, a noted voting rights attorney, law professor, and former MacArthur fellow, addressed racially polarized voting during his testimony at the Commission's Western Regional hearing. He attributed the underrepresentation of Latinos at the local level—on city councils, school boards, and governing bodies of special election districts in California—to "the pernicious effects of racially polarized

voting in at-large methods of election and to the absence of effective enforcement of the bilingual election provisions."[301]

Caltech historian Morgan Kousser, a long-time resident of Los Angeles County whose research—and much of his testimony as an expert in voting cases—has focused on the South, stressed some of the similarities between California and the South. As an example, he cited a suit decided in 1990 in which Los Angeles County was found to have racially gerrymandered its county supervisor districts to prevent the election of Latinos.[302] "[T]here are instances like this," he said, "even in the enlightened state of California, where you have a history of . . . very important and powerful discrimination," Kousser noted, and then amplified his point:

> It's also true in Monterey [County]. . . . When Californians think of Monterey County, they think of Big Sur, they think of Pebble Beach Golf Course, they think of Monterey Bay Aquarium. They don't think of the north county areas. They don't think of the terrible strikes that we've had, the long history of the farm worker—anti-farm worker—violence in Monterey County. They don't think of the degree of discrimination on the county level in drawing the supervisorial districts. It looks just like L.A. County and it looks just like several southern counties and cities that I've worked in. Again and again, they drew boundaries to ensure that Latinos had no opportunity to elect candidates of their choice, and this went through the 1990s. And they abolished local courts to allow only the countywide Anglo-majority voters to elect, then, virtually all whites to the . . . judgeships.[303]

Kousser stressed that not all elections are polarized, pointing as an example to those in the Pasadena Unified School District, as well as to the statewide election for lieutenant governor won by the Latino candidate Cruz Bustamante. Nonetheless, he noted other examples of racial polarization in statewide California contests. Kousser believes African American candidates draw the most white opposition, but that Latinos and Asians attract some, too.[304]

Evidence from Scholarly Sources and Court Opinions

Political Scientist Bernard Grofman, a noted expert on the Voting Rights Act, wrote in the early 1990s that "there is strong evidence for continuing patterns of racially polarized voting for both blacks and Hispanics. Such continuing polarization makes it likely

that minorities will feel the need to sue to protect their voting rights . . ." While noting that "most of the evidence on racial polarization is buried in court records," he pointed to the work of sociologist James Loewen, whose review of data from South Carolina elections provided, in Grofman's words, "stark testimony about the levels of polarization in that state which suggests little or no change in polarization over the course of a decade." Grofman stated that both in the Deep South and in many non-southern states, "black legislative success essentially occurs only in districts where blacks constitute a substantial portion of the electorate. While the pattern for Hispanics is not quite as stark, it is similar."[305]

According to knowledgeable observers, racial politics may actually be getting more acutely polarized than in the nineties, in part because of partisan polarization. David Bositis of the nonpartisan Joint Center for Political and Economic Studies, writes that

> the degree of racially polarized voting in the South is increasing, not decreasing. . . . [and is] in certain ways re-creating the segregated system of the Old South, albeit a de facto system with minimal violence rather than the de jure system of late.[306]

By the same token, research published by Grofman and his colleagues in 2001 urge caution with respect to overly broad generalizations of racial voting patterns, noting that several factors affect the degree of polarization.[307]

No comprehensive study of the extent of racially polarized voting in recent years exists, to the Commission's knowledge, but a cursory examination of the information "buried in the court records," as Grofman put it, is suggestive. A brief and far from comprehensive search for cases involving statewide redistricting plans since the 1982 reauthorization revealed twenty-three cases in sixteen states (eight of which are not covered by Section 5) that found racial bloc voting. More than one-third of the cases were decided in 2000 or later.[308]

A few examples of the language judges employ in such cases are instructive. The following quotes are taken from federal court decisions:

- Florida: "The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting."[309]

- South Carolina: "In this case, the parties have presented substantial evidence that this disturbing fact has seen little change in the last decade. Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting. Indeed, this fact is not seriously in dispute."[310]

- Louisiana: "A consistently high degree of electoral polarization in Orleans Parish was proven through both statistical and anecdotal evidence. Particularly as enhanced by Louisiana's majority vote requirement, . . . racial bloc voting substantially impairs the ability of black voters in this parish to become fully involved in the democratic process."[311]

- Maryland: "In sum, the *Gingles* threshold inquiry clearly shows that a bloc-voting white majority on the Eastern Shore [of Maryland] consistently defeats black candidates supported by a politically cohesive and geographically compact black community. Plaintiffs' claim of vote dilution is anything but hypothetical."[312]

- Massachusetts: "The evidence establishes beyond peradventure that African-American voters in the Boston area are politically cohesive. The same evidence, taken as a whole, also suffices to show that white voters, who constitute a majority in most districts, vote sufficiently as a bloc to enable them, as a general rule, to defeat the black-preferred candidates."[313]

- Texas: "This court recognizes that Plaintiffs have established racially polarized voting and a political, social, and economic legacy of past discrimination."[314]

- South Dakota: "The court concludes that substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians in Districts 26 and 27."[315]

Another source suggestive of the extent of racially polarized voting is the analysis of reported Section 2 cases by the Voting Rights Initiative at the University of Michigan.[316] The 323 lawsuits in their data base, as noted above, represent only a small percentage of all post-1982 Section 2 cases, reported and unreported. Of the 186 cases that addressed racially polarized voting, in 91 (49 percent) there was a judicial finding, not overturned by a later court, that it existed. The governments whose elections were so characterized included school boards, city councils, state legislatures, judicial bodies, county commissioner boards, and state commissions of transportation and of public service. These cases were filed in 24 states, both within and outside Section 5 jurisdictions. (Ten states were totally outside Section 5 coverage.) Geographically, the states ranged from California to New York and from Wyoming to Florida. Even in some of the cases minority plaintiffs did not win, the court nonetheless found racial bloc voting.[317]

In short, a broad range of evidence points to continuing racial polarization in many elections across the nation. The causes are more complex than white racism alone, although this factor obviously plays an important role. But for whatever reasons, minority voters are often prevented by a white bloc vote, in combination with dilutive voting mechanisms, from electing their preferred candidates in venues numerically dominated by whites. It is this diamond-hard fact that the Department of Justice and minority voters have addressed, often effectively, using both the permanent and nonpermanent features of the Voting Rights Act as their weapons.

CHAPTER EIGHT

Summary and Conclusions

The continuing impact of the Voting Rights Act can be fully appreciated only by understanding the historical context in which it was passed. From the beginning of the twentieth century, when southern blacks were almost completely disfranchised, until 1965, when many had regained the franchise and others were struggling to do so, key elements of the southern white power structure opposed black voting and ensured continued implementation of the myriad tests and devices designed decades earlier to prevent blacks from casting a ballot. Into the 1960s, black civil rights activists, along with their white allies, were threatened, harassed, jailed, beaten and even murdered as they encouraged and helped black citizens to register and vote.

Nonetheless, after the Supreme Court declared the white primary unconstitutional in 1944 and the Civil Rights Movement gathered momentum, southern whites, at least the more prescient, saw the handwriting on the wall. They began to prepare for the day when blacks would once again achieve the right to vote. White officials set about changing many aspects of the election systems they controlled in order to dilute the power of the black vote as it became more widespread. These changes were put in place at every level of government in the southern states, in many instances soon after a black was elected to office or came close to winning. Electoral districts were racially gerrymandered or abandoned entirely and replaced by at-large schemes. Majority-vote requirements replaced plurality-win rules. The numbered place system and staggered terms replaced rules allowing single-shot voting. Offices were changed from elective to appointive, or their authority was diminished. Municipal annexations or de-annexations were designed to increase the white percentage of cities' population. In short, black vote dilution was white supremacy's second line of defense when the first line of defense, massive disfranchisement, was breached—as it was in 1965.

The task of African Americans, who now had at their disposal a new and powerful weapon to secure their voting rights, was thus twofold: to put an end to massive disfranchisement, primarily in the South; and to dismantle the dilutive mechanisms designed to prevent them from electing their preferred candidates. The first task was accomplished, in the main, within a few years of the Act's passage in 1965, as the gap in black-white voter turnout narrowed dramatically. In 2000, the reported black voter turnout nationwide, as a percentage of their VAP, was 53.5 percent; for non-Hispanic whites, it was 60.4. The percentage of blacks who reported *voting* nationwide in 2000 was

thus almost as high as the percentage of blacks *registered* in 1964—58.5 percent.[318] While efforts to depress the black vote in the South and elsewhere have continued into the twenty-first century, the relatively high black turnout rate is a measure of the Act's success.[319]

The attack on black vote dilution—and on minority vote dilution generally, as the Act's purview expanded to include Latinos, Indians, Alaska Natives, and Asian Americans—was slower to gain force. Although both Sections 5 and 2 were used early on by the Department of Justice and private plaintiffs to dismantle dilutive structures not only in the South but around the nation, the battle has been lengthy, and the most dramatic manifestations of it—redistricting—continue to be fought at least once a decade, given the widespread persistence of racially polarized voting. This is not to deny that dramatic progress has been made on this front as well. However, the battle is far from over, and many knowledgeable observers and participants have expressed the belief that congressional failure to renew Section 5, a major bulwark against both disfranchisement and vote dilution, would be a serious step backward. Testimony at the Commission's national hearings in 2005 addressed both problems.

Problems Facing Language Minorities

While the original focus of the Voting Rights Act was almost entirely on African Americans, amendments in 1975 broadened the focus to include language minorities. As a result of the discrimination experienced by Latinos, primarily in the Southwest, and by Native Americans and Asian Americans, the coverage formula in Section 4 was changed so as to expand Section 5 protections to include three states in their entirety as well as other smaller jurisdictions. As a result of both this expansion and the addition of Section 203, language assistance was mandated for four language groups: Latinos, American Indians, Alaska Natives, and Asian Americans. Research and hearing testimony on the problems faced by these groups in the electoral process reveals continuing discrimination against them, as well as a widespread failure by election officials in Section 203-covered jurisdictions to comply with the law requiring language assistance. The record of the Department of Justice in enforcing language assistance is discussed below.

Enforcement of Section 5

One important measure of the extent of voting discrimination of both types is the number of Section 5 objections interposed by the

Department of Justice. Of the 1,116 objections from 1968 through 2004, prohibiting 1,589 proposed election changes submitted for preclearance, 626, or 56 percent of the total, occurred after August 5, 1982. There is no system for monitoring whether covered jurisdictions submit all the proposed changes required by law, as was vividly demonstrated when civil rights lawyers in the early part of this decade discovered that several hundred such changes in the two South Dakota counties covered by Section 5 had not been submitted for preclearance since the 1970s.

The largest number of post-1982 objections occurred in Mississippi, followed by Texas, Louisiana, Georgia, South Carolina, and Alabama. Sixty-three of those objections in the five states were statewide objections, typically to prevent racially gerrymandered redistricting plans. The overwhelming majority of the objections occurred in counties within the southern states having a sizable non-white voting-age population. The same general pattern is true for declaratory judgments adverse to Section 5 jurisdictions handed down by the U.S. District Court for the District of Columbia: the majority of such judgments occurred after August 5, 1982.

Yet another index of voting discrimination is a jurisdiction's withdrawal of a proposed voting change as a result of Department of Justice requests for more information, suggesting that, at least in many instances, officials in the jurisdiction concluded that the change would be objected to if it were not withdrawn. While no data on submission withdrawals prior to 1982 were available for the Commission's analysis, the post-1982 data revealed 205 withdrawals, compared with 626 objections and 25 declaratory judgment actions favorable to minorities in the same period.[320]

The Role of Federal Observers

A somewhat different indicator of actual or potential vote discrimination is an observer coverage, whereby the Attorney General sends federal observers to a locale covered by either Sections 5 or 203 on Election Day, when there is credible evidence that racial tensions are high and efforts to discriminate may occur. Post-1982 data revealed 622 such coverages, involving several thousand federal observers. There were 250 coverages in Mississippi alone during this period, involving over 3,000 observers. Five of the six states originally covered by Section 5 accounted for 66 percent of all post-1982 coverages.

Section 5 and Section 203 Enforcement Actions

Between passage of the Act and 2004, the Department of Justice filed or joined as *amicus curiae* or plaintiff intervenor in 107 enforcement actions against Section 5 jurisdictions to force them to submit proposed changes that had not been precleared. Of these, the majority—61—occurred after 1982, although it is unknown how many of these were successful. Research by the Commission staff discovered 105 successful Section 5 enforcement actions in the same period, either by private citizens or the Department. In the case of Section 203 enforcement actions in which the Department was involved, while few were filed, virtually all of them were successful and the overwhelming majority of them—19 of 21—were filed since 1982.

Trends in Federal Enforcement of the Nonpermanent Provisions

An analysis of voting-related Department of Justice trends on a one-year and five-year basis was also conducted in order to discover whether more fine-grained patterns emerge. This analysis revealed that the number of Section 5 objections reached historic highs in the early 1990s, but then began to decline significantly since then. While some commentators have taken this decline as evidence that discrimination against minority voters is rapidly disappearing, Figure 2, discussed above, shows that when all the activities by the Department of Justice and the D.C. Court to prevent vote discrimination are examined simultaneously, there has been appreciably more enforcement activity over the past decade than a focus on objections alone would suggest. Further, there is the possibility—so far unverified—that part of the recent decline in objections can be traced to a less aggressive stance toward Section 5 submissions by the Department of Justice under the current administration than in the past. Another likely reason for part of the decline in objections is the Supreme Court's *Bossier Parish II* decision in 2000 that sharply constricted the criterion for applying the Section 5 intent standard. An additional reason might be that jurisdictions have finally learned to adopt practices and procedures for voting changes that conform to Section 5 as they would with most governmental regulation. Absent Section 5, some jurisdictions may disregard those practices and procedures.

Enforcement of Section 2

Data regarding Section 2 of the Act also point to widespread and continuing vote discrimination, right down to the present. A study by Professor Ellen Katz and the University of Michigan Voting Rights Initiative of reported cases since 1982, revealed that 117 led to favorable outcomes for plaintiffs, most of whom were African Americans. (Fifty-seven percent were filed in jurisdictions covered by Section 5, but 43 percent were filed elsewhere.) The study concluded that racial discrimination in voting is still widespread nationally.

However, reported suits represent a small percentage of all Section 2 suits filed, as Katz has pointed out. A non-comprehensive list compiled by the Commission staff of both reported and unreported Section 2 cases resolved in a manner favorable to minority voters since 1982, limited to eight of the nine states entirely covered by Section 5 as well as North Carolina, revealed that the great majority of such cases went unreported. Whereas Katz's focus on reported suits led to a finding of 117 successful cases nationwide, the Commission's focus on both reported and unreported suits in the nine states led to a finding of 653 successful cases. Obviously the number would be substantially greater nationwide.

Evidence from the National Commission's Ten Hearings

In addition to the data so far described, the Commission was able to draw on testimony and information entered into the record during its ten widely dispersed hearings across the nation in 2005. People from many walks of life with a wide variety of experience and expertise took the time to present their views. The Commission accepted testimony from lawyers and activists, some of whom have been involved in voting rights struggles in the South from the 1960s onward; election officials; scholars with a specialty in racial politics; expert witnesses in voting rights cases; participants in election protection programs; former key officials in the Voting Section of the Department of Justice; current or recent members of the U.S. House of Representatives and the U.S. Senate, as well as other elected officials; and ordinary citizens who simply spoke of their life histories and their hopes and fears regarding minority voting rights. Because the hearings were widely dispersed across the nation, testimony shed light on problems in varied locales affecting a broad spectrum of racial and nationality groups. (The highlights of the hearings are available in a separate document prepared by the Commission.)

Taken as a whole, the evidence presented at the hearings strongly suggests that the two major problems the Act has focused on

solving—restricted ballot access and minority vote dilution—continue in twenty-first century America. Efforts to suppress the minority vote, while not as systematic and pervasive as those of the pre-Act South, are still encountered in every election cycle in many venues across the country. The location of polling places for minority voters is changed, often on short notice. Citizens with English-language difficulties are sometimes discouraged from voting. Requirements to register and vote are sometimes unduly burdensome on minority voters. Racially polarized voting continues in many venues across the country, with the result that qualified minority candidates often have difficulty winning election unless from majority-minority districts. Appeals to voters' racial prejudice are sometimes made by candidates, increasing the polarization. Several people who gave testimony stressed that problems encountered by minorities are the work of both white Democrats and Republicans.

In short, both the evidence from the hearings and the additional data relied on in this Report indicate that while the Voting Rights Act has accomplished much during its first forty years, more remains to be done in order to protect the rights of racial and ethnic minorities to fully and equally participate in the electoral process.

NOTES

[1] Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Westbury, N.Y.: The Foundation Press, Inc., 1998), 264-66; Nick Kotz, *Judgment Days: Lyndon Baines Johnson, Martin Luther King Jr., and the Laws That Changed America* (Boston & New York: Houghton Mifflin Company, 2005), 269-70.
[2] Howell Raines, *My Soul is Rested: Movement Days in the Deep South Remembered* (New York: Putnam, 1977), 337.
[3] Stephen B. Oates, *Let The Trumpet Sound: The Life of Martin Luther King, Jr.* (New York: Harper & Row, 1982), 370.
[4] Kotz, *op. cit.*, 337; Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York: Columbia University Press, 1985), 4.
[5] For an account of the Act's impact in the South during its first twenty-five years, see Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, New Jersey: Princeton University Press, 1994).
[6] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 323.
[7] For a list of state-imposed disfranchising measures, see *ibid.*, 325-401.
[8] Vincent L. Hutchings and Nicholas A. Valentino, "The Centrality of Race in American Politics," *Annual Review of Political Science* 7 (2004), 401. Political scientist Linda Williams makes the point in stronger terms. She argues that "the real problem is the social and political construction of race in a way that advantages whites over people of color in economic markets, political institutions, and social policies. . . . In effect, the problem of the twenty-first century is not the color line but finding a way to successfully challenge whiteness as ideology and reality." For her balanced yet critical assessment of racial progress in the twentieth century, see Linda Faye Williams, *The Constraint of Race: Legacies of White Skin Privilege in America* (University Park, Pennsylvania: The Pennsylvania State University Press, 2003), Chapter 8.
[9] James M. McPherson, *Abraham Lincoln and the Second American Revolution* (Oxford: Oxford University Press, 1990), 19.
[10] For accounts of this chapter in American history, see C. Vann Woodward, *Origins of the New South, 1877-1913* (Baton Rouge: Louisiana State University Press: 1951, 1971); and J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale University Press, 1974). For a brief overview of this period, see also John Hope Franklin and Alfred A. Moss, Jr., *From Slavery to Freedom: A History of Negro Americans* (6th ed.) (New York and other cities: McGraw Hill, Inc., 1988), 227-38.
[11] Kimball W. Brace, *Final Report of the 2004 Election Day Survey, Submitted to the U.S. Election Assistance Commission, September 27, 2005* (Washington, D.C.: Election Data Services, 2005).
[12] Summary of the report's findings on ethnic inequality quoted in Dan Seligman, "EAC Survey Answers Raise Equality Questions," *electionline Newsletter*, 29 Sept. 2005.
[13] Voters cast provisional ballots when election workers at the polls cannot verify their eligibility. They are set aside from other ballots and the decision whether to count them is made after the election.

[14] The definition of "inactive" in the EAC report does not allow the reader, without further information, to determine whether inactive voters were legally or illegally designated as such. See Brace, *op. cit.*, 43.
[15] Seligman, *op. cit.* For specifically race-related findings in the EAC report, see 30, 34, 37, 53, 59, 70, 75, 88, 97, 103, 114, 120, 129, 134, 144, 152, 156, 160, 175, 179, 183, 191, 195, 199, 203, 215, 222, 231, 242. Page numbers refer to pdf document containing the report.
[16] Brace, *op. cit.*, 15.
[17] See, for example, Ronald Hayduk, *Gatekeepers to the Franchise: Shaping Election Administration in New York* (Dekalb: Northern Illinois University Press, 2005); Steven Donziger *et al.*, *America's Modern Poll Tax* (Washington, D.C.: The Advancement Project, 2001); *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today: A Report by PFAW Foundation and NAACP* (Washington, D.C.: 2004), see http://www.pfaw.org/pfaw/dfiles/file_462.pdf (last visited 11 Nov. 2005); and Laughlin McDonald, "The New Poll Tax," *The American Prospect*, 30 Dec. 2002, 26-28.
[18] Gwen Patton, Southern Regional transcript, 49, 59, Appendix 1A.
[19] Vernon Burton, Southern Regional transcript, 73, Appendix 1A.
[20] *Ibid.*, 94-95.
[21] *Ibid.*, 95.
[22] *Ibid.*, 73-74.
[23] Victor Landa, Southern Regional transcript, 147-48, Appendix 1A.
[24] *Ibid.*, 180.
[25] Written Statement of Claude Foster, Southwest Regional Hearing, 3-4, Appendix 2C.
[26] *Ibid.*, 5.
[27] Nina Perales, Southwest Regional transcript, 46-47, Appendix 2A.
[28] *Ibid.*, 48.
[29] See, for example, letter from Deval L. Patrick, Assistant Attorney General for Civil Rights, to Edward S. Allen, Esq., Birmingham, Alabama, 2 Nov. 1994, which states that "an attempt to videotape areas where black voters are present at their polling places could constitute a violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973I(b)."
[30] *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* (New York: Asian American Legal Defense and Education Fund, 2005), 15.
[31] Dorsey & Whitney LLP, *Report to the National Commission on the Voting Rights Act: Midwest Regional Hearing, July 22, 2005* (Minneapolis, MN: 2005), 59, Appendix 4R. See also, Written Statement of Ihsan Ali Alkhatib, Midwest Regional Hearing, 2-4, Appendix 4B.
[32] Written Statement of Margaret Fung, Northeast Regional Hearing, 3, Appendix 3E. A disturbing account of recent discrimination against Arab Americans nationwide is found in Hussein Ibish and Anne Stewart, *Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash, September 11, 2001-October 11, 2002* (Washington, D.C.: American-Arab Anti-Discrimination Committee, 2003), submitted to the National Commission on the Voting Rights Act, Midwest Regional Hearing, Appendix 4B, Ex. 1.
[33] Dorsey & Whitney, LLP, *op. cit.*, 40, 58, 59, 65.
[34] See, for example, Election Protection Coalition, *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections* (December 2004),

available at www.lawyerscomm.org/preliminaryreport.pdf (last visited 18 Oct. 2005).
[35] Tisha Tallman, South Georgia transcript, 19, Appendix 5A.
[36] Lawrence D. Rice, *The Negro in Texas: 1874-1900* (Baton Rouge: Louisiana State University Press, 1971), 26.
[37] 349 U.S. 294 (1954).
[38] Chandler Davidson, "The Voting Rights Act: A Brief History," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C.: The Brookings Institution, 1992), 26.
[39] William R. Keech and Michael Sistrom, "North Carolina," in Davidson and Grofman, *Quiet Revolution*, *op. cit.*, 159-60.
[40] 321 U.S. 649 (1944).
[41] Peyton McCrary, Jerome A. Gray, Edward Still, and Huey L. Perry, "Alabama," in Davidson and Grofman, *Quiet Revolution*, *op. cit.*, 39.
[42] Chandler Davidson, "The Voting Rights Act: A Brief History," in Grofman and Davidson, *Controversies*, *op. cit.,* 27.
[43] For the specific aspects of the Mississippi law objected to, see letter of Jerris Leonard, Assistant Attorney General for Civil Rights to Honorable A. F. Summer, Attorney General of Mississippi, 21 May 1969, Files, U.S. Department of Justice.
[44] 398 U.S. 544, 569 (1969).
[45] S. Rep. No. 97-417 (1982), reprinted in 1982 U.S.C.C.A.N. 177 (hereinafter *Senate Report*), 6.
[46] *Ibid.*, 8-9.
[47] *Ibid.,* 10.
[48] H. Rep. No. 97-227 (1981), 18.
[49] Peyton McCrary, "Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990," *University of Pennsylvania Journal of Constitutional Law* 5 (May 2003): 700.
[50] *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 328 (1966).
[51] The explanation of the Act contained in this Chapter is indebted to the summary found in *The Voting Rights Act: Unfulfilled Goals* (Washington, D.C.: U.S. Commission on Civil Rights, 1981).
[52] 42 U.S.C. §§ 1973b(b), 1973b(f)(3).
[53] U.S. Commission on Civil Rights, *op. cit.*, 5 n.14.
[54] Map 1 was taken from the Voting Section Web site, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited 29 Aug. 2005).
[55] U.S. Commission on Civil Rights, *op. cit.*, 6-7.
[56] U.S. Department of Justice, Civil Rights Division, Voting Section, "Terminating Coverage Under the Act's Special Provisions," available at http://www.usdoj.gov/crt/voting/misc/sec_4.htm> (last visited 29 Dec. 2005).
[57] J. Gerald Hebert, *Statement to the Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearing on 'The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act'*, 20 Oct. 2005, 2-5.
[58] 42 U.S.C. § 1973c.
[59] *Ibid.*
[60] In 1976, the Supreme Court interpreted the meaning of effect in Section 5 as "retrogressive effect." *Beer* v. *United States*, 425 U.S. 130 (1976). Until 2000, the retrogression standard applied only to the effects prong of Section 5. However, a Supreme Court decision that year interpreted the standard to apply to the intent prong as well. See discussion at the end of Chapter 5.

[61] *Morris* v. *Gressette*, 432 U.S. 491 (1977).
[62] Quoted in U.S. Commission on Civil Rights, *op. cit.*, 8.
[63] U.S.C. § 1973d. On examiners and observers, see the Voting Section Web site, http://www.usdoj.gov/crt/voting/examine/activ_exam.htm (last visited 29 Aug. 2005).
[64] At the Commission's Mid-Atlantic Regional Hearing, Guest Commissioner Karen Narasaki asked former Department of Justice lawyer Mark Posner whether, given the frequent need for observers to investigate compliance with the minority language provisions, it might be a good idea to extend the Attorney General's authority to certify examiner/observer coverage to jurisdictions covered by Section 203. Posner replied that it would. Mark Posner, Mid-Atlantic Regional transcript, 212, Appendix 9A.
[65] For a detailed account of the examiner and observer process, see Barry H. Weinberg, *Statement . . . Before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives, Concerning the Voting Rights Act, Sections 6, 7, and 8—Federal Examiner and Observer Provisions*, 15 Nov. 2005.
[66] Calculated from U.S. Department of Justice list, "Geographic Public Listing, Elections in All States, During All Dates," 10 Nov. 2003, Department of Justice files.
[67] http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm (last visited 29 Aug. 2005).
[68] 42 U.S.C. § 1973l(c)(3).
[69] *Testimony of Dr. James Thomas Tucker . . . Before the House Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearings on the Voting Rights Act: Section 203, Bilingual Election Requirements, Part 2,* 9 Nov. 2005, 16 n.6.
[70] 42 U.S.C. § 1973aa-1a(2). A Limited-English-Proficient (LEP) person is defined as one who speaks English "less than very well" and would need assistance to participate effectively in the political process. Tucker, *op. cit.*, 3.
[71] Tucker, *op. cit.*, 3; For an overview of Section 203 see U.S. Department of Justice, Voting Section, *Language Minority Brochure*, available at http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm (last visited 30 Dec. 2005).
[72] 28 C.F.R. Part 55.8
[73] U.S. Department of Justice, *Language Minority Brochure*, *op. cit.*
[74] U.S.C. § 1973aa-1a(c).
[75] 42 U.S.C. § 1973.
[76] *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).
[77] 42 U.S.C. § 1973a(a).
[78] 42 U.S.C. § 1973a(c).
[79] Information provided by Commission staff.
[80] Mark Posner, Mid-Atlantic Regional transcript, 179, Appendix 9A.
[81] 42 U.S.C. § 1973h.
[82] 42 U.S.C. § 1973aa. Section 201 was added in 1975 and made the ban on tests and devices permanent. In the 1965 enactment of the Act, the ban on tests and devices was for five years in the Section 5 covered jurisdictions, and in 1970, the ban was extended for an additional five years. S. Rep. No. 94-295 (1975), 20-21.
[83] 42 U.S.C. § 1973aa-6.
[84] 42 U.S.C. § 1973i.
[85] 42 U.S.C. § 1973b(e).
[86] A judicious, if brief, summary of the issues regarding the possible trade-off between these two types of representation can be found in Larry Bartels, Hugh Heclo, Rodney E. Hero, and Lawrence R. Jacobs, "Inequality and American

Governance," in Lawrence R. Jacobs and Theda Skocpol (eds.), *Inequality and American Democracy: What We Know and What We Need to Learn* (New York: Russell Sage Foundation, 2005), 131-36.

[87] For purposes of this Report, Native Americans means American Indians and/or American Indians and Alaska Natives.

[88] Voting and population statistics cited in this chapter to shed light on recent demographic facts will usually refer to the year 2000, first, because the sample size on which the statistics are based is often larger and produces more accurate results than do samples drawn between decennial censuses; and, second, because a single year allows of better comparisons.

[89] *The Black Population: 2000* (Washington, D.C.: U.S. Census Bureau, 2001), 3. Publication available at http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf (last visited 2 Jan. 2006). Because the census in 2000 began giving respondents a chance to indicate multiple races to which they belonged, it now typically presents its findings in terms of a) people who say they belong only to one race and b) those who indicate they belong to other races in addition to the one specified. In the racial statistics mentioned in this Report for 2000 or later, the data sometimes refer to a single-race population (referred to as "alone" in census tables) and sometimes to a single-race population plus any people who are of the specified race in combination with any other race (referred to as "alone or in combination"). The differences between "alone" and "alone or in combination" for each of the five major racial groups in the United States are not large, as percentages of the total population—but they are large enough to make note of. In 2003, for example, the two categories of whites composed 81.1 and 82.2 percent of the total population, respectively; regarding blacks, 12.7 and 13.2 percent; American Indians and Alaska Natives, 0.9 and 1.5 percent; Asians, 3.8 and 4.3 percent; and Native Hawaiian and other Pacific Islanders, 0.2 and 0.3 percent.

[90] U. S. Bureau of the Census, *Statistical Abstract of the United States: 2004-2005,* 124th Ed. (Washington, D.C.: 2004), Table 407, 256.

[91] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1965*, 86th Edition (Washington, D.C.: 1965), Table 524, 385.

[92] U.S. Census Bureau, *Voting and Registration in the Election of November 2000*, Detailed Tables for Current Population Report, P20-542. Calculated from data in Table 2. Available at http://www.census.gov/population/www/socdemo/voting/p20-542.html (last visited 1 Nov. 2005). Turnout data in 2000 by ethnicity, as reported by the census, differ, by a percentage point or more, depending on the publication.

[93] *Ibid.*, Tables 2 and 4c.

[94] Raymond E. Wolfinger and Steven J. Rosenstone, *Who Votes?* (New Haven and London: Yale University Press, 1980), 117-18. See also Gerald D. Jaynes and Robin M. Williams, Jr. (eds.), *A Common Destiny: Blacks and American Society* (Washington, D.C.: National Academy Press, 1989), 234.

[95] Jaynes and Williams, *ibid.*, 235.

[96] This eleven-state black registration rate, it will be noted, is slightly higher than the actual voter turnout rate for the same year reported above. This discrepancy is likely due to the fact that the census definition of the South contains more than the eleven states of the old Confederacy.

[97] Harold W. Stanley, *Voter Mobilization and the Politics of Race: The South and Universal Suffrage, 1952-1984* (New York, Westport, Conn., and London: Praeger, 1987), 97; and James E. Alt, "The Impact of the Voting Rights Act on Black and

White Voter Registration in the South," in Davidson and Grofman, *Controversies*, *op. cit.*, 374.
[98] U.S. Department of Justice, "The Effect of the Voting Rights Act," Table entitled "Voter Registration Rates (1965 vs. 1988)" on the Voting Section Web site at http://www.usdoj.gov/crt/voting/intro/intro_c.htm (last visited 3 Jan. 2006). Some of the data in the table differ trivially from data in Stanley, *ibid.*, and Alt, *ibid.*
[99] *National Roster of Black Elected Officials* (Washington, D.C. and Atlanta: Metropolitan Applied Research Center, Inc. and Voter Education Project, 1970), Table entitled, "Black Elected Officials in United States," no pagination.
[100] Calculated from data in David A. Bositis, *Black Elected Officials: A Statistical Summary, 2000* (Washington, D.C.: Joint Center for Political and Economic Studies, 2002), 15, 16. The total includes 204 officials in the District of Columbia and 39 in the Virgin Islands.
[101] *Ibid.*, 18.
[102] Two blacks were elected to the Senate from Mississippi during the First Reconstruction—Hiram Revels and Blanche K. Bruce. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, Publishers, 1988), 352, 357. Both senators were selected by the state legislature, as was the practice before adoption of the Seventeenth Amendment in 1912.
[103] "The 1990 Campaign: Democrats Accuse G.O.P. of Voter Intimidation in Two States," *The New York Times*, 2 Nov. 1990, A19; Laughlin McDonald, "The New Poll Tax," *op. cit.,* 28; C. Mathesian, "N.C. Republicans Settle Complaint," *Congressional Weekly Report*, 29 Feb. 1992, 487.
[104] In Tables 1, 2, and 3, data identifying BEOs and HEOs holding elective office in 2000 (i.e., officials elected earlier than 2000 and thus incumbents that year) were obtained respectively from the Joint Center for Political and Economic Studies and the National Association of Latino Elected and Appointed Officials ("NALEO"). Data on the racial demography of the districts the officials represented were obtained primarily from the Census 2000 Redistricting Project. However, state compliance with this project was voluntary. Ten states did not participate at all: Arkansas, California, Florida, Hawaii, Kentucky, Maine, Maryland, Minnesota, Montana, and Texas. Of these ten states, however, Texas presented data on all legislative districts on its state Website. Thus, district demographic data for 9 states in Tables 2, 3, and 4 are missing entirely. Moreover, of the 41 other states, only 36 submitted data on all legislative districts, and so some of their legislative data are not included in the tables' analysis. In the case of North Carolina, the missing data were obtained from that state's Web site. (Regarding congressional districts, however, the Joint Center and NALEO supplied demographic data for all U.S. Representative districts that year.) To summarize the extent of the data base for the tables, all states electing a black or Latino member of Congress are represented in the tables. Of the 40 states participating in the census project, plus Texas, there is complete legislative data for 36. In the remaining 5 states, there is demographic data for 82.8 percent of upper-chamber legislative districts and 75.1 percent of lower-chamber districts. For the 41 states for which there was at least some information, data were obtained for 99.1 percent of all legislative districts. To the Commission's knowledge, this is the most complete database of congressional and state legislative districts electing BEOs and HEOs for the year 2000.
[105] David A. Bositis, *Black Elected Officials: A Statistical Summary 2000* (Washington, D.C.: Joint Center for Political and Economic Studies, 2002), 22.

[106] Hon. Melvin Watt, testimony to the National Commission on the Voting Rights Act, Mid-Atlantic Regional transcript, 38-40, Appendix 9A.
[107] A similar table published in another venue by a reputable source indicates thirteen (34%) of the 37 black U.S. representatives in 2002 were elected from *minority-black* districts. (Bositis, *op. cit.*, 2003, 22). Yet only four (11%) were elected from *majority-non-Hispanic white* districts in 2002. By focusing just on the proportion of blacks in a district, one can mistakenly infer that "whites" are more likely to vote for blacks than is actually the case. In fact, there are other minority groups in many of the minority-black districts—the most numerous typically being Latinos, many of whom also consider themselves white and report this to the census. The dramatic nature of the distinction can be seen in the ethnic makeup of the district represented by Sheila Jackson Lee, an African American. In 2000 her district's VAP was 39% black. But it was only 27% non-Hispanic white. It was also 30% Hispanic. It is highly unlikely she would have won if the non-black VAP had been 61% non-Hispanic white.
[108] Samantha Sanchez, *Money and Diversity in State Legislatures, 2003* (Helena, Montana: The Institute on Money in State Politics, 2005), 7, 22.
[109] Jaynes and Williams, *op. cit.*, 1-32.
[110] Steven A. Tuch and Jack K. Martin, "Regional Differences in Whites' Racial Policy Attitudes," in Steven A. Tuch and Jack K. Martin (eds.), *Racial Attitudes in the 1990s: Continuity and Change* (Westport, Connecticut & London: Praeger Publishers, 1997), 167-69; Steven A. Tuch, Lee Sigelman, and Jack K. Martin, "Fifty Years after Myrdal: Blacks' Racial Policy Attitudes in the 1990s," in Tuch and Martin, *ibid.*, 233.
[111] "Regional Differences," *ibid.,* 173.
[112] Howard Schuman, Charlotte Steeh, Lawrence Bobo, and Maria Krysan, *Racial Attitudes in America: Trends and Interpretations*, rev'd. ed. (Cambridge & London: Harvard University Press, 1997), 172-78.
[113] The National Urban League and Global Insights, Inc., "National Urban League 2005 Equality Index," in Lee A. Daniels (ed.), *The State of Black America 2005* (New York: The National Urban League, 2005), 15-40.
[114] Puerto Ricans were given protection against discriminatory literacy tests in New York by Section 4(e) when the Act when passed in 1965; and some small numbers of Latinos lived in those primarily Deep South states initially covered by Section 5.
[115] Robert Brischetto, David Richards, Chandler Davidson, and Bernard Grofman, "Texas," in Davidson and Grofman, *Quiet Revolution*, *op.cit.*, 239ff.
[116] Louis DeSipio and Rodolfo O. de la Garza, "Between Symbolism and Influence: Latinos in the 2000 Elections," in Rodolfo O. de la Garza and Louis DeSipio (eds.), *Muted Voices: Latinos and the 2000 Elections* (Lanham, Maryland, and other cities: Rowman & Littlefield Publishers, Inc., 2005), 15.
[117] Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For the United States, Regions, Divisions, and States* (Washington, D.C.: U.S. Census Bureau, Population Division, 2002), Table 1; U. S. Bureau of the Census, *Statistical Abstract of the United States: 2004-2005* (124th Ed.)(Washington, D.C.: 2004), Tables 13, 14.
[118] Roberto Suro and Jeffrey S. Passell, *The Rise of the Second Generation: Changing Patterns in Hispanic Population Growth* (Washington, D.C.: Pew Hispanic Center, 2003), 3.
[119] Angelo Falcon, *Atlas of Stateside Puerto Ricans* (Washington, D.C.: Puerto Rico Federal Affairs Administration, n.d.), 1.

[120] Juan Cartagena, "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," *National Black Law Journal* 18 (2005), 207-08.
[121] Jeffrey Passel, "New Estimates of the Undocumented Population in the United States," *Migration Information Source*, 22 May, 2002, http://www.migrationinformation.org/feature/display.cfm?ID=19 (last visited 25 Nov. 2005); on anti-Hispanic violence, see Carmen T. Joge with Sonia M. Pérez, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the '90s*, Final ed., (Washington, D.C.: National Council of La Raza, 1999).
[122] Nicholas Riccardi, "Eligible to Vote? Prove It," *Los Angeles Times*, 5 Nov. 2005, http://www.latimes.com/news/printedition/la-na-arizona5nov05,1,2598787.story (last visited 5 Nov. 2005). For the response of non-Hispanics in the South to the recent influx of Latinos, see Clay Risen, "Immigration Migrates: Going South," *The New Republic Online*, post date 3 Oct. 2005 http://www.tnr.com/doc.mhtml?i=20051107&s=risen110705 (last visited 4 Oct. 2005).
[123] Michael Jones-Correa, "Language Provisions Under the Voting Rights Act: How Effective Are They?" *Social Science Quarterly* 86 (September 2005), 551. The Anglo turnout figure given by Jones-Correa—62 percent—differs slightly from the figure of 60.4 given in the text above.
[124] *Ibid.*, *558*. "Residing in an area offering voting materials in the respondent's language of origin . . . is significant[ly] and positively correlated with voter turnout for Latinos but has no effect for Asian Americans. . . . Latinos living in an area covered by the language provisions of the Voting Rights Act were 4.4 percent more likely to have voted in 1996 and 2000 than their counterparts residing elsewhere."
[125] Nina Perales, Southwest Regional transcript, 49-52, Appendix 2A.
[126] The standard work on Mexican Americans in Texas is David Montejano, *Anglos and Mexicans in the Making of Texas, 1836-1986* (Austin: University of Texas Press, 1987). See especially Chapters 10-11 for an account of "Jim Crow" as it applied to Latinos, and Chapter 12 on its abolition. For a more general account of Latino politics nationwide, see Kim Geron, *Latino Political Power* (Boulder, Colorado: Lynne Rienner Publishers, Inc., 2005).
[127] "Material on Houston's Adoption of Its 9/6 City Council Plan," Fondren Library, Rice University.
[128] The 2000 census combined the two categories of Alaska Native and American Indian. The figure of 0.9 refers to those who chose that designation alone, exclusive of other racial mixtures. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2000* (Washington, D.C.: U.S. Department of Commerce, February 2002), Table 1, 3. http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf (last visited 1 Nov. 2005).
[129] U.S. Census Bureau, *Race and Hispanic Origin in 2003* (Population Profile of the United States, Dynamic Version, 2005), 4.
[130] Russ Lehman and Alyssa Macy, *Native Vote 2004: A National Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved* (First American Education Project: 2005), submitted as part of the testimony of the Native American Rights Fund and the National Congress of American Indians before the National Commission on the Voting Rights Act, Rapid City, South Dakota, 9 Sept. 2005, 13, Appendix 7D.
[131] Therese Droste, "States and Tribes: A Healthy Alliance," *State Legislatures* (Apr. 2005), 29.

[132] For a succinct account of events from the 1960s into the early 1980s that led to sharp and occasionally violent clashes between Indians and non-Indians and which undoubtedly still resonate in some states, see U.S. Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (Washington, D.C.: U.S. Government Printing Office: 1981), Chapter 1.
[133]Dan McCool, South Dakota Transcript, 30, Appendix 7A. See also "Table 1: Voting Rights Cases Brought on Behalf of American Indians and/or Interpreting the Voting Rights Act re Indian Interests," compiled for inclusion in McCool's forthcoming monograph to be published by Cambridge University Press, Appendix 7E.
[134] Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," *American Indian Law Review* 29 (2004): 46-47.
[135] *Ibid.*, 52.
[136] *Ibid.*, 55-65. The focus of McDonald's account in these pages is South Dakota.
[137] 336 F. Supp. 2d 976 (D.S.D. 2004).
[138] *Ibid.*, 1023-27. For an account of the issues leading to the *Bone Shirt* case, see McDonald, *op., cit.*, 59ff.
[139] Lehman and Macy, *op. cit.*, 4. See also Russ Lehman, *The Emerging Role of Native Americans in the American Electoral Process* (Olympia, Washington: Evergreen State College Native American Applied Research Institute, 2003), for an overview of Indian involvement in electoral politics, particularly in recent years.
[140] The litigation, based on the 1990s redistricting plan, was not successful. However, it brought to light enough problems that a different process was used in the post-2000 redistricting. See *Old Person* v. *Cooney*, No. 98-36157 (9th Cir. Oct. 27, 2000).
[141] Lehman and Macy, *op. cit.*, 24.
[142] Sia Davis, "Indian Country Concerns," *State Legislatures* (Apr. 2005), 31.
[143] *Ibid.*, 31.
[144] Heather Dawn Thompson, *Special Report: Native Vote 2004 Election Protection Project* (Washington, D.C.: National Congress of American Indians, February 2005), submitted to the National Commission on the Voting Rights Act, South Dakota Hearing, 25, 29, Appendix 7D, Ex. 1.
[145] *Reynolds v. Sims*, 377 U.S. 533 (1964).
[146] Dan McCool, South Dakota transcript, 32-33, Appendix 7A.
[147] *Ibid.*, 33.
[148] All data in this paragraph are found in Jessica S. Barnes and Claudette E. Bennett, *The Asian Population: 2000 (Census 2000 Brief)*, C2KBR/01-16 (Washington, D.C.: U.S. Census Bureau, 2002), 3-4, 7, 9. Available at http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf (last visited 3 Jan. 2006).
[149] H.M. Lai, "Chinese," in Stephan Thernstrom (ed.), *Harvard Encyclopedia of American Ethnic Groups* (Cambridge, MA, and London: The Belknap Press, 1980), 220; *The Oxford Companion to United States History* (Oxford and New York: Oxford University Press, 2001), 51, 361-62.
[150] Harry H.L. Kitano, "Japanese," in Thernstrom, *ibid.*, 566-67. Congress apologized for the unjustified internment in 1988 and granted compensation of $20,000 to each surviving prisoner.
[151] For a discussion of some of these studies' findings, see Asian American Justice Center, *Testimony Submitted to the House Judiciary Committee on the Constitution, Oversight Hearings on the Voting Rights Act of 1965,* 22 Nov. 2005, 3-4.
[152] U.S. Equal Employment Opportunity Commission, "New Gallup Poll on Employment Discrimination Shows Progress, Problems 40 years After Founding of

EEOC," news release, 14 Dec. 2005, at http://www.eeoc.gov/press/12-8-05.html (last visited 14 Dec. 2005).
[153]For the 1970 figure, see Gibson and Jung, *op. cit*, Table 1.
[154] See Angelo N. Ancheta, *Race, Rights, and the Asian American Experience* (New Brunswick, NJ: Rutgers University Press, 1998).
[155] See, for example, Written Statement of Margaret Fung, Northeast Regional Hearing, 2-4, Appendix 3E.
[156] Carol Hardy-Fanta, Christine Marie Sierra, Pei-te Lien, Dianne M. Pinderhughes, and Wartyna L. Davis, "Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States," paper presented at the 2005 Annual Meeting of the American Political Science Association, 4. The data seem to include AEOs in American Samoa, the Mariana Islands, and Guam.
[157] James S. Lai, "The Suburbanization of Asian American Politics," *National Asian Pacific American Political Almanac* (Los Angeles: UCLA Asian American Studies Center, 2005), 7-9.
[158] Glenn D. Magpantay, "Ensuring Asian American Access to Democracy in New York City," *AAPI Nexus* 2 (2004), 91.
[159] *Ibid.*, 96-110.
[160] Asian American Legal and Education Fund, *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* (New York: AALDEF, 2005), 14-15. For a more detailed account of 2004 election problems in New York City, see letter from Glenn D. Magpantay to John Ravitz, Executive Director of the New York City Board of Elections, *et al.*, 16 June 2005.
[161] National Asian Pacific American Legal Consortium, *Sound Barriers: Asian Americans and Language Access in Election 2004* (Washington, D.C.: NAPALC, 2005), 9-12.
[162] Amie Jamieson, Hyon B. Shin, and Jennifer Day, *Voting and Registration in the Election of November 2000*, Current Population Reports: P20-542 (Washington, D.C.: U.S. Census Bureau, February 2002), Tables 1, 5.
[163] Interview with Joseph Rich, former Section Chief.
[164] 28 C.F.R., Part 5.
[165] 28 C.F.R. 51.27.
[166] Interview with Joseph Rich, former Section Chief.
[167] At least, this was the procedure used until fall 2005. According to media reports, the Civil Rights Division changed the review process at that time so that a recommendation comes only from the section chief. The staff is now allegedly instructed not to make a recommendation. Michelle Mittelstadt, "Voting-rights friction building inside Justice: Recommendations no longer allowed by career staff in cases, critics say," *Dallas Morning News*, 9 Dec. 2005, 1A. See also, Dan Eggen, "Staff Opinions Banned In Voting Rights Cases," *Washington Post*, 10 Dec. 2005, A03.
[168] The definition of voting change chosen for this analysis is conservative. For example, regarding annexations, some analysts have treated all annexations objected to within a given objection decision as separate changes. This analysis treats them as one change only.
[169] Data on objections were obtained by the Commission and compared with (and supplemented by) a data base prepared by Peyton McCrary and Christopher Seaman.
[170] *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1027 (D.S.D. 2004).

[171] Information provided to the National Commission on the Voting Rights Act by J. Gerald Hebert, an attorney involved in all nine cases, telephone call, 5 Dec. 2005.
[172] 519 U.S. 9 (1996) (*Lopez I*), and 525 U.S. 266 (1999) (*Lopez II*).
[173] 525 U.S. 266.
[174] *Lopez I*, 519 U.S. 9, 12.
[175] Drew S. Days III and Lani Guinier, "Enforcement of Section 5 of the Voting Rights Act," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C.: Howard University Press, 1984), 168-69.
[176] Non-white is defined here as the total VAP minus all non-Hispanic whites. Data are from the 2000 decennial census.
[177] Note that the single objection in New Mexico was interposed under Section 3, mentioned above; New Mexico has not been covered under Section 5.
[178] These maps do not show objections to statewide submissions—only those at the county or sub-county level. Note that different non-white VAP intervals are employed in these maps' color code than in the national-level maps.
[179] Alaska's two objections are both to statewide submissions, and thus the color coding of counties cannot reveal a correlation between percent non-white and objections.
[180] V.O. Key, Jr., *Southern Politics in State and Nation* (New York: Knopf, 1949), 9.
[181] Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to Geoffrey Connor, Acting Secretary of State of Texas, 16 Nov. 2001. (Department of Justice files.)
[182] *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983).
[183] Written Statement of Debo Adegbile, Florida Hearing, 7-8, Appendix 6D.
[184] Much of the following discussion is contained in South Carolina voting rights attorney Armand Derfner's recent testimony before Congress. See *Statement of Armand Derfner before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 20 Oct. 2005, available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=479> (last visited 7 Jan. 2006).
[185] *United States* v. *Charleston County*, 316 F. Supp. 2d 268, 277-278, 286 n.23, 295-97 (D.S.C. 2003).
[186] *United States* v. *Charleston County*, 365 F.3d 341 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 606 (2004).
[187] *Charleston County*, 316 F. Supp. 2d at 283.
[188] Letter from R. Alexander Acosta to C. Havird Jones, Esq., 26 Feb. 2004, available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=479> (last visited 7 Jan. 2006).
[189] Written Statement of Brenda Wright, Mississippi Hearing, 3, Appendix 10D. See also Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill and London: The University of North Carolina Press, 1989), 206, on the impact of dual registration on blacks: "Substantial numbers of black voters apparently were not informed of the dual registration requirement when they registered to vote with the circuit clerks or were otherwise unaware of the requirement, and disproportionate numbers of black voters have been denied the ballot in municipal elections in Mississippi because they had failed to register again with their municipal clerks."
[190] Wright, *ibid.*, 5-7.
[191] Letter from Philip R. Volland to Chief of the Voting Section, United States Department of Justice, 25 Apr. 2002, 2, 4.

[192] *In re 2001 Redistricting Cases*, No. 3AN-01-8914 CI, slip op. at 9 (Alaska Sup., Ct., 3rd Dist., May 18, 2002), *aff'd*, 47 P.3d 1089 (Alaska 2002).
[193]Lisa Handley, A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts, in Philip R. Volland, letter to Joseph D. Rich, United States Department of Justice, 26 July 2001, Appendix C, 2.
[194] Myra Munson and Donald Simon, *Report to the Alaska Redistricting Board and Proposed Plan*, 3 Apr. 2001, 1.
[195]Myra Munson, e-mail to Nancy Barnes, aide to Alaska State Senator Albert Kookash, 3 Jan. 2006; submitted to the National Commission on the Voting Rights Act, 17 Jan. 2006.
[196] For example, see Joaquin Avila, Western Regional transcript, 40-41, Appendix 8A; Anita Earls, *Overview of Current Racial Discrimination in Voting in North Carolina*, 2-3, Appendix 1E; Laughlin McDonald, Southern Regional transcript, 247, Appendix 1A; Joseph Rich, Northeast Regional transcript, 99-101, Appendix 3A; Theodore Shaw, Northeast Regional transcript, 84, Appendix 3A; Kent Willis, Mid-Atlantic transcript, 73-75, Appendix 9A.
[197] The declaratory judgments used for this map were obtained from a list entitled "Declaratory Judgments" supplied by the Department of Justice. After consultation with Joseph Rich, former Section Chief of the Voting Section, the list was narrowed to include only those instances in which a case was heard on its merits with one of four results: 1) the jurisdiction's changes were denied; 2) the case was dismissed by the court or dismissed voluntarily by plaintiffs; 3) the case was dismissed and a subsequent change to cure the discriminatory problem was submitted and reviewed administratively; 4) a consent decree was agreed to, thus curing the problem.
[198] Not all withdrawals are due to a jurisdiction's belief that its submission contains an objectionable change. By the same token, the number of changes per submission is greater than the total number of submissions. So here, too (as with the problem of Department of Justice objection withdrawals discussed above), two facts may work against each other, with regard to reckoning the total number of proposed illegal *changes* on the basis of the total number of withdrawn *submissions*. Does the undercount of illegal submissions withdrawn compensate for the fact that there are more changes than the count of submission withdrawals alone would indicate? This would be a useful subject of further research.

The method employed for identifying withdrawn submissions also undercounts the actual number of them. The data were obtained through a Freedom of Information Act request for a list of all voting changes since 1982 where the Department had sent jurisdictions a letter requesting more information before deciding whether to preclear. All submissions containing the word "Withdraw" after a "more information" letter had been submitted were tallied to arrive at the total number of withdrawals used in the accompanying maps and charts. It was later discovered that the Department sometimes used another notation ("ND/wd") to indicate a withdrawn submission. Unfortunately, there was insufficient time to go through the submissions yet again to count the additional ones containing the latter notation.

In summary, the method employed to tally withdrawals a) significantly understates the actual number of all *submission withdrawals* in the Department's files (because of the failure to understand the second type of notation used to identify them), b) understates the number of *changes withdrawn* (because there were more changes, on average, than submissions), and c) overstates the number of

submissions withdrawn containing illegal changes (because legal changes were not counted).
[199] Withdrawal data before 1980 are not available from the Department of Justice.
[200] Regarding the current status of examiners, see Weinberg, *op. cit.*, 6.
[201] In addition to observers, the Department of Justice sometimes sends lawyers or paralegals from the Voting Section, or from other sections, to oversee Election Day activities. These are called "monitors" and may be sent to jurisdictions that are not certified for examiners or observers. However, they do not have all of the authority of federal observers. For example, they do not have the right to be inside polling places without consent of the jurisdiction.
[202] Anita Earls, Southern Regional transcript, 229-30, Appendix 1A.
[203] In the words of a former Department of Justice official with extensive experience in Section 5 enforcement: "Of course observers are not sent out willy-nilly but are sent out after the Department identifies potential problems on Election Day and they're a way to try to prevent those problems from occurring, to try to have people on the ground should problems occur." He went on to point out "there has been a close connection between observer activity . . . and subsequent lawsuits and enforcement actions and work under [Section] 203. . . . [I]f you take it [the sending of federal observers] as a whole, I think it is a clear indication of the presence of problems." Mark Posner, Mid-Atlantic Regional Transcript, 202, Appendix 9A.
[204] There is no map for Virginia, the sixth state, because there were no observer coverages during this period.
[205] Weinberg, *op. cit.*, 4.
[206] Hon. Bobby Singleton, Southern Regional transcript, 186-8. Appendix 1A.
[207] *Ibid.*, 189.
[208] *Ibid.*, 190-91.
[209] Carlos Zayas, Northeast Regional Hearing transcript, 176-84, Appendix 3A; *United States* v. *Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003).
[210] *Ibid.* at 574.
[211] *Ibid.* at 575-76.
[212] The jurisdictions for which the Voting Section produced observer reports were Alameda County, CA (4 elections); San Benito, CA (1 election); East Chicago, IN (3 elections); Hamtramck, MI (6 elections); Sandoval County, NM (5 elections); Suffolk County, NY (2 elections); Reading, PA (3 elections); Buffalo County, SD (1 election).
[213] Office of Personnel Management Observer Report, Berks County, Reading, PA, 2nd Ward, 1st Precinct (Senior Center), 4 Nov. 2003.
[214] Office of Personnel Management Observer Report, Berks County, Reading, PA, 3rd Ward, 1st Precinct (Rhodes Apartments), 4 Nov. 2003.
[215] Office of Personnel Management Observer Report, Berks County, Reading, PA, 3rd Ward, 2nd Precinct (Southern Middle School), 27 Apr. 2004.
[216]Office of Personnel Management Observer Report, Berks County, Reading, PA, 9th Ward, 2nd Precinct (City Hall), 20 May 2003.
[217]See, for example, Office of Personnel Management Observer Report, Sandoval County, NM, Precincts 18, 21, and 22 (Cuba Independent School District), 22 Sept. 1987; Office of Personnel Management Observer Report, Alameda County, CA, Oakland Korean Church, 5 Nov. 1996; Office of Personnel Management Observer Report, Berks County, Reading, PA, 13th Ward, 2nd Precinct (St. Marks Church), 20 May 2003.
[218] See, for example, Office of Personnel Management Observer Report, Wayne County, Hamtramck, Precincts 10 (Recreation Center), 7 Nov. 2000; Berks County, Reading, PA, 6th Ward, 1st Precinct (Neversink Fire Station), 20 May 2003.

[219] Written Statement of Joseph D. Rich, Northeast Regional Hearing, 3, Appendix 3I.
[220] *Ibid.*, 3.
[221] *Ibid.*, 5
[222] *Symm* v. *United States*, 439 U.S. 1105 (1979), *aff'g United States* v. *Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). For an account of the Prairie View cases in the 1970s, see David Richards, *Once Upon A Time in Texas: A Liberal in the Lone Star State* (Austin, Texas: The University of Texas Press, 2002), Chapter 16.
[223] Information provided by John B. Strasburger (Houston, Texas), a lawyer representing the students. E-mail to the Commission 9 Jan. 2006.
[224] The number of Section 5 enforcement actions in which the Department of Justice was involved was calculated from the Department list, "Voting Section Cases in Which the United States' Participation Began Since October 1, 1976," 18 Oct. 2005, 5-7, 12, 14-16.
[225] The purpose of this effort is to identify as many Section 5 enforcement actions known to be successful, whether brought by the Department of Justice or private parties, in order to get as full a picture as possible of the reach of these suits. Because of the unique nature of such actions, there are different ways in which they may be successful. One is when a covered jurisdiction, after the action is filed, submits (either "voluntarily" or by court order) the voting change it previously refused to submit, even if the change is subsequently precleared. Another way is when the court enjoins implementation of the proposed change. A third way is when the jurisdiction, under a court order to do so, abandons or modifies the change after the lawsuit is brought. In any of these situations, a Section 5 action is defined as "successful." The cases were obtained from several sources: data bases and files of voting rights litigators; cases published in Lexis, cases noted on the Voting Section's list of cases, and docket information contained on the federal courts electronic file system known as PACER. As a check, a Freedom of Information Act request was made to the Voting Section for a Submission Tracking and Processing System report on every Section 5 submission involving a change in a method of election resulting from the suit. An attempt was made to rely on more than one source for information, although this was not always possible. As with the compilation of successful Section 2 cases described below, the list of Section 5 cases compiled using these methods is the most comprehensive one the Commission is aware of, but there are undoubtedly cases that are missing, especially those resolved in the early to mid-1980s, when many of the court dockets were not on PACER.
[226] 28 C.F.R. § 55.15.
[227] See, for example, the supplementary data entered into the record at various Commission hearings, contained in the appendices to this Report, especially Appendices 3, 4, and 6, which contain the transcripts and supplementary material of the hearings in the Northeast, Midwest, and Western Regional hearings.
[228] In the words of Tucker, "The surveyed jurisdictions include: all jurisdictions specifically identified by the Census Department under either Section 4(f)(4) or Section 203; all counties in the five states that are covered; all cities in covered jurisdictions that the 2000 Census reports as having 50,000 or more people; a handful of jurisdictions that no longer are covered as a result of the 2002 Census determinations; and the chief elections officer in each of the surveyed states." *Testimony of Dr. James Thomas Tucker . . . before the House Committee on the Judiciary, Subcommittee on the Constitution, Oversight Hearings on the Voting Rights Act: Section 203—Bilingual Election Requirements, part II*, 9 Nov. 2005, 5.

[229] *Ibid.*, 5.
[230] *Ibid.*, 4.
[231] *Ibid.*, 5. See Tucker's more expansive remarks on costs, *ibid.*, 4-6.
[232] *Ibid.*, 8.
[233] *Ibid.*, 10-13.
[234] *Ibid.*, 13.
[235] *Ibid.*, 15.
[236] See, for example, *ibid.*, 10.
[237] Jorge Sanchez, Midwest Regional transcript, 176-79, Appendix 4A.
[238] Lydia Guzman, Southwest Regional transcript, 157-64, Appendix 2A.
[239] Alberto Olivas, Southwest Regional transcript, 70-71, 85-86, Appendix 2A.
[240] Penny Pew, Southwest Regional transcript, 27-36, Appendix 2A.
[241] Shirlee Smith, Southwest Regional transcript, 155, Appendix 2A.
[242] See materials submitted to the National Commission on the Voting Rights Act, Western Regional Hearing, Appendix 8F, Exs. 1-38.
[243] Written Statement of Conny McCormack, Western Regional Hearing, 3, Appendix 8F.
[244] Conny McCormack, Western Regional Transcript, Appendix 8A.
[245] "Multilingual Voter Requests on File, as of 8/26/05," submitted to the National Commission on the Voting Rights Act, Western Regional Hearing, Appendix 8F, Ex. 22.
[246] Written Statement of Conny McCormack, Western Regional Hearing, 4, Appendix 8F, 24.
[247] Margaret Jurgensen, Mid-Atlantic Regional transcript, 127, Appendix 9A.
[248] *Ibid.*, 128.
[249] *Ibid.*, 132-33.
[250] *Ibid.*, 132-34.
[251] *Ibid.*, 134-35.
[252] Rogene Calvert, Southwest Regional transcript, 196-202, Appendix 2A.
[253] Lisa Falkenberg, "Heflin likes his odds in the House," *Houston Chronicle*, 16 Dec. 2005, B1.
[254] Victor Landa, Southern Regional transcript, 143-45, Appendix 2A.
[255] Adam Andrews, Southwest Regional transcript, 192-96, Appendix 2A.
[256] Written Statement of Eugene Lee, Western Regional Hearing, 3, Appendix 8E.
[257] *Ibid.*, 4.
[258] The number of language-assistance enforcement actions in which the Department of Justice was involved was calculated from the Department list, "Voting Section Cases in Which the United States' Participation Began Since October 1, 1976," 18 Oct. 2005, 7-9. There have been very few private language-assistance enforcement actions since 1982.
[259] Interview with Joseph Rich, former Chief of the Voting Section, 13 Jan. 2006.
[260] The period 2001-04 is the exception. Data for 2005 were not available with regard to all the variables for which trends were charted. The missing data would only affect the lines in the graphs if there were a very large rise in various enforcement activities in 2005, which does not seem to be true.
[261] William R. Yeomans, "An Uncivil Division," Legal Affairs. See http://www.legalaffairs.org/printerfriendly.msp?id=878 (last visited 24 Oct. 2005); the Department of Justice has denied these allegations. Ari Shapiro, "Career Lawyers Leaving Justice Department," Nation Public Radio Morning Edition, 6 Oct. 2005. See http://www.npr.org/templates/story/story.php?storyId=4946744 (last visited 6 Oct. 2005). In less than six months, according to another line attorney

who resigned, the Chief, Deputy Chief, and eight lawyers in the Voting Section—"approximately 1/3 of the entire section"—left it. He called it "unprecedented . . . as I understand it . . ." E-mail message of David J. Becker to the election law blog of Professor Rick Hasen, owner-election-law_gl@majordomo.lls.edu (10 Oct. 2005).
[262] 528 U.S. 320 (2000).
[263] *Bossier Parish School Bd.* v. *Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995).
[264] For a detailed treatment of *Bossier Parish II* and its effects on the Department of Justice enforcement of the Act, see Peyton McCrary, Christopher Seaman, and Richard Valelly, "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," *Michigan Journal of Race and Law* 11 (Spring 2006), forthcoming.
[265] Mark Posner, Mid-Atlantic Regional transcript, 145, Appendix 9A.
[266] Brenda Wright, Managing Attorney, National Voting Rights Institute. Document submitted to the National Commission on the Voting Rights Act, e-mail, 5 Oct. 2005.
[267] McCrary *et al., op. cit.*, 99-102.
[268] Ellen Katz, *et al.*, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (December 2005), 7. http://www.votingreport.org (last visited 17 Jan. 2006). Reprinted in *University of Michigan Journal of Law Reform* 39 (forthcoming 2006).
[269] *Senate Report*, *op. cit.*, 28-29. Two other factors were mentioned by the Senate Report as having "probative value" in deciding a Section 2 case: 1) Whether "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"; and whether there is a "tenuous" justification for the policy behind the challenged arrangements. *Ibid.*, 29. These are sometimes referred to as the additional Senate factors.
[270] Katz *et al.*, *op. cit.*, 8.
[271] For a summary of the progress made in attacking minority vote dilution in southern cities between 1965 and 1990, often through Section 2 lawsuits, see Bernard Grofman and Chandler Davidson, "The Effect of Municipal Election Structure on Black Representation in Eight Southern States," in Davidson and Grofman, *Quiet Revolution*, *op. cit.*, 302-34. For an account of progress in southern legislatures and congressional delegations during the same period, see Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Davidson and Grofman, *Quiet Revolution*, *op. cit.*, 335-50.
[272] Ellen Katz and the Voting Rights Initiative, Voting Rights Initiative Database, http://www.votingreport.org (last visited 16 Jan. 2006). "Reported cases" were defined as those available through a search of the Westlaw and LexisNexis legal research data bases.
[273] Katz *et al.*, *op. cit.*, 8-9.
[274] *Ibid.*, 8, 52 n.42.
[275] *Ibid* ., 9.
[276] *Ibid.*
[277] *Ibid.*, 15.
[278] *Ibid.*, 8.
[279] The cases in question targeted jurisdictions covered by Section 5 that would not redistrict in compliance with Section 5. In some cases, the jurisdictions would adopt a plan that was not precleared and would then refuse to remedy the defects; in other instances, the jurisdictions would refuse to redistrict at all. In either event,

these jurisdictions would try to evade acknowledging minority voter concentration by simply keeping their old plans, and because no change was involved, the Department had no legal basis under Section 5 for objecting. Minority plaintiffs attacked such refusal to redistrict on the grounds that, as time had passed since the last redistricting, and population inequalities had grown among the districts, the outdated plans violated the Constitution's one-person, one-vote principle. Some of these cases also stated a Section 2 claim, but were primarily one-person, one-vote actions where jurisdictions were sued in order to compel them to conduct a post-census redistricting. There were several of these cases, particularly during the early 1990s, in Alabama, Georgia, Louisiana, Mississippi, and Texas. No matter how these suits are characterized, however, they attacked discrimination against minority voters.

[280] The definition of a "successful" Section 2 case—one resolved favorably to minority voters—is one in which a Section 2 claim or a claim of intentional vote dilution played a significant role in leading to a voting change that benefited the minority group or groups whom the case was designed to benefit. Successful cases include those where the plaintiffs prevailed at trial or a hearing; where the parties settled the matter regardless of whether the settlement was entered into the court record as a consent decree; where the court granted preliminary relief for plaintiffs and the parties settled; or where a voter referendum approving a change was passed after the lawsuit was filed. In some cases—particularly those involving redistricting—Section 2 was one of several claims (other typical claims being one-person, one vote claims and Section 5 enforcement claims). Where such cases were settled, an effort was made to determine, on a case-by-case basis, whether the Section 2 claim played a significant role in the settlement. If it did not, it was not included in the data base.

Cases were derived from a number of sources: data bases and files of voting rights litigators; cases published in Lexis; cases cited in the tables in *Quiet Revolution in the South* (Davidson and Grofman, *op. cit.)*; and docket information contained on the federal courts' electronic file system. As a check, a search was made in the Department of Justice data base known as Submission Tracking and Processing System, which reports every Section 5 submission involving a change in a method of election. This data base was obtained from the Voting Section through a Freedom of Information Act request. Efforts were made to rely on more than one source of information where possible.

Although the cases thus compiled are the most comprehensive list of Section 2 cases in fully covered states and North Carolina that the Commission knows of, the list is not comprehensive. There were probably a good many cases in the early and middle 1980s, when many of the court dockets were not listed on PACER. Further research to complete the list would be a welcome addition to the literature on the Voting Rights Act.

[281] 593 F. Supp. 128 (M.D. Ala. 1984).

[282] See *Harris* v*. Seligman*, 700 F. Supp. 1083 (M.D. Ala. 1988).

[283] The Katz number is derived from the Voting Rights Initiative's master list of suits, available on its Web site. See Voting Rights Initiative Database, *op. cit.*

[284] As discussed above in Chapter 5, this area has had a significant number of Section 5 objections, however.

[285] Richard Engstrom, Southern Regional transcript, 124, Appendix 1A.

[286] *Ibid.*, 125.

[287] *Ibid.,* 128-37.

[288] Hon. Melvin Watt, Mid-Atlantic Regional transcript, 38, Appendix 9A.

[289] Hirsch, Mid-Atlantic Regional transcript, 51-53, Appendix 9A.
[290] *Ibid.*, 57.
[291] *Ibid.*, 58-61.
[292] Brad Brown, Florida transcript, 118-24, Appendix 6A.
[293] *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002).
[294] Meredith Bell Platts, Florida transcript, 106-8, Appendix 6A.
[295] Hon. R.K. Butterworth, Florida transcript, 45-47, Appendix 6A.
[296] Dan McCool, South Dakota transcript, 31-32, Appendix 6A.
[297] Robert McDuff, Mississippi transcript, 29, Appendix 10A.
[298] *Ibid.*, 29-30.
[299] Mississippi Supreme Court justices are not elected statewide, but from three three-member districts.
[300] Carlton Reeves, Mississippi transcript, 117-19, Appendix 10A.
[301] Written Statement of Joaquin G. Avila, Western Regional Hearing, 2, Appendix 8B.
[302] *Garza* v. *County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir.), *cert. denied*, 498 U.S. 1028 (1991).
[303] Morgan Kousser, Western Regional transcript, 52-54, Appendix 8A. For an account of Latino vote dilution in the Monterey county supervisor districts, see J. Morgan Kousser, "Tacking, Stacking, and Cracking: Race and Reapportionment in Monterey County, 1981-1992: A Report for *Gonzalez* v. *Monterey County Board of Supervisors*" (Rev. version 1992); and J. Morgan Kousser, "Racial Injustice and the Abolition of Justice Courts in Monterey County" (9 Sept. 2000), submitted to the National Commission on the Voting Rights Act, Western Regional Hearing, Appendix 8C, Ex. 1.
[304] Morgan Kousser, Western Regional transcript, Appendix 8A, 75-77.
[305] Bernard Grofman, "Would Vince Lombardi Have Been Right If He Had Said: 'When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing'?," *Cardozo Law Review* 14 (Apr. 1993), 1242-43. The article referred to is James W. Loewen, "Racial Bloc Voting and Political Mobilization in South Carolina," *The Review of Black Political Economy* 19 (1990), 23-37.
[306] David Bositis, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," in Richard M. Valelly (ed.), *The Voting Rights Act: Securing the Ballot* (Washington, D.C.: CQ Press, 2006), 119.
[307] Bernard Grofman, Lisa Handley, and David Lublin, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," *North Carolina Law Review* 79 (June 2001), 1383-1430.
[308] Not all cases were Section 2 cases, nor did minority plaintiffs prevail in all. But judges found racially polarized voting in each. To compile this case list, a Commission staff member conducted a Lexis search of federal cases involving state districting plans and then added to the list unpublished statewide redistricting decisions the staff member knew about. The cases finding polarized voting are as follows: **Arkansas**: *Jeffers* v. *Clinton*, 730 F. Supp. 196, 208, 215-16 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991) ; *Smith* v. *Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark. 1987), *aff'd,* 488 U.S. 988 (1988); **Colorado**: *Sanchez* v. *Colorado*, 97 F.3d 1303, 1321-22 (10th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); **Florida**: *Martinez* v. *Bush*, 234 F. Supp. 2d 1275, 1298-99 (D. Fla. 2002); *DeGrandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), *aff'd in part and rev'd in part on other grounds sub nom. Johnson* v. *DeGrandy*, 512 U.S. 997, 1079 (1994); **Georgia**: *Georgia* v. *Ashcroft*, 195 F. Supp. 2d 25, 31, 94 (D.D.C. 2002), *vacated on other grounds by* 539 U.S. 461 (2003); **Louisiana**: *Hays* v. *Louisiana*, 936 F. Supp. 360,

365 (W.D. La. 1996); *Major* v. *Treen*, 574 F. Supp. 325, 351-52 (E.D. La. 1983): *Chisom* v. *Edwards*, 690 F. Supp. 1524, 1533 (E.D. La. 1988), *vacated by Chisom* v. *Roemer*, 853 F.2d 1186 (5th Cir. 1988), *appellate decision reversed and remanded by* 501 U.S. 380 (1991); *Clark* v. *Roemer*, 777 F. Supp. 445, 453-65 (M.D. La. 1990), *vacated on other grounds by* 501 U.S. 1246 (1991); **Maryland**: *Marylanders For Fair Representation* v. *Schaefer*, 849 F. Supp. 1022, 1060 (D. Md. 1994); **Massachusetts**: *Black Political Task Force* v. *Galvin*, 300 F. Supp. 2d 292, 310 (D. Mass. 2004); **Mississippi**: *Jordan* v. *Winter*, 604 F. Supp. 807, 812-13 (N.D. Miss. 1984), *aff'd sub nom. Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984); *Martin* v. *Allain*, 658 F. Supp. 1183, 1193-94 (S.D. Miss. 1987); **Montana**: *Old Person* v. *Cooney*, 230 F.3d 1113, 1123 (9th Cir. 2000); **New Mexico**: *Sanchez* v. *King*, No. 82-0067-M, 24 (D. N.M. August 8, 1984); **North Carolina**: *Thornburg* v. *Gingles*, 478 U.S. 30, 80 (1986); **Ohio**: *Armour* v. *State of Ohio*, 775 F. Supp. 1044, 1060-61 (N.D. Ohio 1991) ; **South Carolina**: *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 641, 656 (D.S.C. 2002); **South Dakota**: *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D 2004); **Tennessee**: *Rural West Tennessee African American Affairs Council* v. *Sundquist*, 209 F.3d 835, 841 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *Affairs Council* v. *McWherter*, 836 F. Supp. 453, 459-60 (W.D. Tenn. 1993), *vacated and remanded on other grounds*, 512 U.S. 1248 (1994); **Texas**: *Session* v. *Perry*, 298 F. Supp. 2d 451, 492-93 (E.D. Tex. 2004), *vacated and remanded on other grounds sub nom. Jackson* v. *Perry*, 125 S. Ct. 351 (2004).

[309] *DeGrandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992*), aff'd in part and rev'd in part on other* grounds *sub nom. Johnson* v. *DeGrandy*, 512 U.S. 997, 1079 (1994).

[310] *Colleton County Council*, 201 F. Supp. 2d at 641.

[311] *Major* v. *Treen*, 574 F. Supp. 325, 351-52 (E.D. La. 1983).

[312] *Marylanders For Fair Representation* v. *Schaefer*, 849 F. Supp. 1022, 1060 (D. Md. 1994).

[313] *Black Political Task Force* v. *Galvin*, 300 F. Supp. 2d 292, 310 (D. Mass. 2004).

[314]*Session* v. *Perry*, 298 F. Supp. 2d 451, 492 (E.D. Tex. 2004), *vacated and remanded on other grounds*, *Jackson* v. *Perry*, 125 S. Ct. 351 (2004).

[315] *Bone Shirt* v. *Hazeltine*, 336 F. Supp. 2d 976, 1036 (D.S.D. 2004).

[316] Katz, *et al., op. cit.*

[317] E-mail to Commission containing the 91-case data base from one of the authors of the VRI report, Emma Cheuse, 10 Dec. 2005.

[318] As noted above, however, self-reported voter turnout probably understates the racial gap.

[319] The narrowing of the black-white turnout gap should not obscure the fact that blacks continue to vote at a lower rate for a number of structural reasons—including felon disfranchisement laws—enumerated by David Bositis, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," *op. cit.*, 114.

[320] The data for withdrawals obtained from the Department of Justice are only through 2003. The data for objections are through 2004—626 altogether. Three objections occurred in 2004.

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Figure 1 Comparison of Three Measures of Federal VRA-Related Activities All States (1966-2004)

Figure 2 VRA-Related Activities (Including Enforcement Actions) 1966 – 2004

TABLE 1
BEOS IN OFFICE, 2000,
BY SELECTED TYPES OF JURISDICTION

Type of Office	Number of Elective Officeholders, All Races	BEOs (Number)	BEOs %	Median % White[a] VAP In Districts With BEOs
		Statewide Constituencies		
President	1	(0)	0	n/a
Vice President	1	(0)	0	n/a
U.S. Senator	100	(0)	0	n/a
Governor	50	(1)	2	65
Lt. Governor	50	(2)	4	84
State officials elected statewide[b]	733[c]	(35)	5	73
		Single-member District Constituencies		
U.S. Representative	435	(38)	9	31
State Senator[d, e]	1,528	(120)	8	33
State Representative[d, e]	3,568	(362)	10	31

[a]Non-Hispanic whites only.

[b]Excludes federal officials elected statewide, i.e., U.S. Representatives in Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming.

[c]In Maryland, Special Appeals Court judges are initially appointed by the governor, but must face a statewide at-large election after one year. In North Carolina, 82 Superior Court judges are appointed by the governor but must face a statewide election after one year. Total (733) pertains to the number of statewide elective offices in 1992, when a national census of these offices was taken.

[d]Demographic data for this row are based only on those 40 states that submitted some or all of their 2000 demographic data to the U.S. Bureau of the Census, plus Texas, whose data were obtained from its state's Web site. See endnote 104 for a description of methodology.

[e]Nine of the districts from which BEOs were elected were multi-member districts, and are included in the database on which the table is based.

SOURCES: Joint Center for Political and Economic Studies (Washington, D.C.), unpublished data; individual state Web sites; *Census 2000 American FactFinder* at (http://factfinder.census.gov/home/saff/main.html?_lang=3n; U.S Bureau of the Census, *1992 Census of Governments*, vol. 1, no. 2, "Popularly Elected Officials," GC92 (1)-2, 1995; David A. Bositis, *Black Elected Officials: A Statistical Summary 2000* (Washington, D.C.: Joint Center for Political and Economic Studies, 2002), 22.

TABLE 2
RACIAL COMPOSITION OF DISTRICTS[a]
REPRESENTED BY BEOS, 2000

Type of Office	Composition of District VAP: Majority-White[b] (N)	%	Majority-Minority[b] (N)	%	Total (N)	%
U.S. Representative	(3)	8	(35)	92	(38)	100
State Senator	(19)	16	(101)	84	(120)	100
State Representative	(65)	18	(297)	82	(362)	100

[a]See note "d" in Table 1 for a list of states whose legislative districts are not included in this table. Congressional data are for all 50 states.

[b]"White" is non-Hispanic white; "minority" is the remaining population in the district, including blacks.

SOURCES: Same as those for Table 1 above.

TABLE 3
RACIAL COMPOSITION OF DISTRICTS[a] REPRESENTED BY HEOS, 2000

Type of Office	Composition of District VAP					
	Majority-White[b]		Majority-Minority[b]		Total	
	(N)	%	(N)	%	(N)	%
U.S. Representative	(0)	0	(19)	100	(19)	100
State Senator	(12)	32	(26)	68	(38)	100
State Representative	(29)	26	(82)	74	(111)	100

[a]See note "d" in Table 1 for a list of states whose legislative districts are not included in this table. Congressional data are for all 50 states.

[b]"White" is non-Hispanic white; "minority" is the remaining population in the district, including blacks.

SOURCES: National Association of Latino Elected Officials (Los Angeles), unpublished data; individual state Web sites; U.S. Bureau of the Census, through Census 2000 American FactFinder (http://factfinder.census.gov/home/saff/main.html?_lang=3n).

TABLE 4

SUCCESSFUL SECTION 5 ENFORCEMENT ACTIONS, NINE STATES, JUNE 29, 1982-DECEMBER 31, 2004

State	Successful Section 5 Cases (N)
Texas	29
Alabama	22
Georgia	17
Mississippi	15
South Carolina	10
Louisiana	5
North Carolina	3
Arizona	3
Virginia	1
TOTAL	105

SOURCE: Data compiled by staff of the National Commission on the Voting Rights Act.

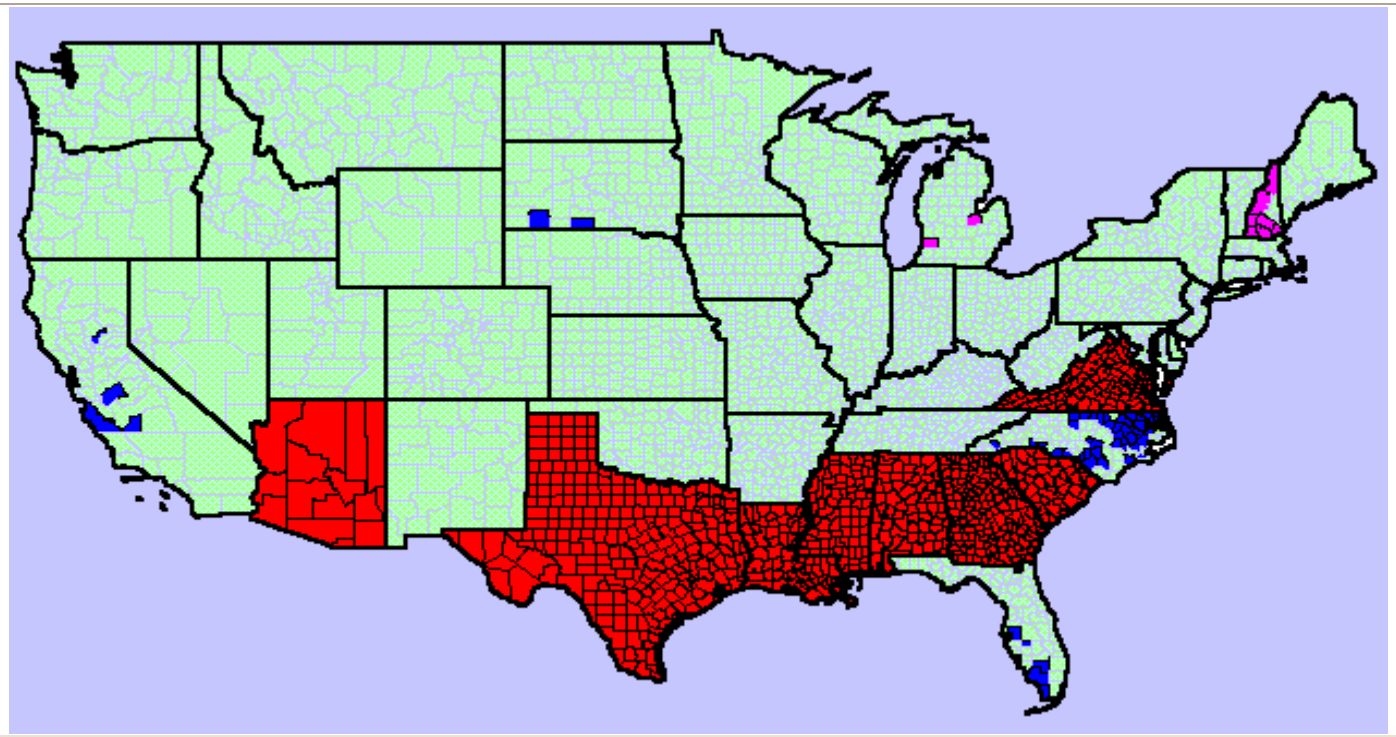
TABLE 5
SUCCESSFUL SECTION 2 CASES
AND THEIR EFFECTS ON COUNTIES,
NINE STATES, JUNE 29, 1982-DECEMBER 31, 2005

State	Reported Cases Only	All Cases, Reported & Unreported	County Voting Populations Affected
Alabama	12	192	275
Arizona	0	2	3
Georgia	3	69	76
Louisiana	10	17	14
Mississippi	18	67	74
North Carolina	9	52	56
South Carolina	3	33	36
Texas	7	206	274
Virginia	4	15	17
TOTAL	66	653	825

SOURCES: Reported cases from the Ellen D. Katz and the University of Michigan Voting Rights Initiative (provided by Emma Cheuse, e-mail to the Commission, 5 Jan. 2006); remaining information compiled by Commission staff.

MAP 1

Section 4(b) Covered Jurisdictions



Key: Covered Jurisdictions

States Covered as a Whole

Covered Counties in States Not Covered as a Whole

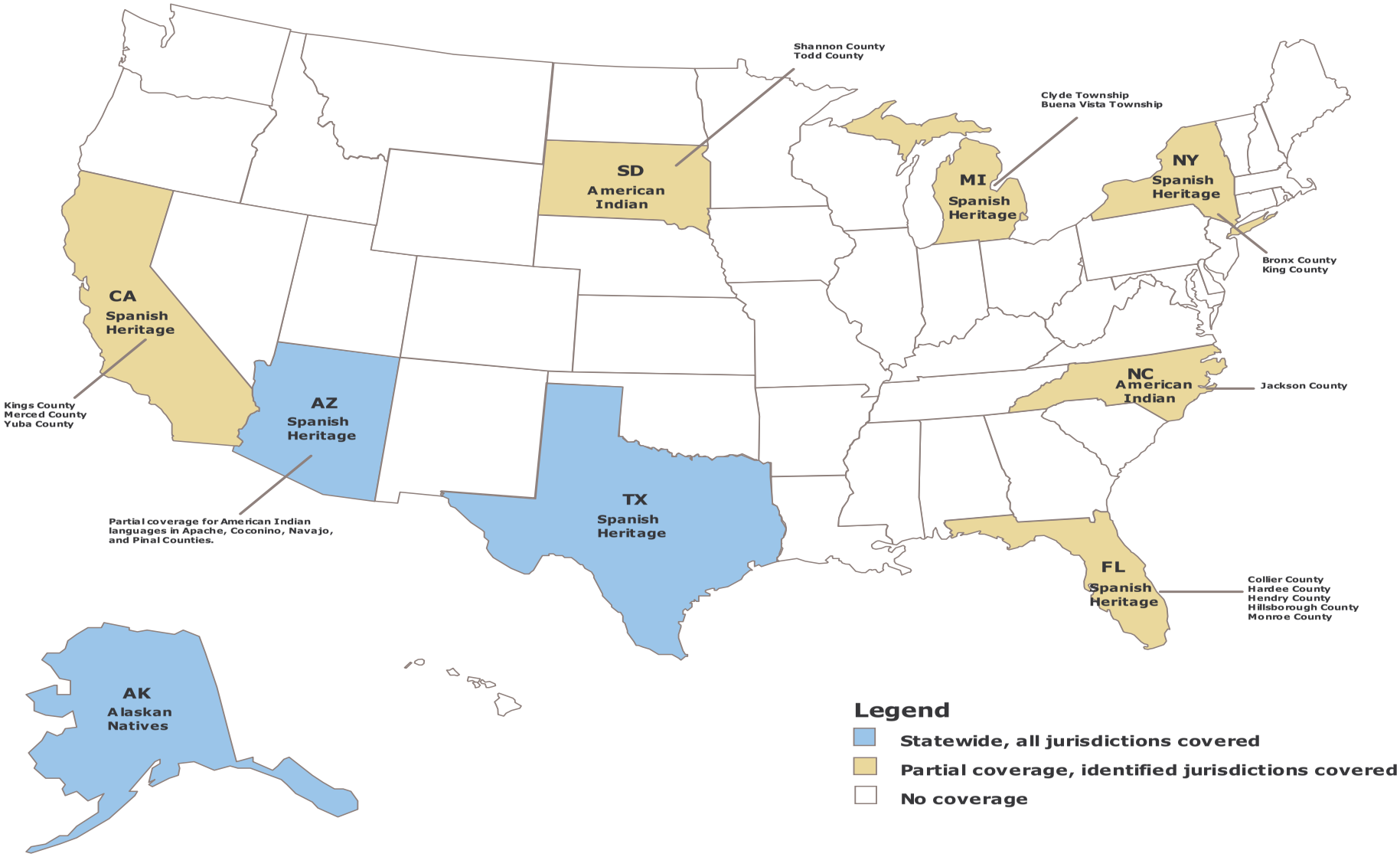
Covered Townships in States Not Covered as a Whole

The entire state of Alaska is also covered. No jurisdiction in Hawaii is covered

Map created by the United States Department of Justice based on coverage determinations made by 28 C.F.R. Part 51, Appendix

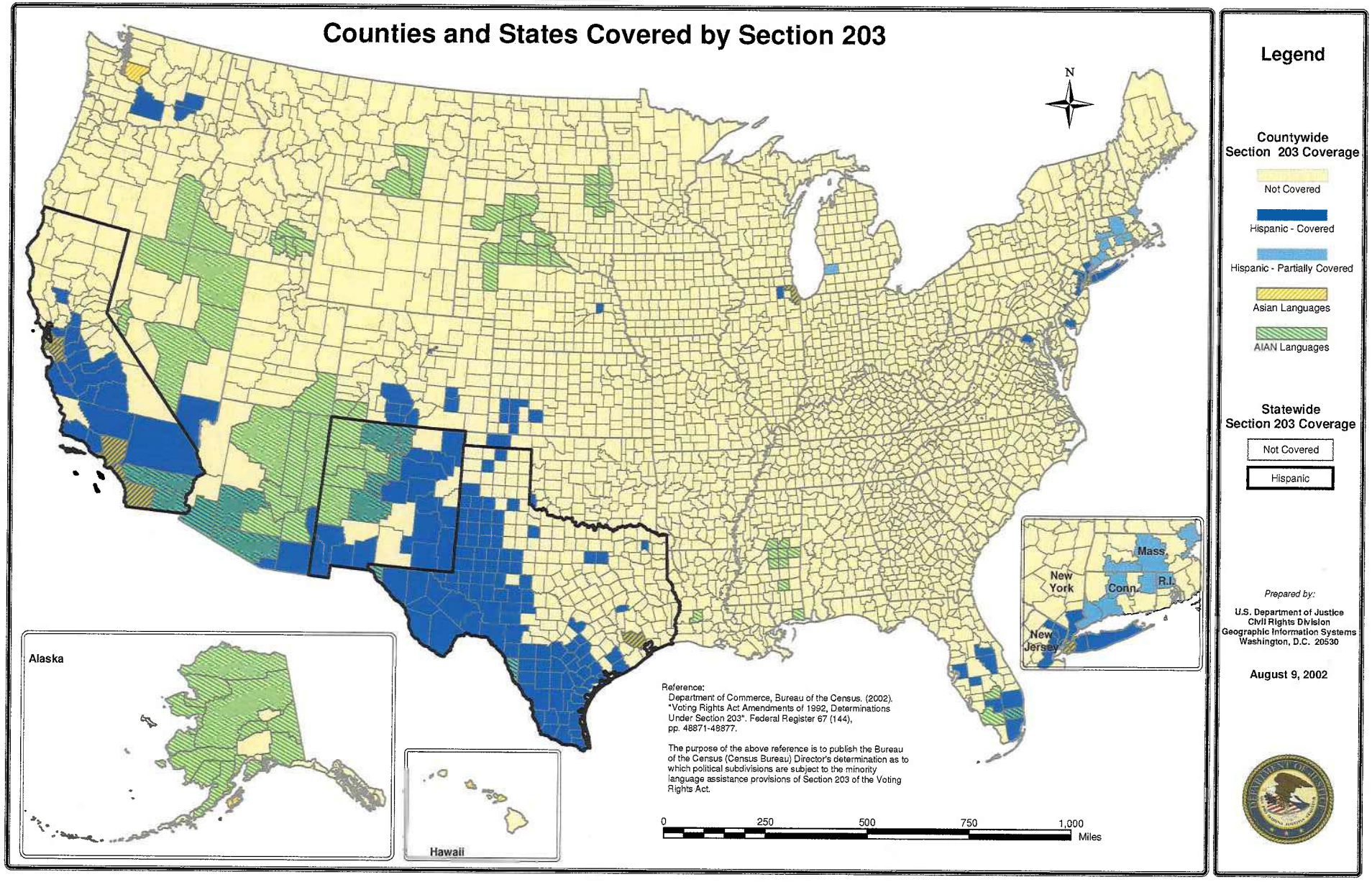
Map 2

Jurisdictions Covered by Section 4(f)(4) of the Voting Rights Act, by State

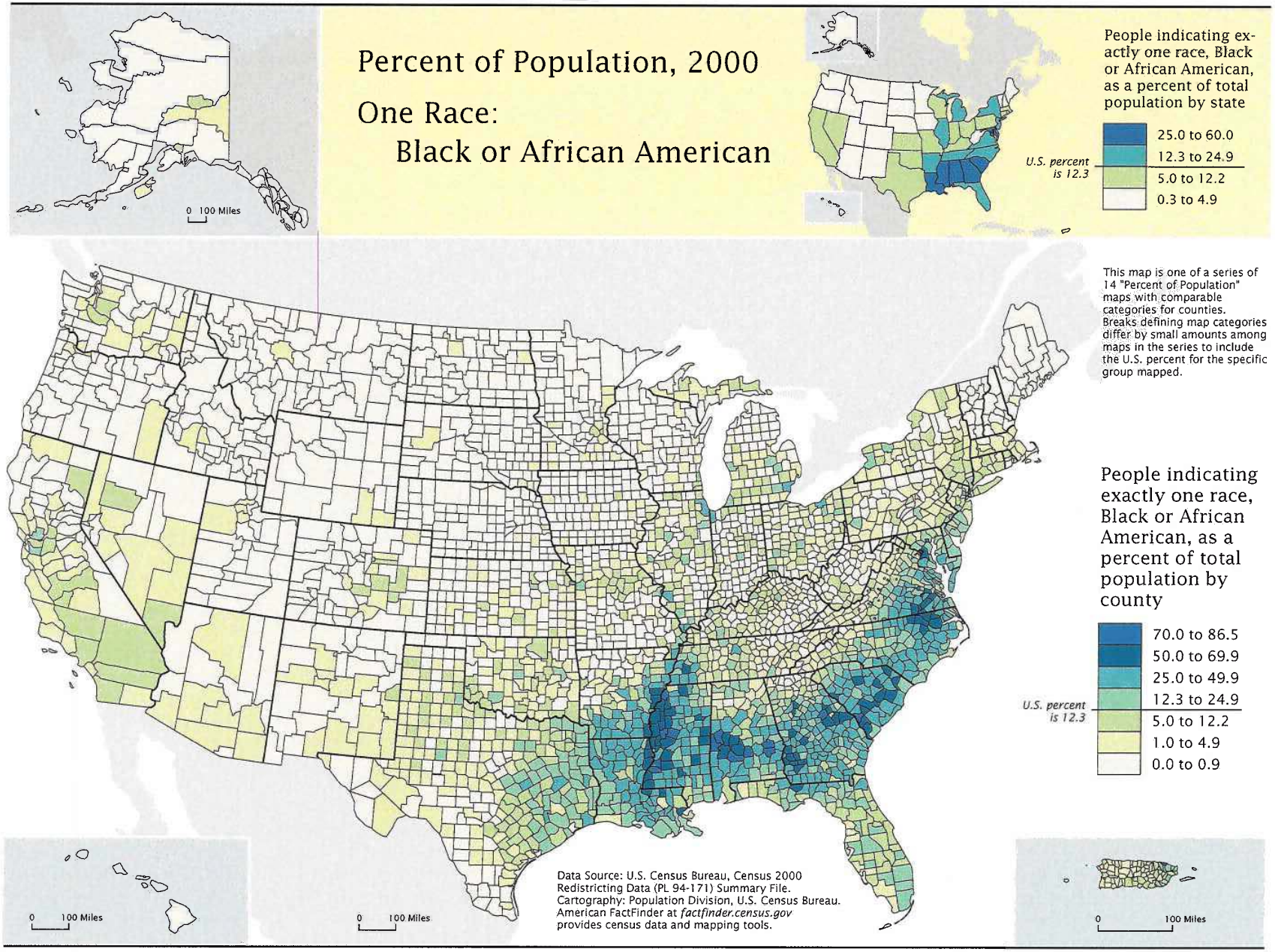


Map created by James T. Tucker based on coverage determinations contained at 28 C.F.R. Part 55, Appendix.

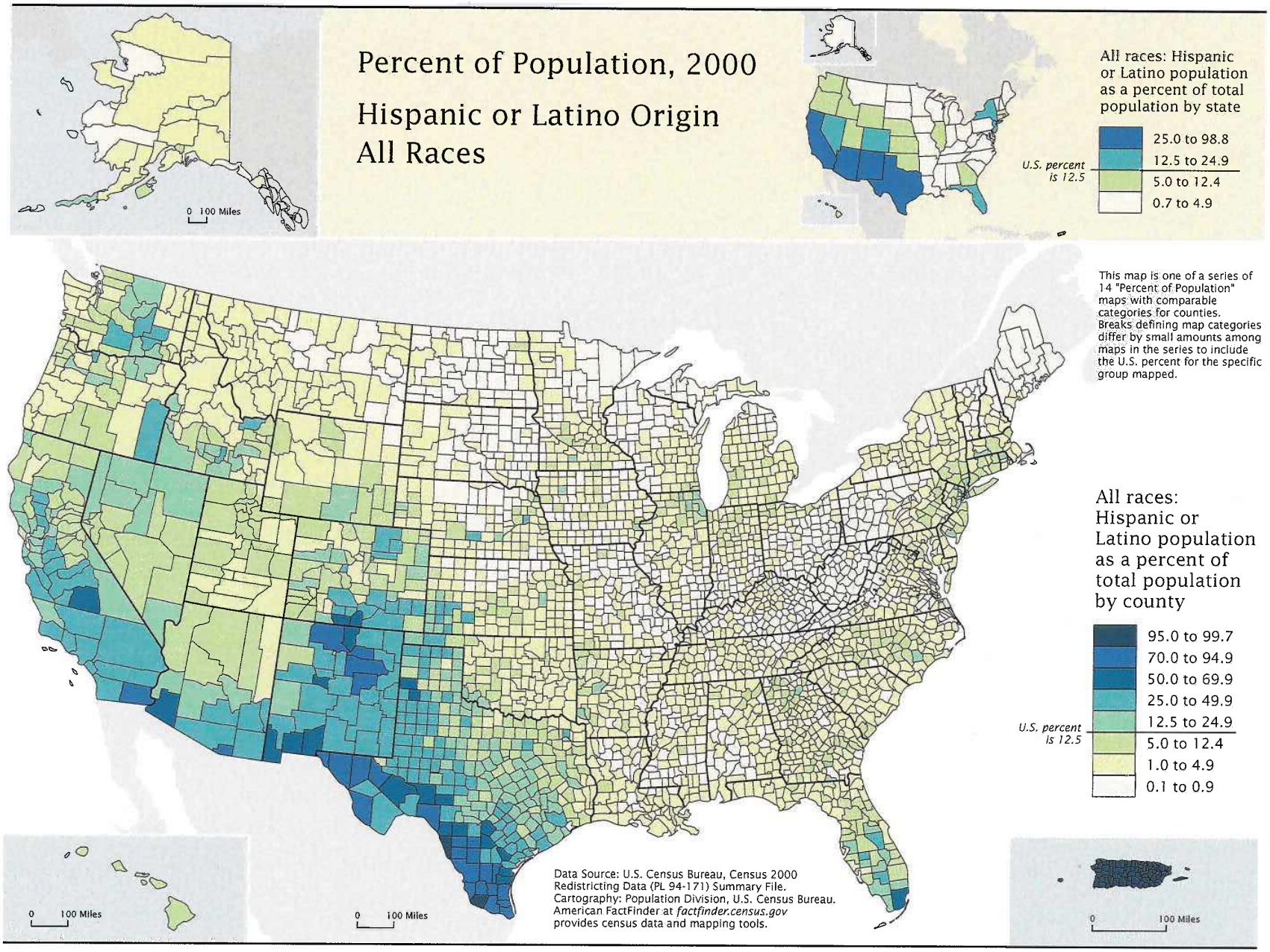
MAP 3


Counties and States Covered by Section 203
N
Alaska
Hawaii
Mass.
New York
Conn.
R.I.
New Jersey
Reference:
Department of Commerce, Bureau of the Census. (2002). "Voting Rights Act Amendments of 1992, Determinations Under Section 203". Federal Register 67 (144), pp. 48871-48877.
The purpose of the above reference is to publish the Bureau of the Census (Census Bureau) Director's determination as to which political subdivisions are subject to the minority language assistance provisions of Section 203 of the Voting Rights Act.
0
250
500
750
1,000
Miles
Legend
Countywide Section 203 Coverage
Not Covered
Hispanic - Covered
Hispanic - Partially Covered
Asian Languages
AIAN Languages
Statewide Section 203 Coverage
Not Covered
Hispanic
Prepared by:
U.S. Department of Justice
Civil Rights Division
Geographic Information Systems
Washington, D.C. 20530
August 9, 2002

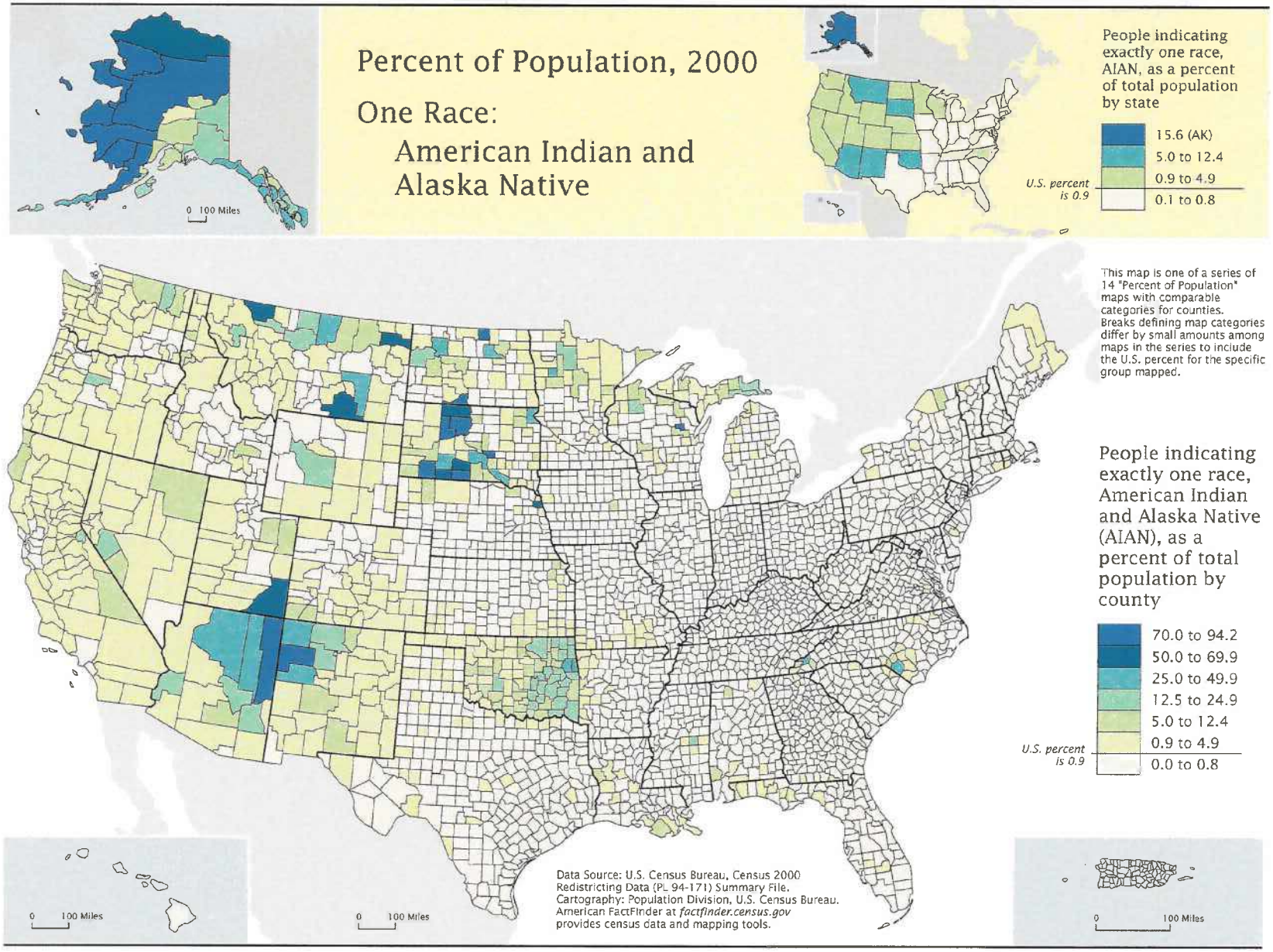
MAP 4A


Percent of Population, 2000
One Race:
Black or African American
0 100 Miles
People indicating exactly one race, Black or African American, as a percent of total population by state
U.S. percent is 12.3
25.0 to 60.0
12.3 to 24.9
5.0 to 12.2
0.3 to 4.9
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
People indicating exactly one race, Black or African American, as a percent of total population by county
U.S. percent is 12.3
70.0 to 86.5
50.0 to 69.9
25.0 to 49.9
12.3 to 24.9
5.0 to 12.2
1.0 to 4.9
0.0 to 0.9
0 100 Miles
0 100 Miles
0 100 Miles
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File.
Cartography: Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.

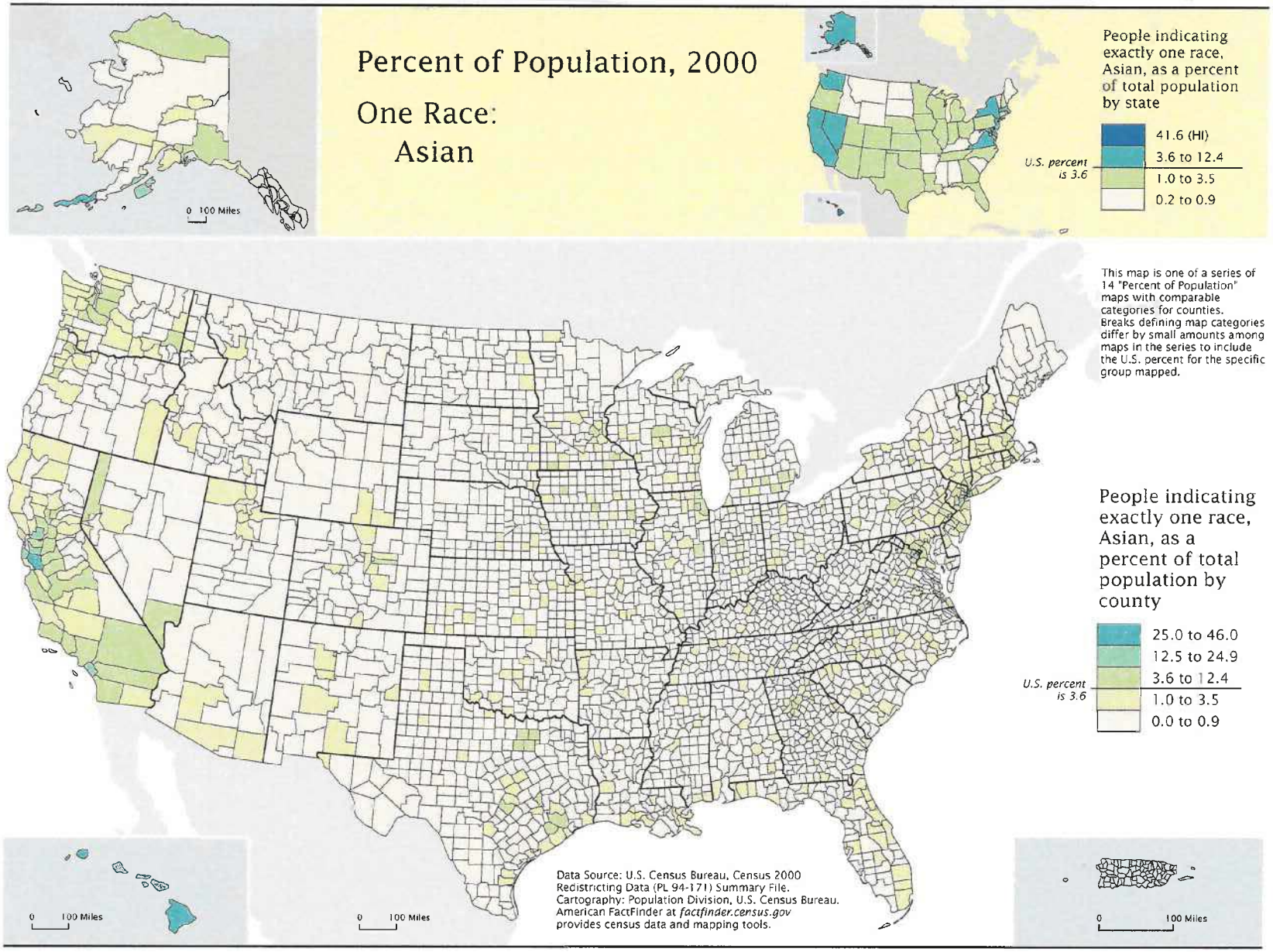
MAP 4B


Percent of Population, 2000
Hispanic or Latino Origin
All Races
All races: Hispanic or Latino population as a percent of total population by state
U.S. percent is 12.5
25.0 to 98.8
12.5 to 24.9
5.0 to 12.4
0.7 to 4.9
0 100 Miles
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
All races: Hispanic or Latino population as a percent of total population by county
U.S. percent is 12.5
95.0 to 99.7
70.0 to 94.9
50.0 to 69.9
25.0 to 49.9
12.5 to 24.9
5.0 to 12.4
1.0 to 4.9
0.1 to 0.9
0 100 Miles
0 100 Miles
0 100 Miles
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File.
Cartography: Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.

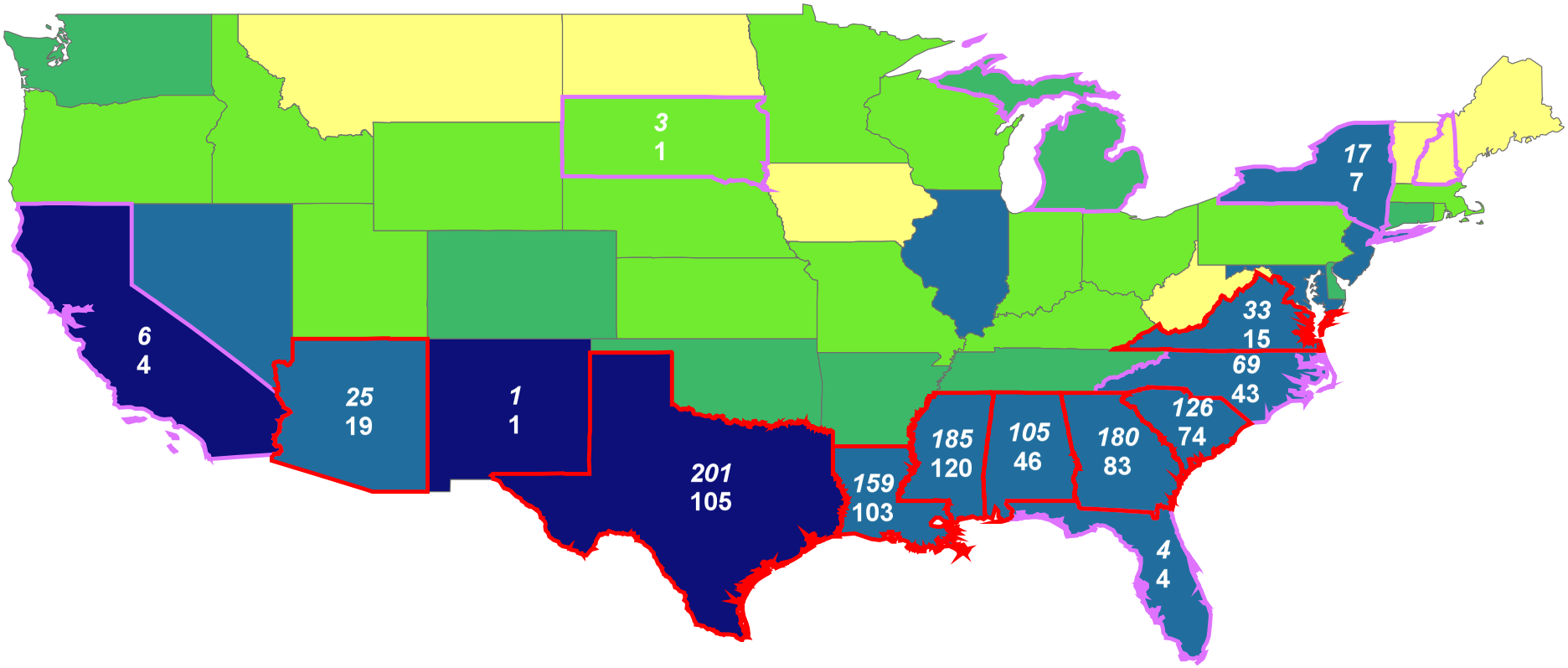
MAP 4C


Percent of Population, 2000
One Race:
American Indian and Alaska Native
0 100 Miles
People indicating exactly one race, AIAN, as a percent of total population by state
15.6 (AK)
5.0 to 12.4
0.9 to 4.9
0.1 to 0.8
U.S. percent is 0.9
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
People indicating exactly one race, American Indian and Alaska Native (AIAN), as a percent of total population by county
70.0 to 94.2
50.0 to 69.9
25.0 to 49.9
12.5 to 24.9
5.0 to 12.4
0.9 to 4.9
0.0 to 0.8
U.S. percent is 0.9
0 100 Miles
0 100 Miles
0 100 Miles
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File.
Cartography: Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.

MAP 4D


Percent of Population, 2000
One Race:
Asian
People indicating exactly one race, Asian, as a percent of total population by state
U.S. percent is 3.6
41.6 (HI)
3.6 to 12.4
1.0 to 3.5
0.2 to 0.9
0 100 Miles
This map is one of a series of 14 "Percent of Population" maps with comparable categories for counties. Breaks defining map categories differ by small amounts among maps in the series to include the U.S. percent for the specific group mapped.
People indicating exactly one race, Asian, as a percent of total population by county
U.S. percent is 3.6
25.0 to 46.0
12.5 to 24.9
3.6 to 12.4
1.0 to 3.5
0.0 to 0.9
0 100 Miles
0 100 Miles
0 100 Miles
Data Source: U.S. Census Bureau, Census 2000 Redistricting Data (PL 94-171) Summary File.
Cartography: Population Division, U.S. Census Bureau.
American FactFinder at factfinder.census.gov provides census data and mapping tools.

MAP 5A
Objections
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

Section 5 Fully Covered States

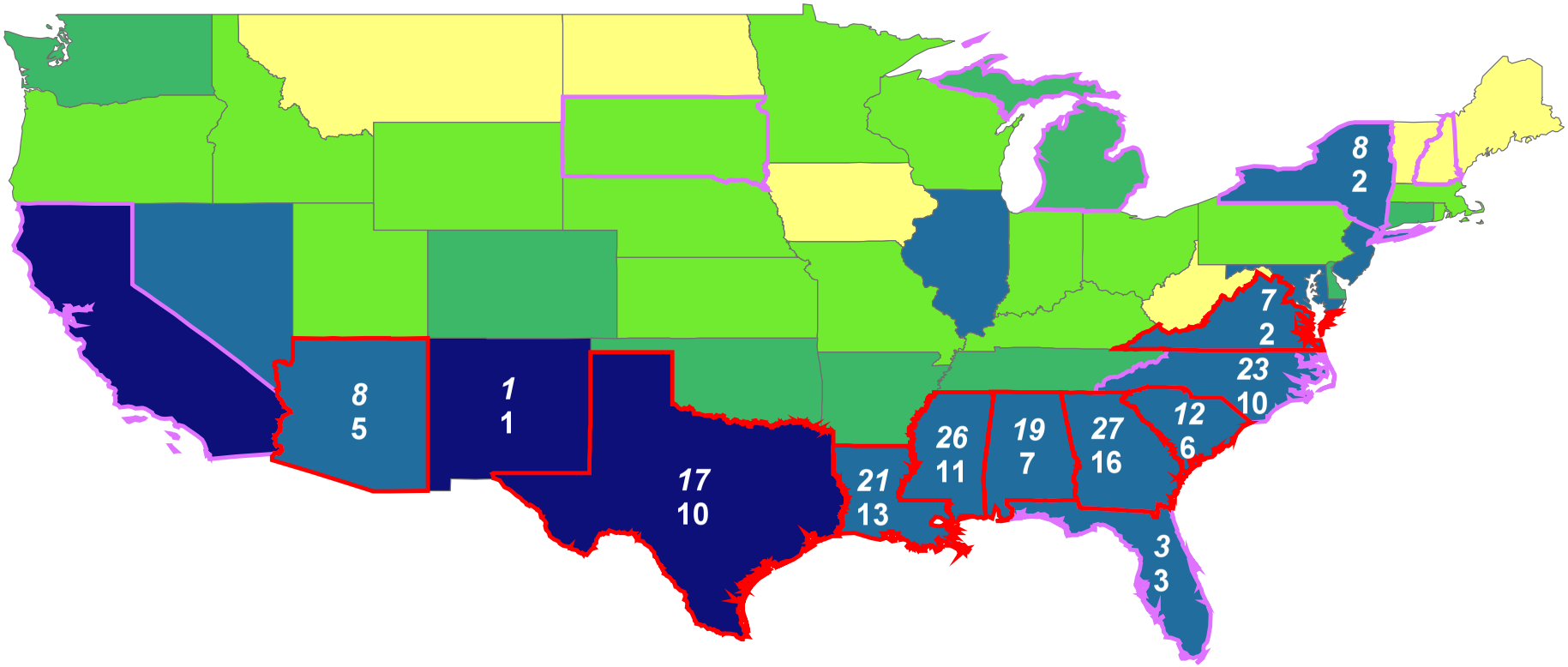
Partially Covered States

*Italicized numbers = Objections 1966 - 2004
Boldface numbers = Objections August 5, 1982 - 2004

Two objections were interposed in Alaska after 1982, and none in Hawaii at any time.

Created for the National Commission on the Voting Rights Act

MAP 5B
Statewide Objections Only
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1- 24.7
- 24.8 - 35.8
- 35.9 - 68.2

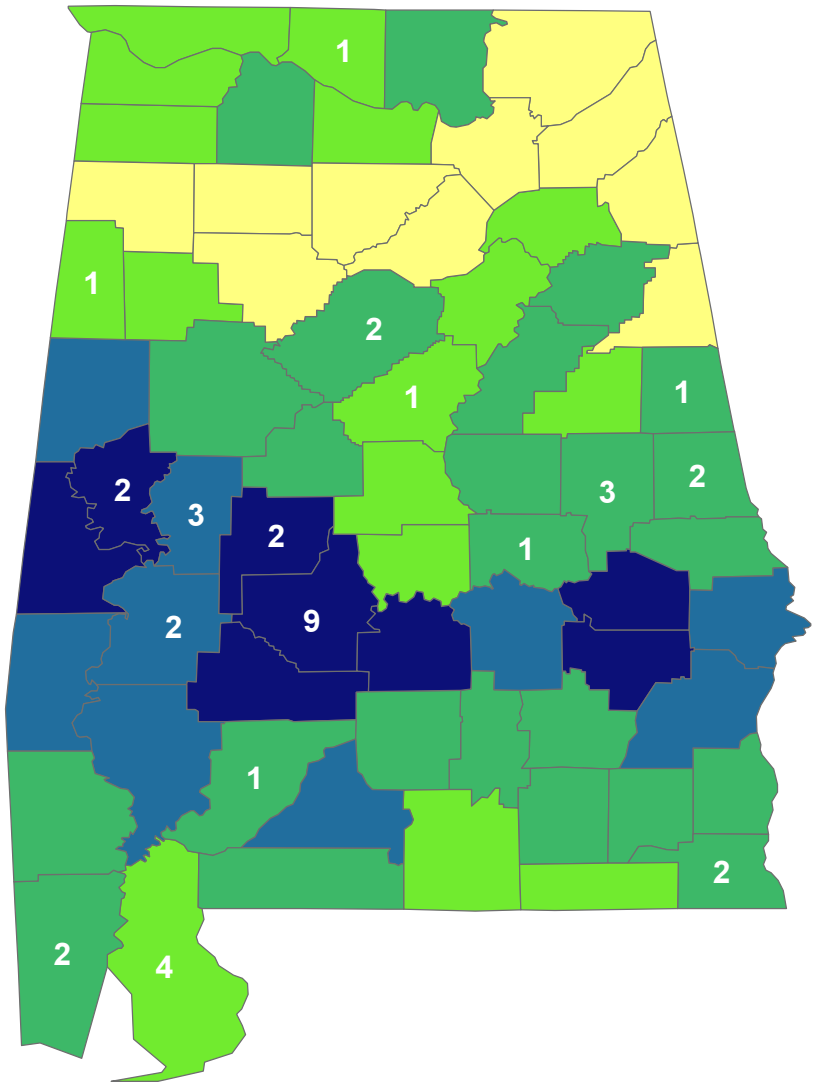
- Section 5 Fully Covered States
- Partially Covered States

*Italicized numbers = Objections 1966 - 2004
Boldface numbers = Objections August 5, 1982 - 2004

Two objections were interposed in Alaska after 1982, and none in Hawaii at any time.

Created for the National Commission on the Voting Rights Act

MAP 5C
Objections by County: Alabama
(August 5, 1982 - 2004)

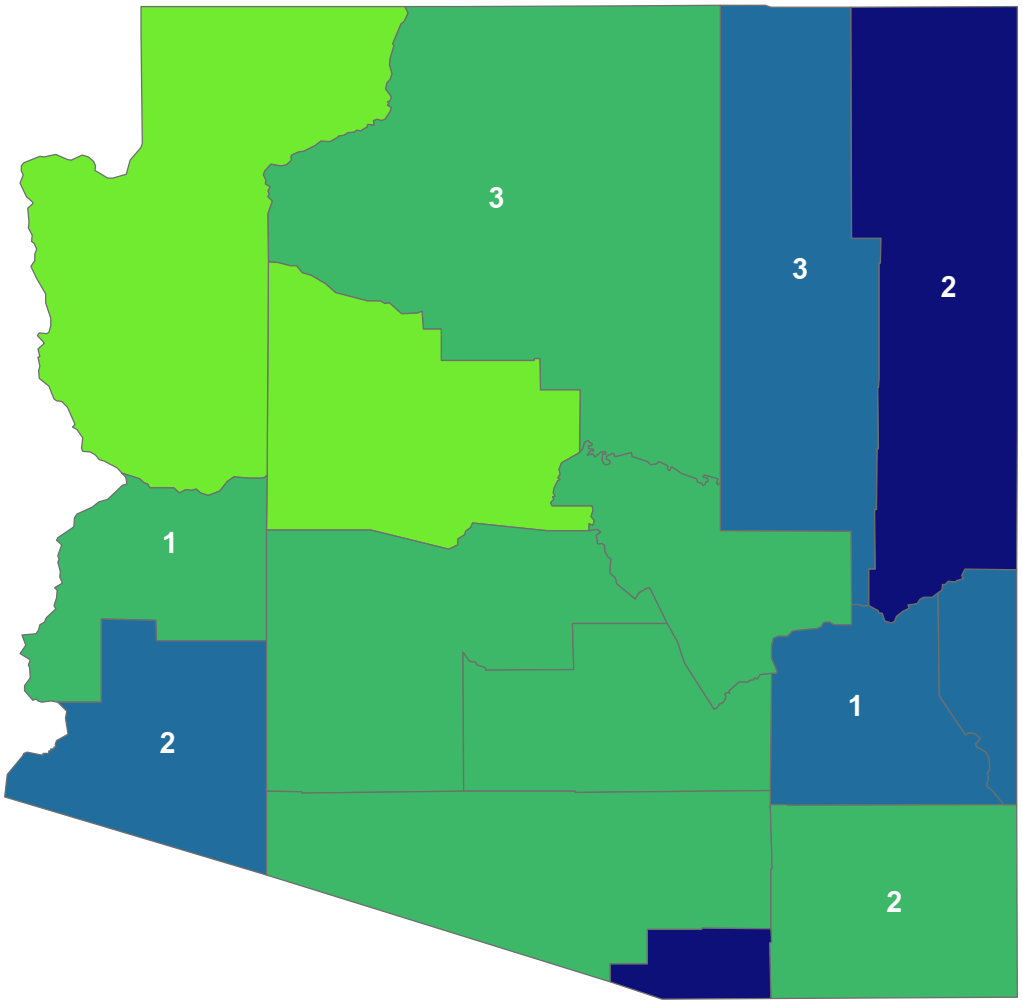


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.1
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5D
Objections by County: Arizona
(August 5, 1982 - 2004)

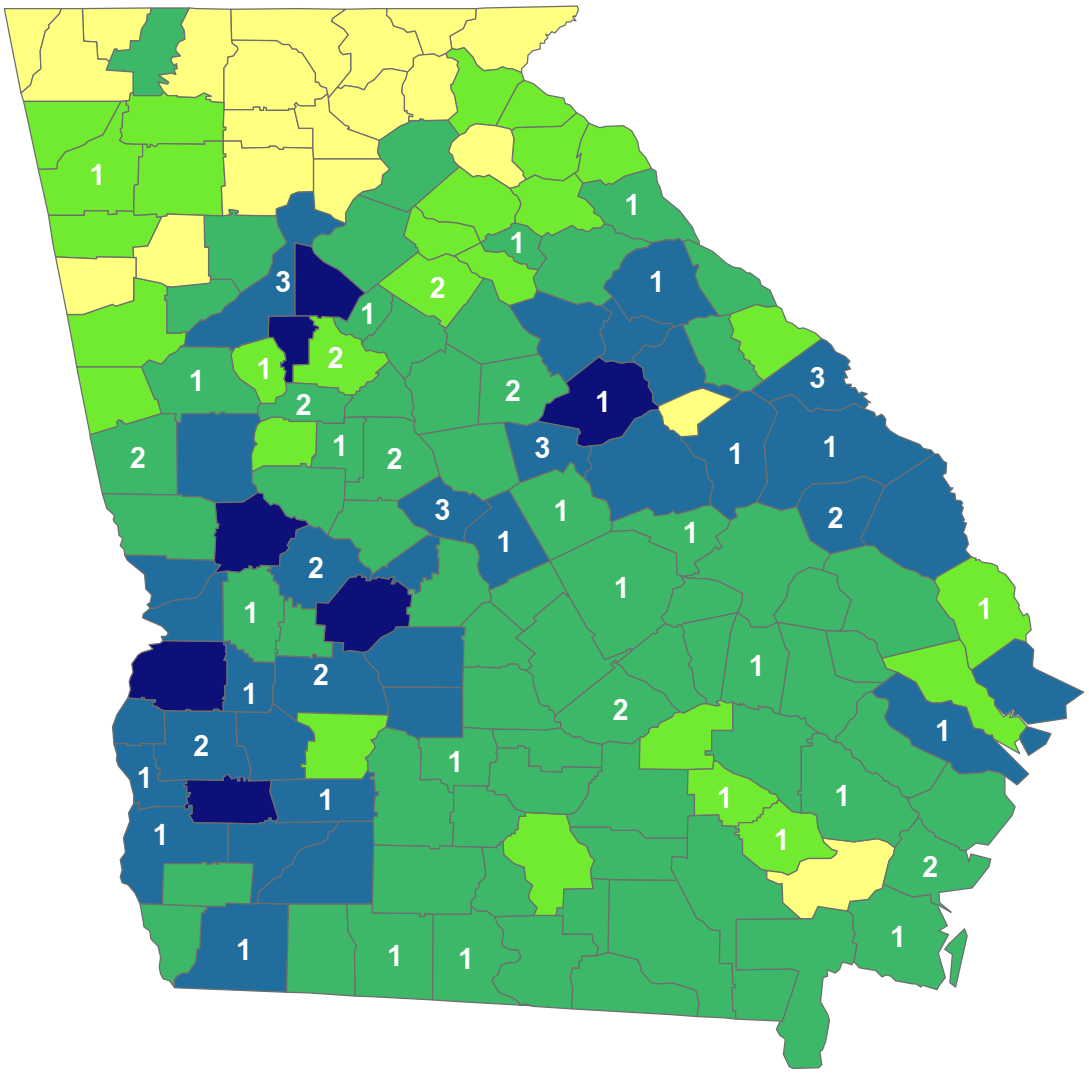


Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

Created for the National Commission on the Voting Rights Act

MAP 5E
Objections by County: Georgia
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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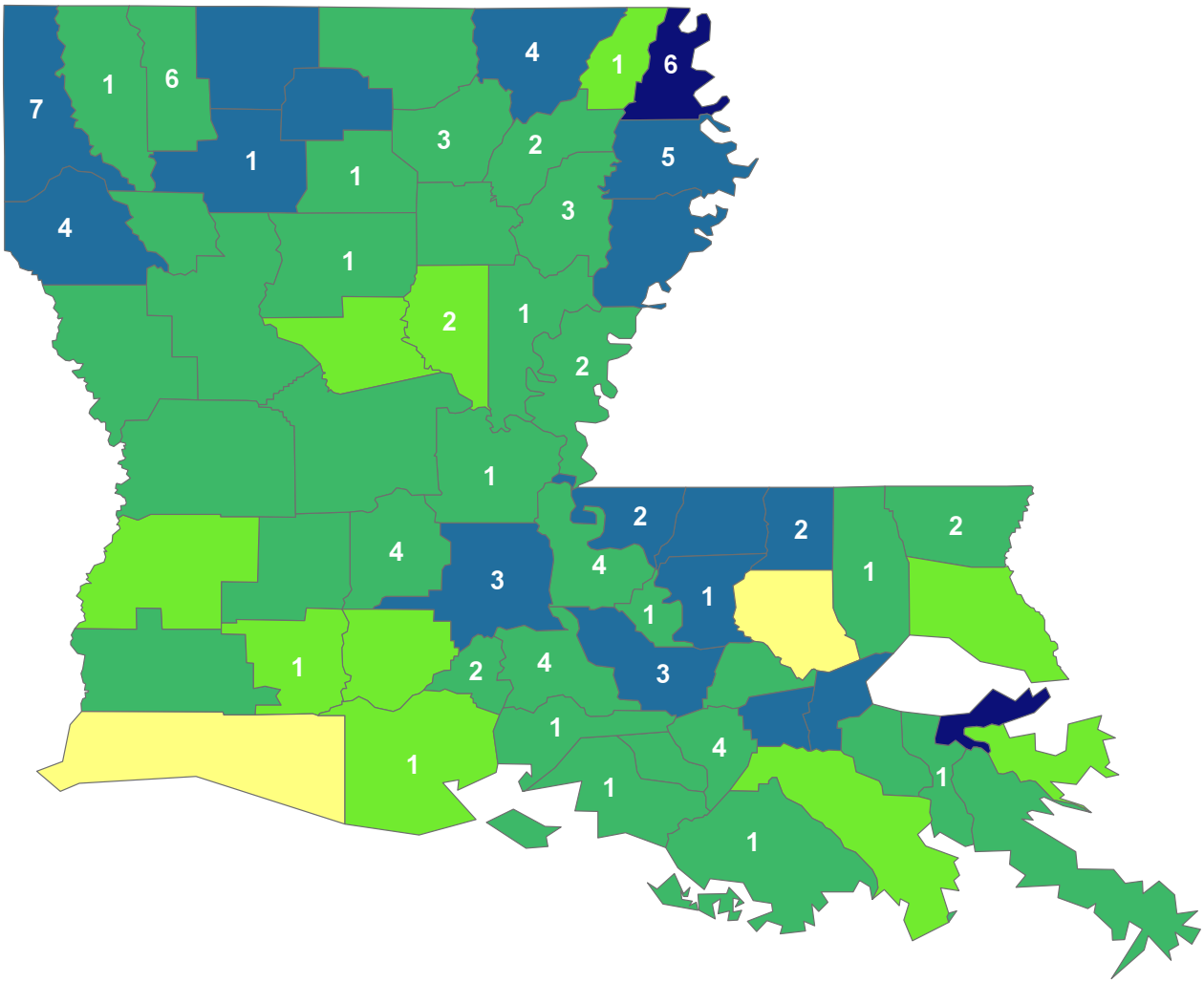
MAP 5F
Objections by Parish: Louisiana
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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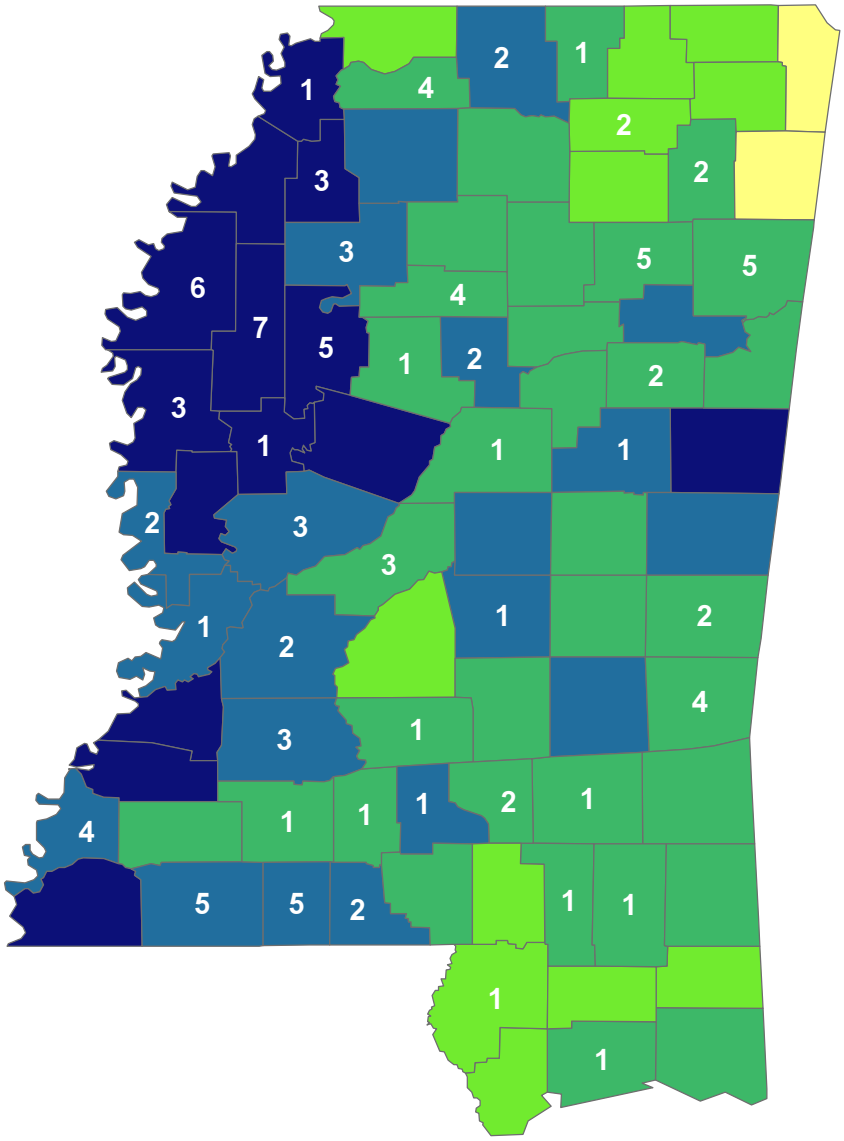
MAP 5G
Objections by County: Mississippi
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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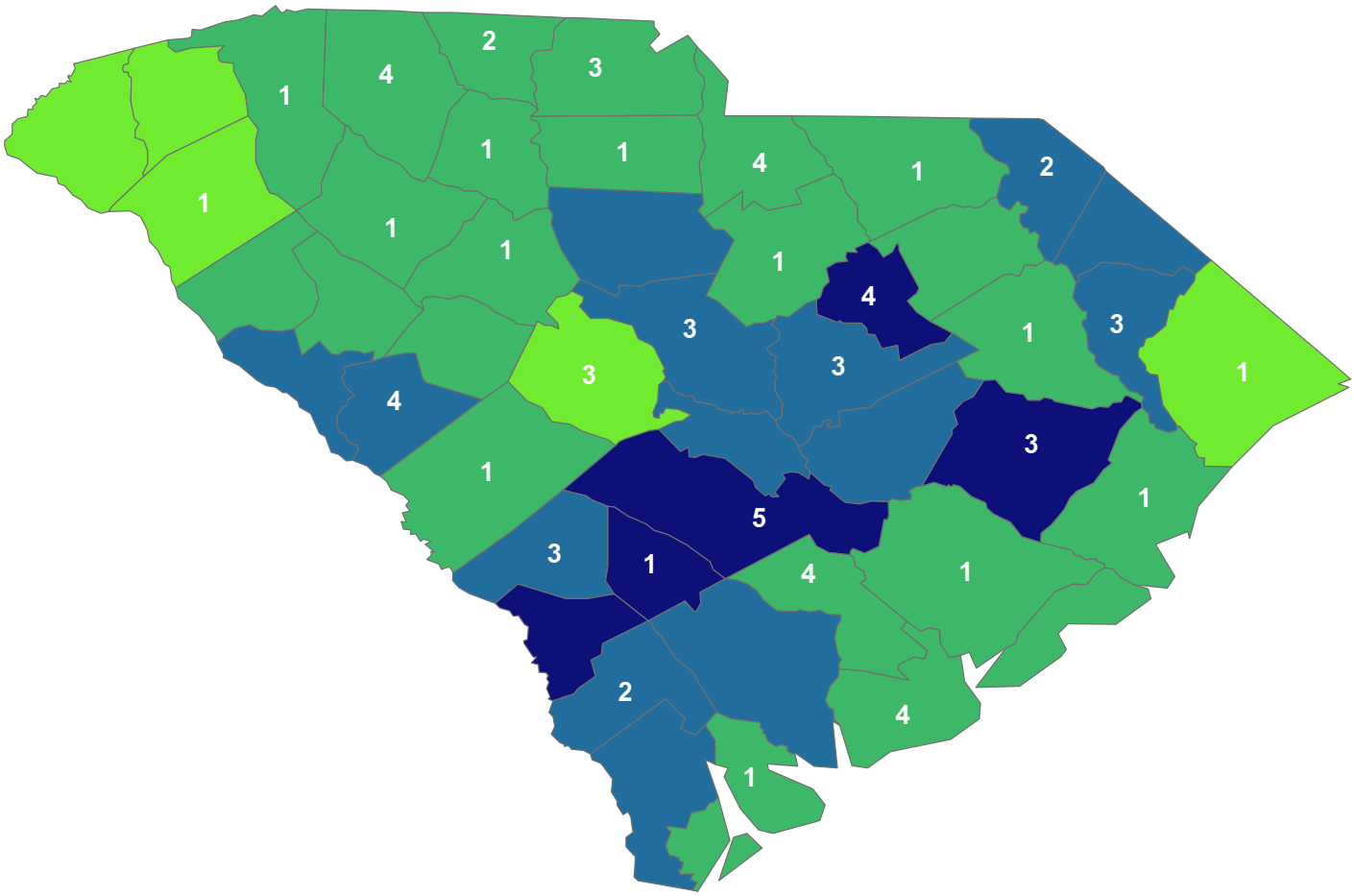
MAP 5H
Objections by County: South Carolina
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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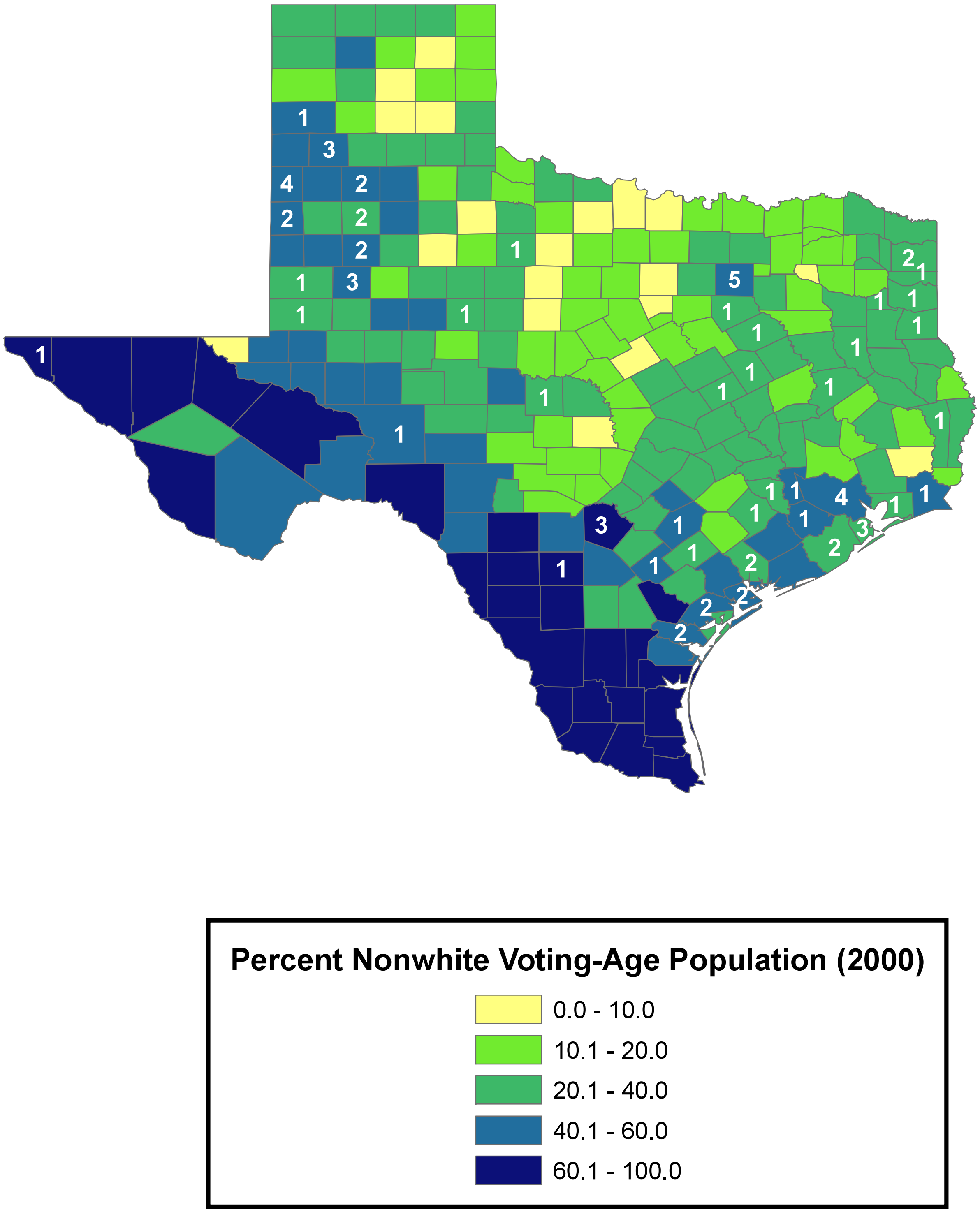
MAP 5I
Objections by County: Texas
(August 5, 1982 - 2004)



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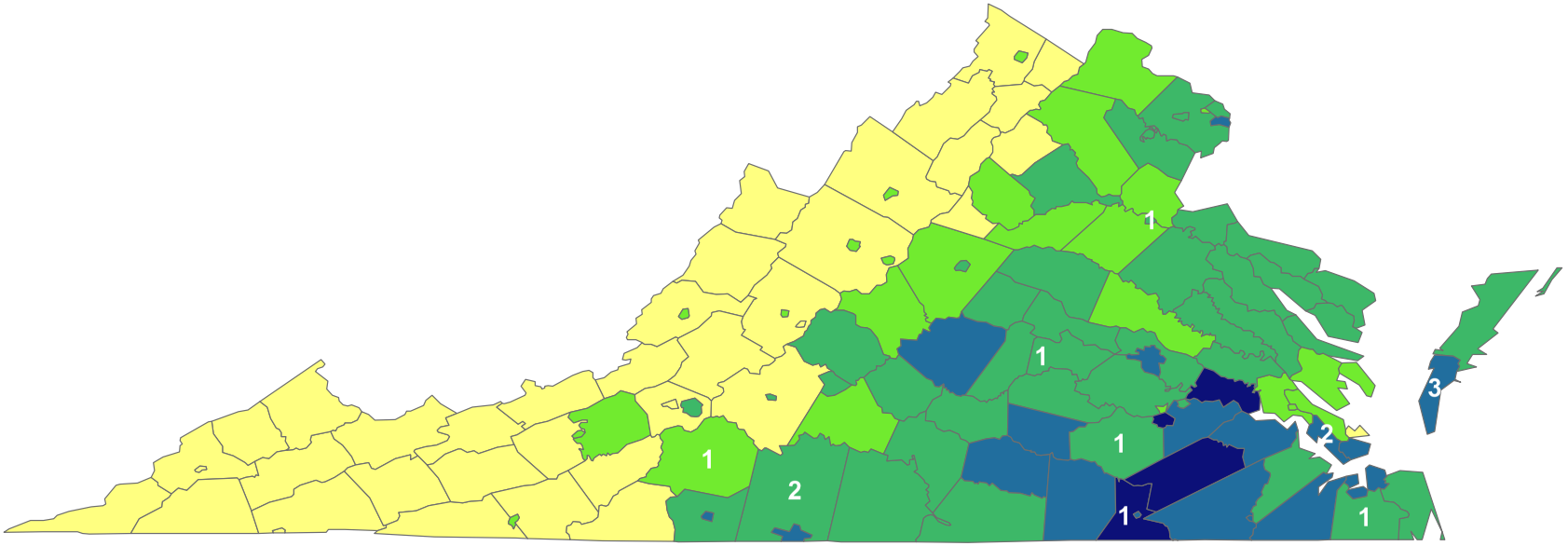
MAP 5J
Objections by County: Virginia
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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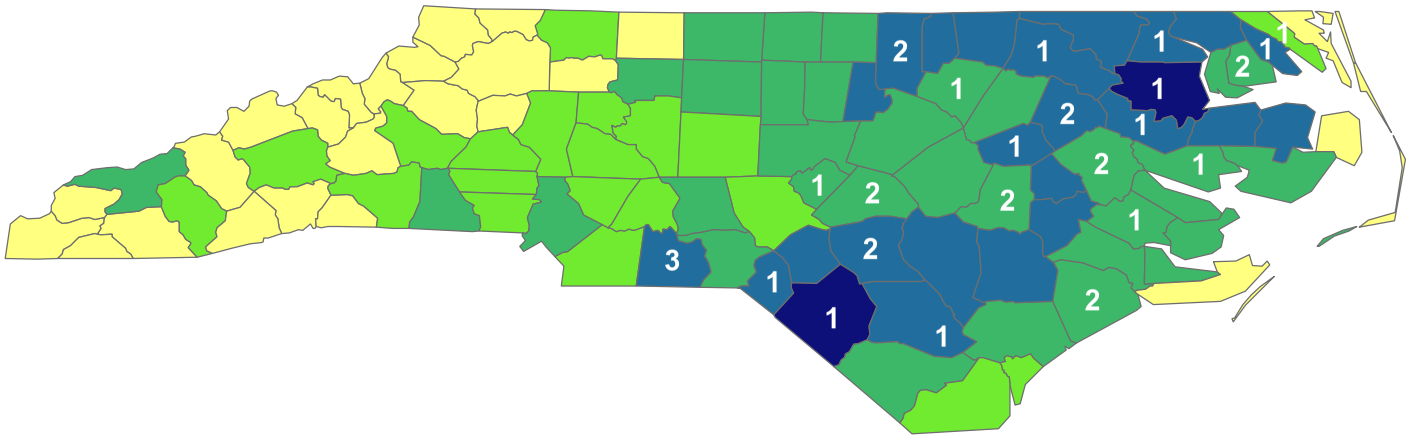
MAP 5K
Objections by County: North Carolina
(August 5, 1982- 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 2.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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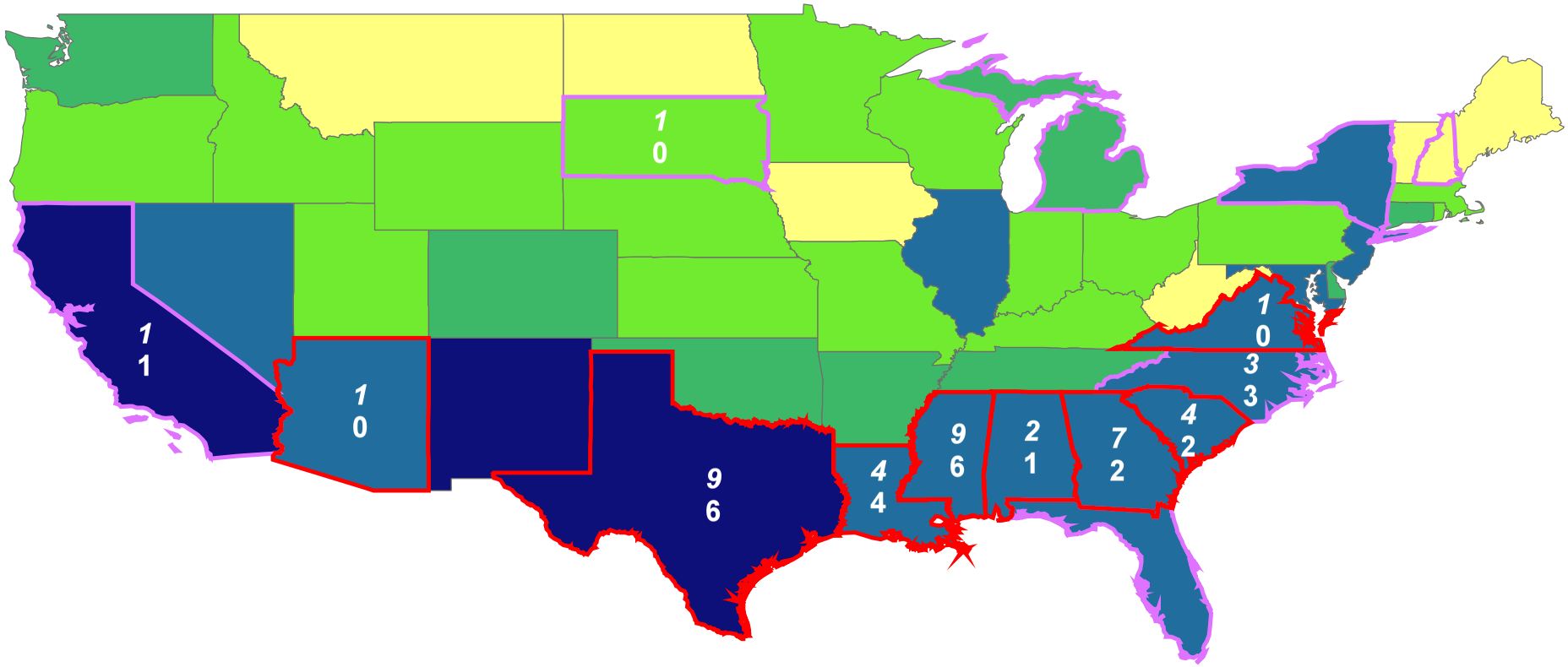
MAP 6
Declaratory Judgment Actions Favorable to Minorities
(1966 - 2004 and August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

- Section 5 Fully Covered States
- Partially Covered States

*Italicized numbers = Actions 1966 - 2004
Boldface numbers = Actions August 5, 1982 - 2004

No actions were filed in Alaska or Hawaii.

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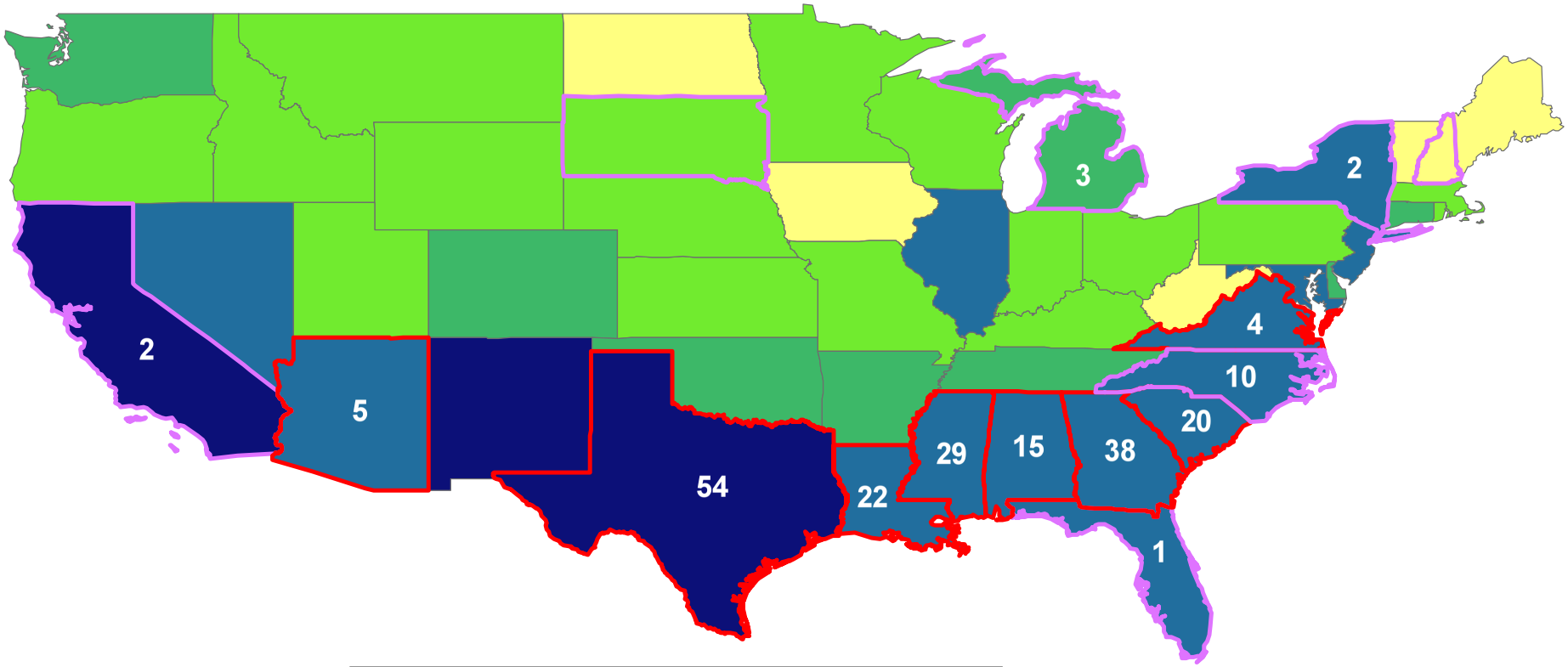
MAP 7
Submission Withdrawals
(August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) by Quintile

- 0.0 - 7.0
- 8.0 - 16.0
- 17.0 - 25.0
- 26.0 - 36.0
- 37.0 - 68.0

- Section 5 Fully Covered States
- Partially Covered States

*Alaska made one withdrawal; Hawaii made none.

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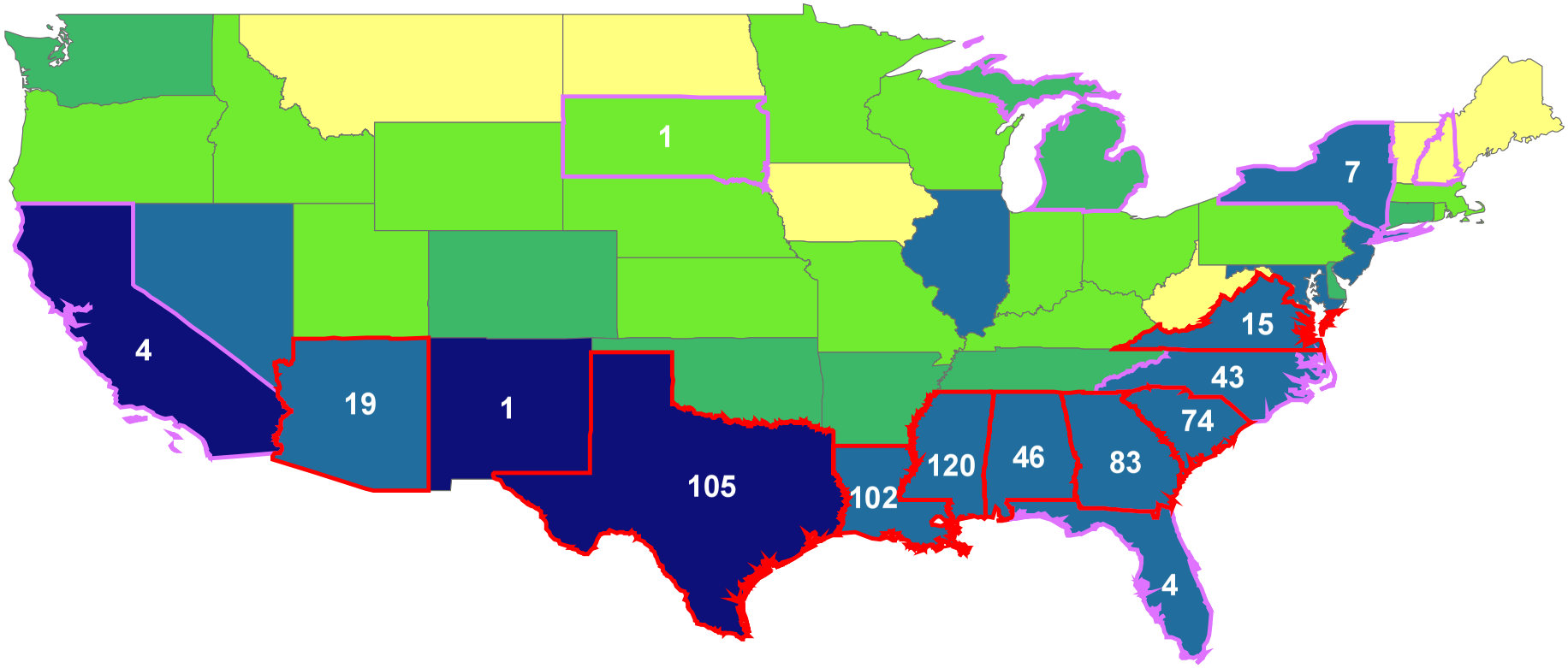
MAP 8
Objections
(August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

- Section 5 Fully Covered States
- Partially Covered States

*Two objections were interposed in Alaska; Hawaii had none.

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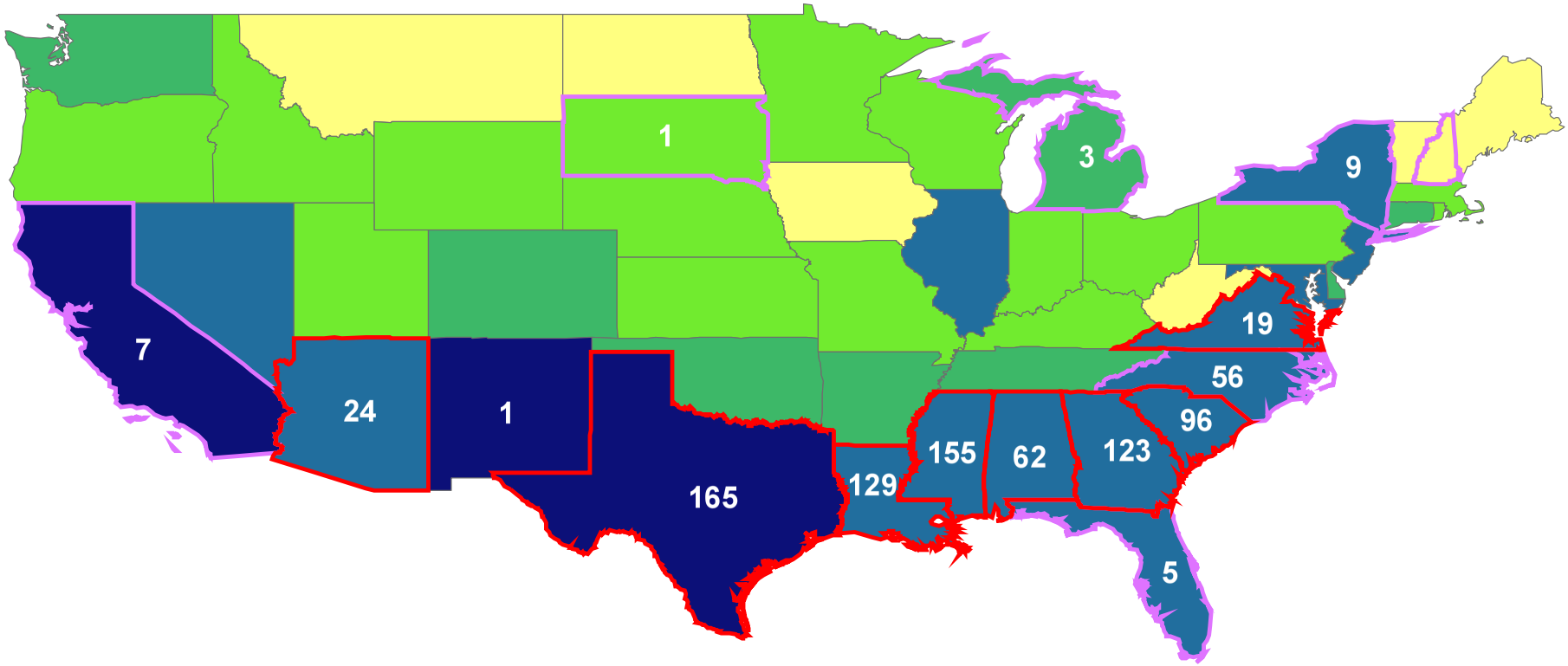
MAP 9
Sum of Objections, Submission Withdrawals, and Declaratory Judgment Actions Favorable to Minorities (August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

- Section 5 Fully Covered States
- Partially Covered States

*The sum in Alaska is three, and zero in Hawaii.

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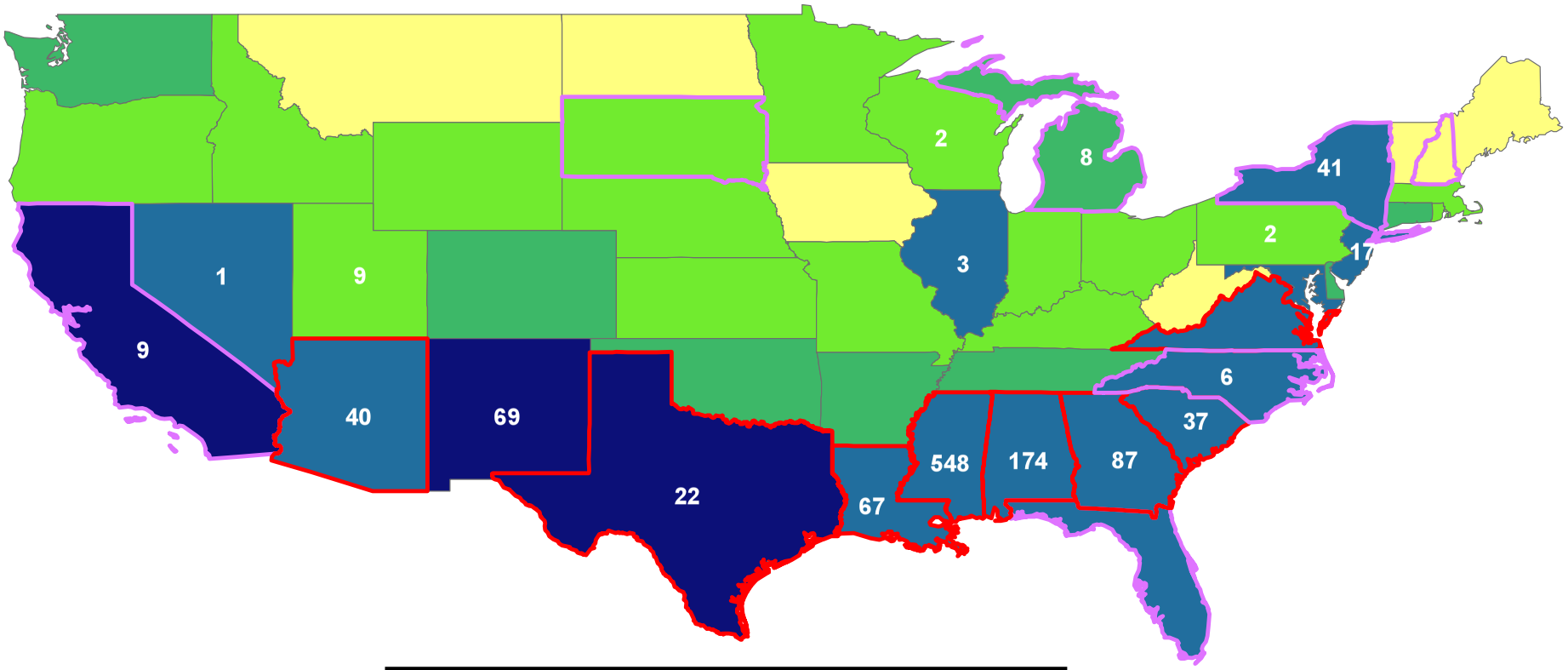
MAP 10A
Observer Coverages: All States*
(1966 - 2004)



Percent Nonwhite Voting-Age Population (2000) by Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

- Section 5 Fully Covered States
- Partially Covered States

*There were no observer coverages in Alaska or Hawaii.

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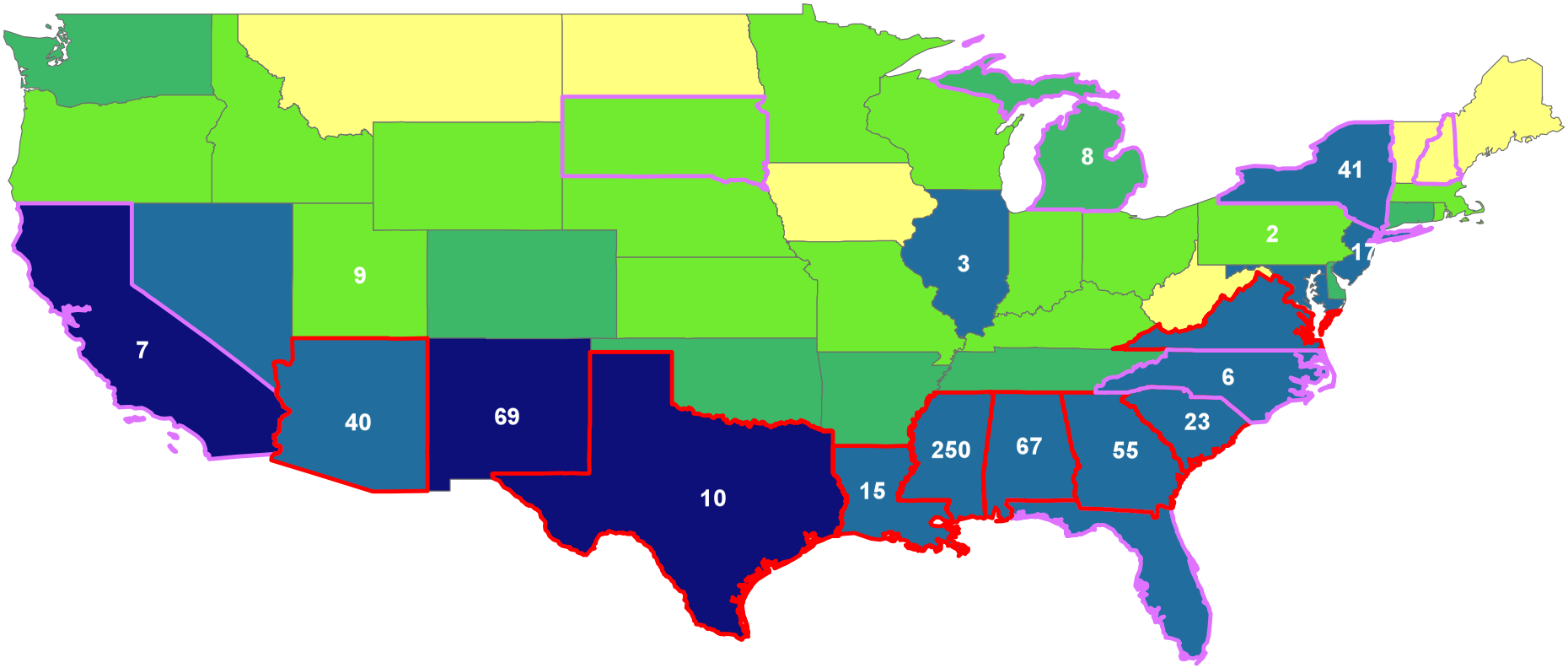
MAP 10B
Observer Coverages: All States
(August 5, 1982 - 2004)*



Percent Nonwhite Voting-Age Population (2000) by Quintile

- 0.0 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

- Section 5 Fully Covered States
- Partially Covered States

*There were no observer coverages in Alaska or Hawaii.

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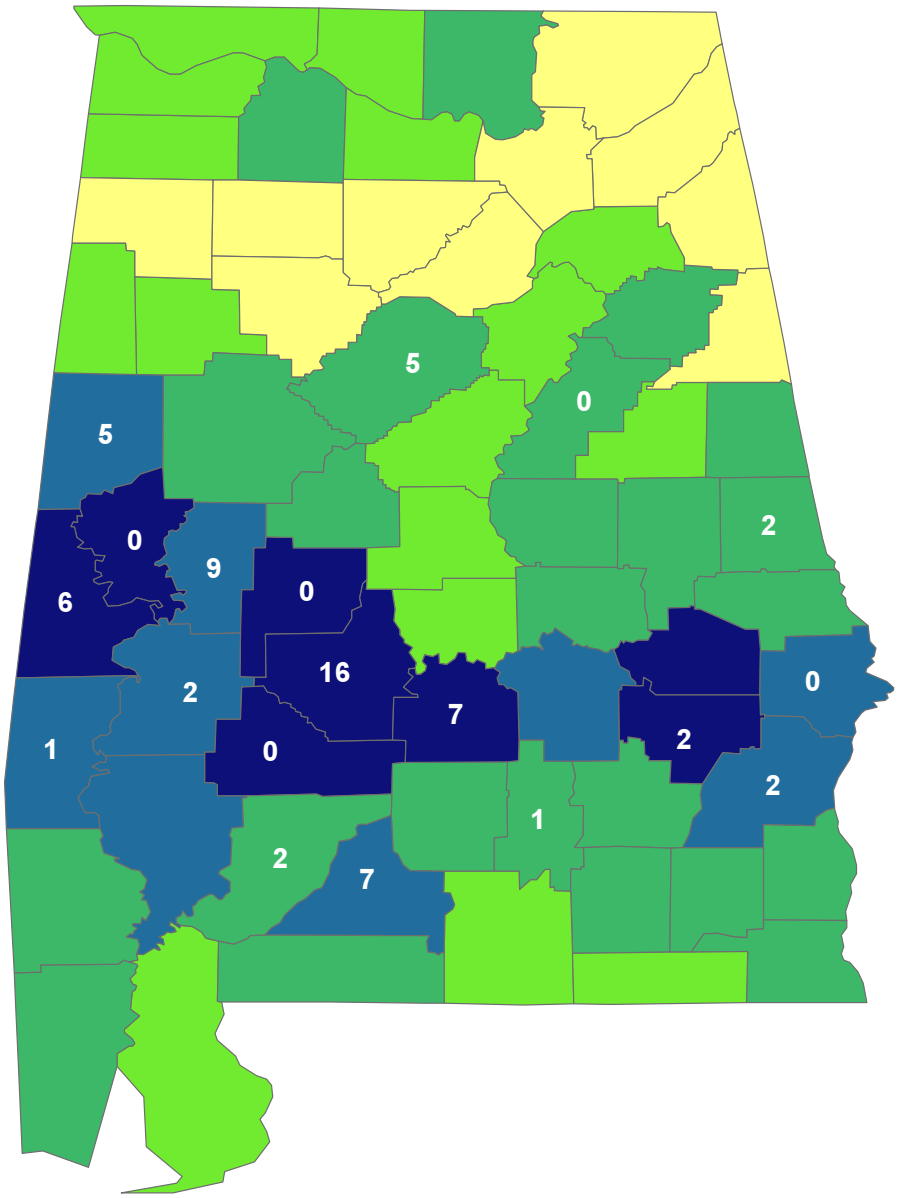
MAP 10C
Observer Coverages by County: Alabama
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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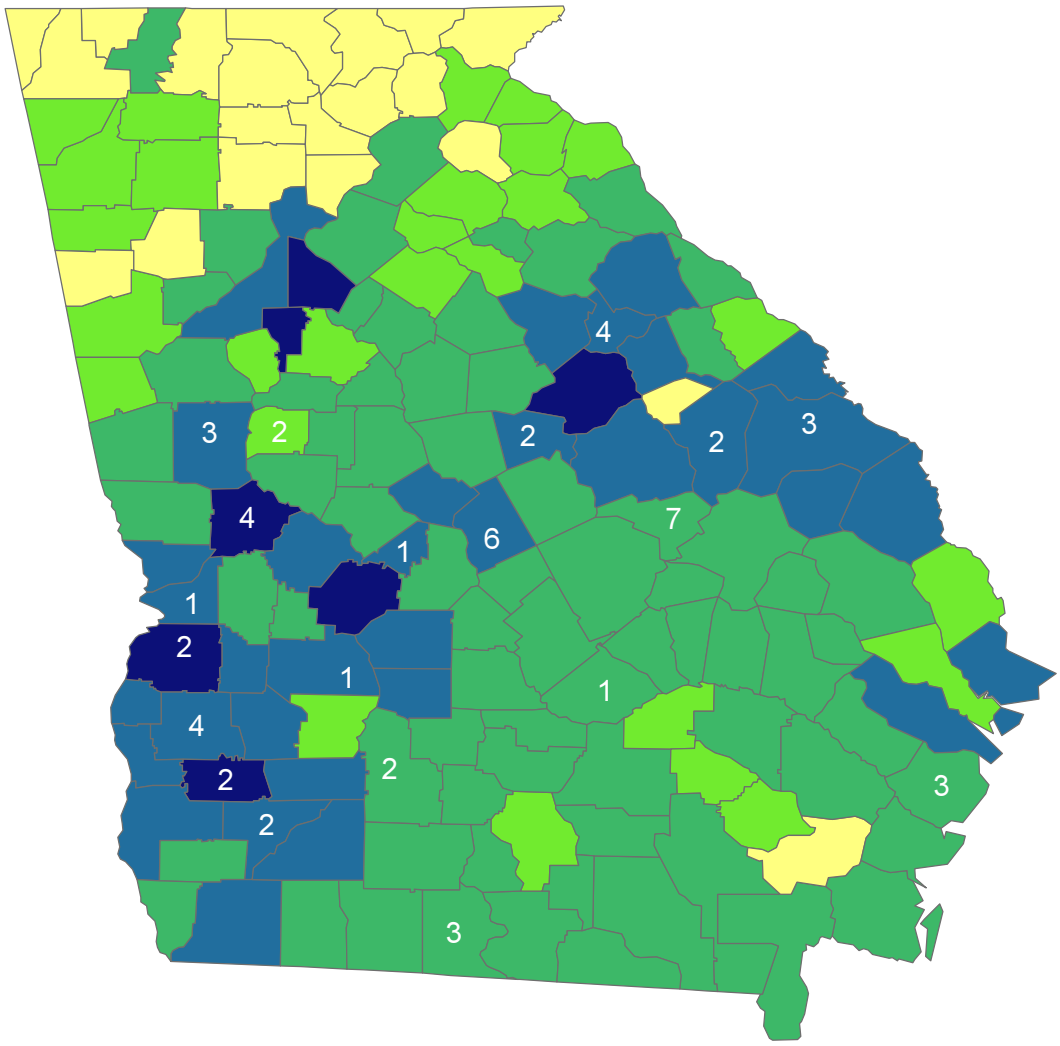
MAP 10D
Observer Coverages by County: Georgia
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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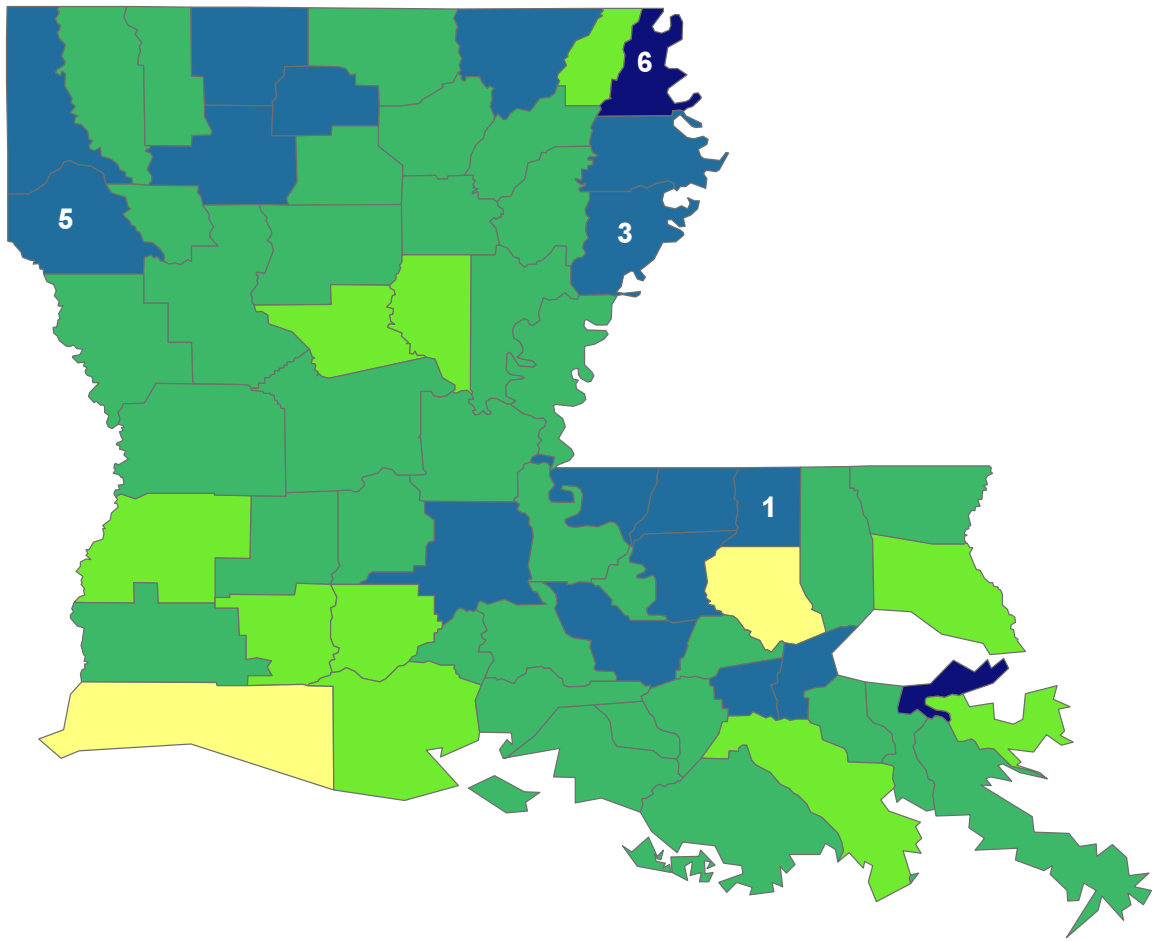
MAP 10E
Observer Coverages by Parish: Louisiana
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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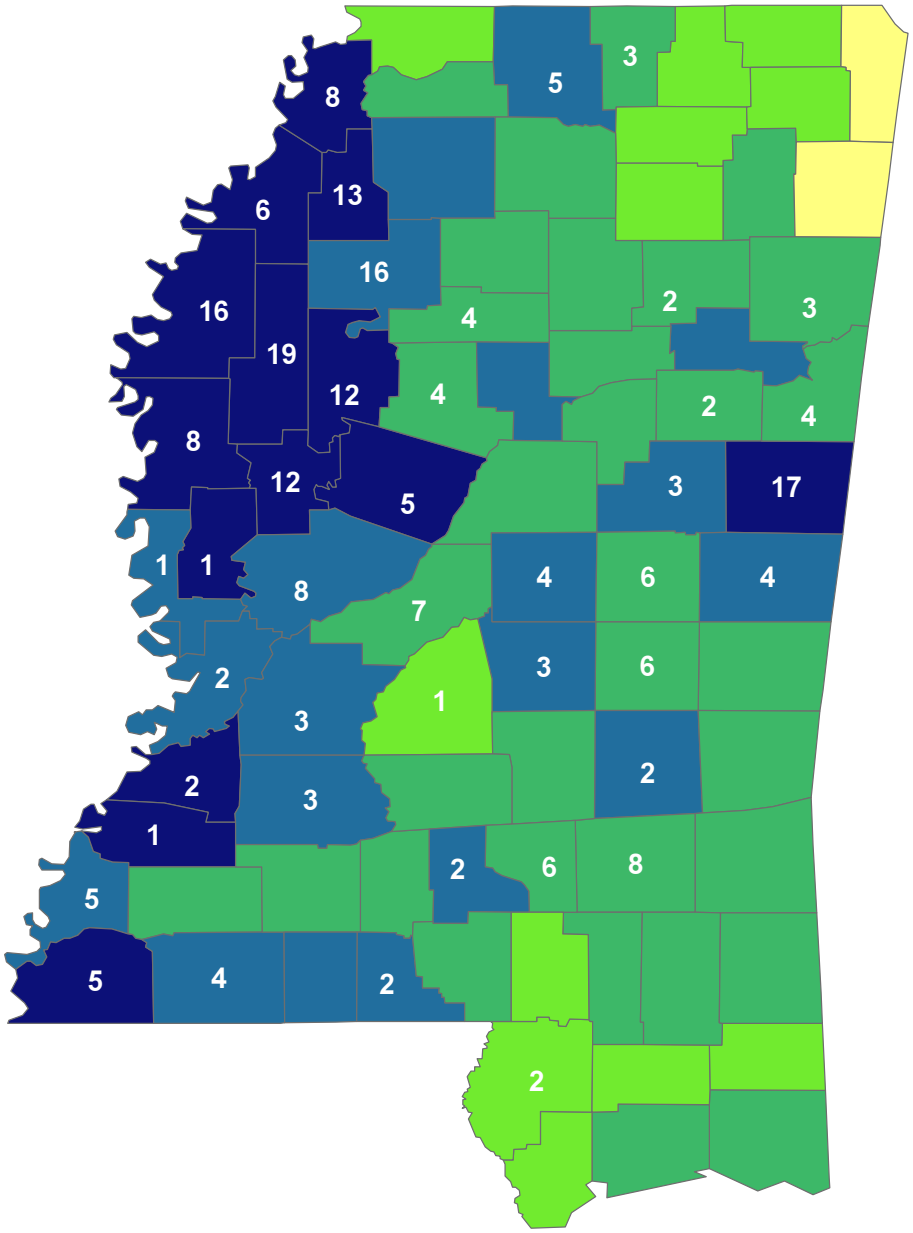
MAP 10F
Observer Coverages by County: Mississippi
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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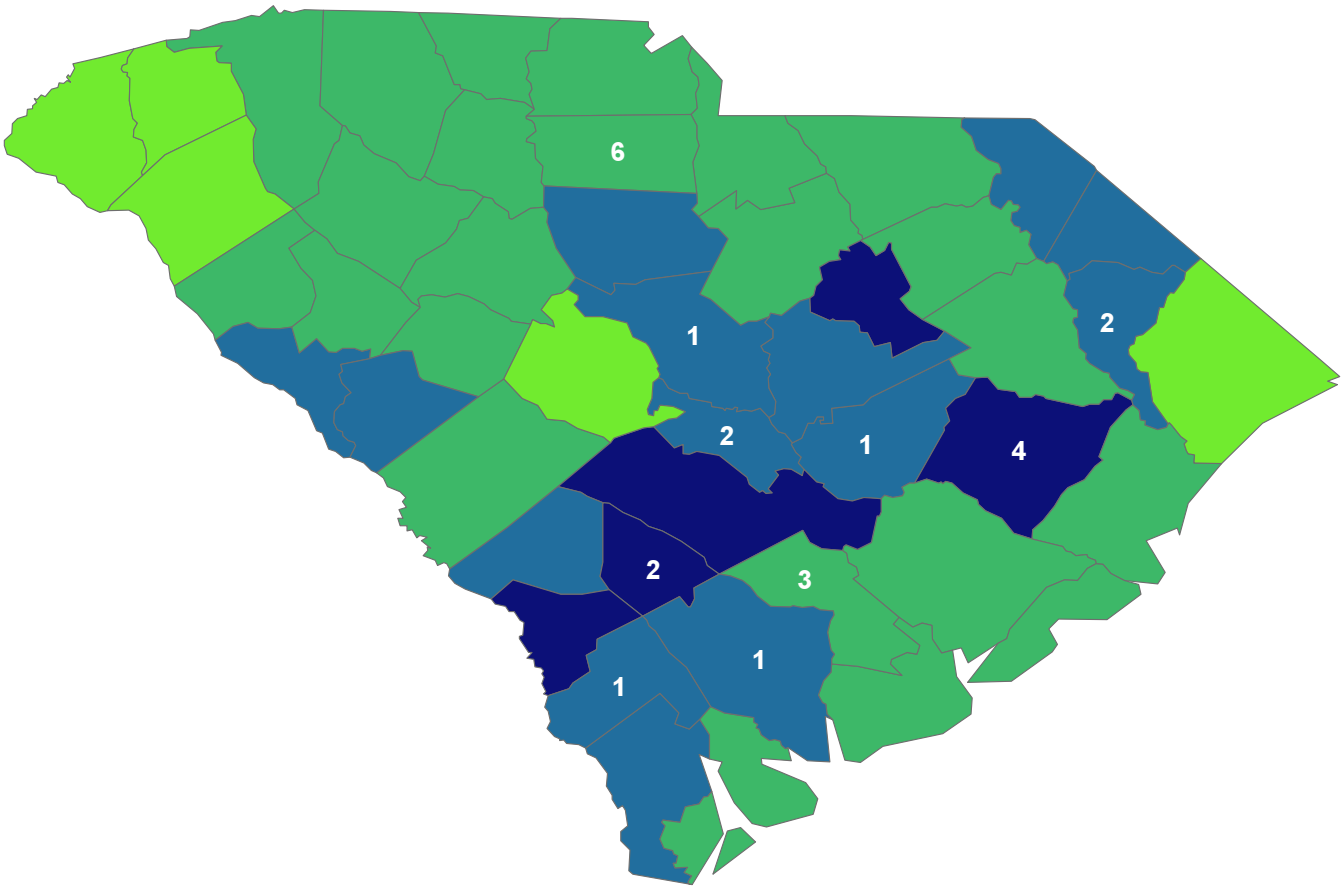
MAP 10G
Observer Coverages by County: South Carolina
(August 5, 1982 - 2004)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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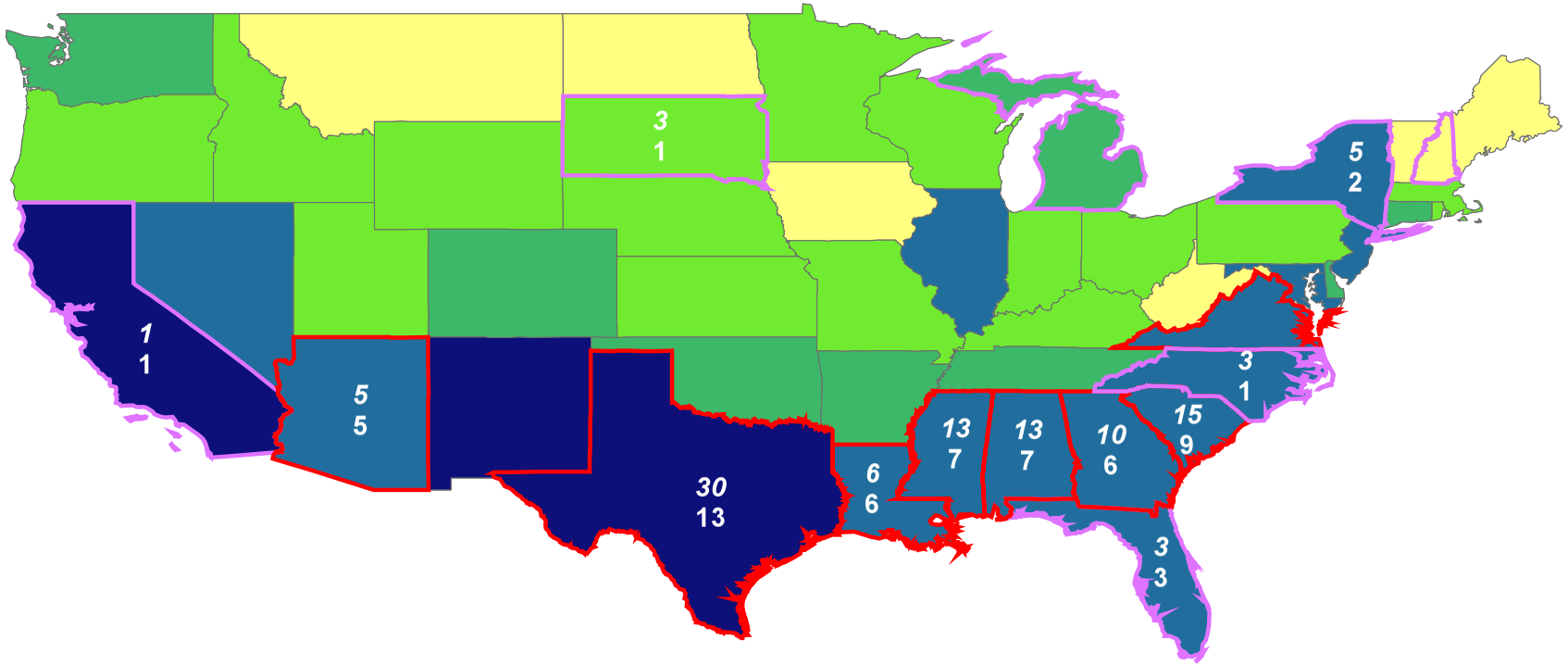
MAP 11
Section 5 Enforcement Actions in Which Department of Justice Participated (1966-2004 and August 5, 1982-2004)*



Percent Nonwhite Voting Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

- Section 5 Fully Covered States
- Partially Covered States

*Italicized numbers = Enforcement Actions 1966 - 2004
Bold-faced numbers = Enforcement Actions August 5, 1982 - 2004

There were no enforcement actions in Alaska or Hawaii.

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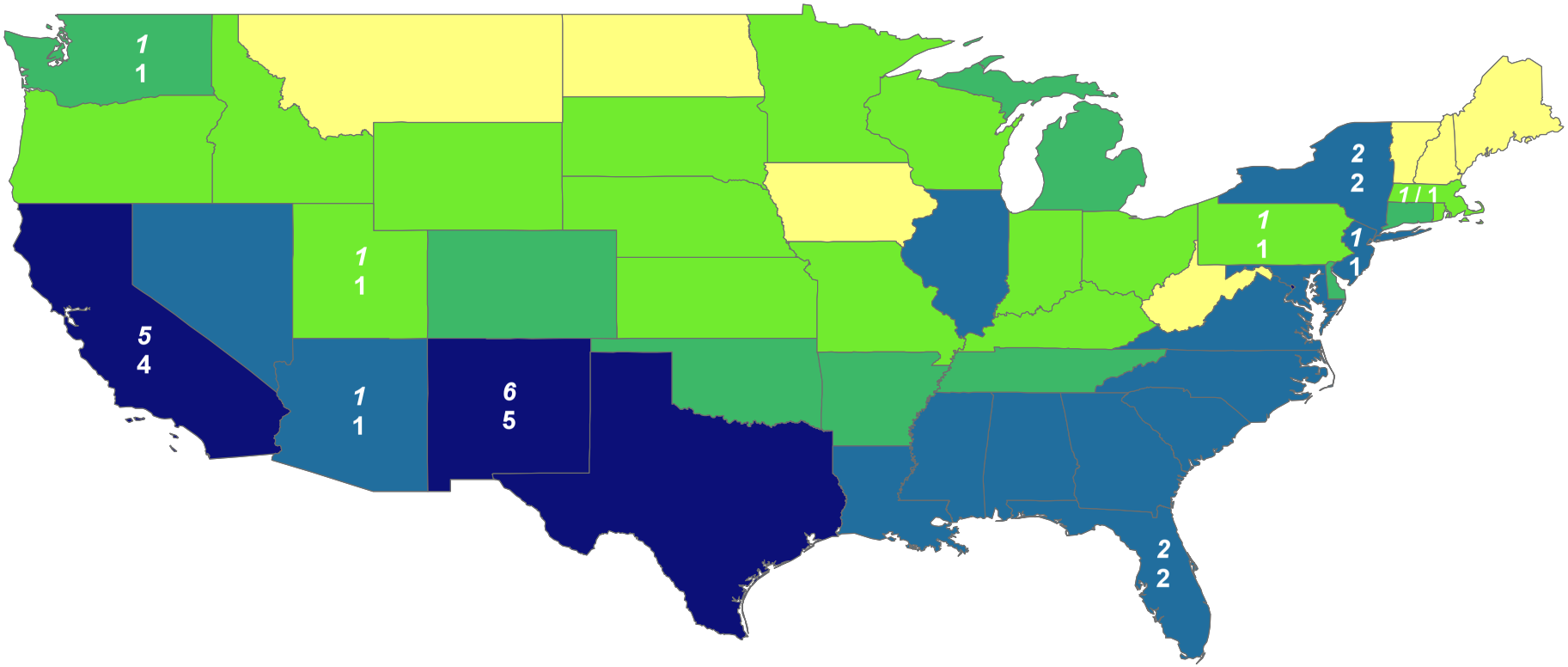
MAP 12
Department of Justice Language Assistance Enforcement Actions (1966-2004 and August 5, 1982-2004)*



Percent Nonwhite Voting-Age Population (2000) By Quintile

- 2.9 - 8.5
- 8.6 - 16.0
- 16.1 - 24.7
- 24.8 - 35.8
- 35.9 - 68.2

*Italicized numbers = Enforcement Actions 1966 - 2004
Bold-faced numbers = Enforcement Actions August 5, 1982 - 2004

There were no enforcement actions in Alaska or Hawaii.

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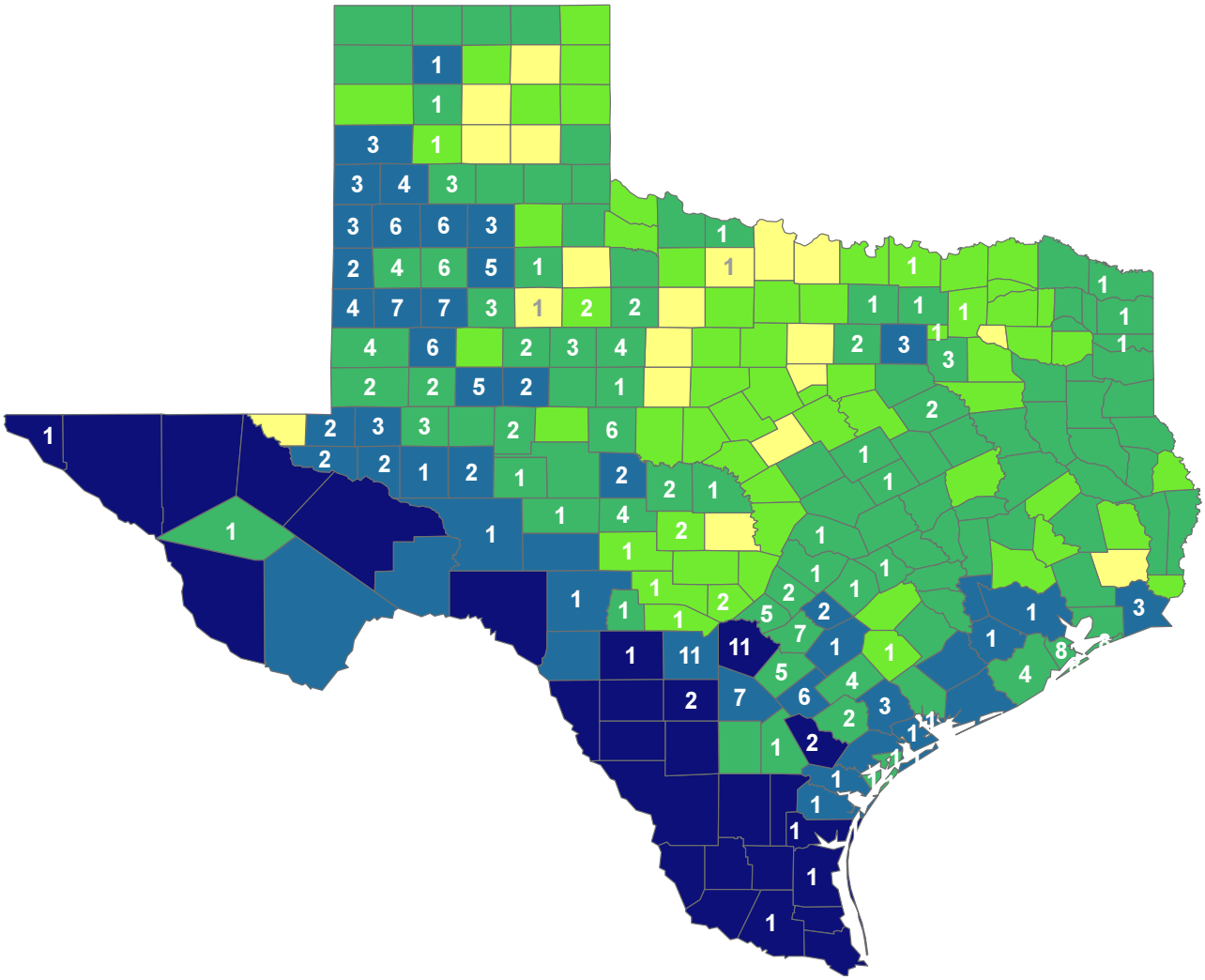
MAP 13A
Number of Times Texas Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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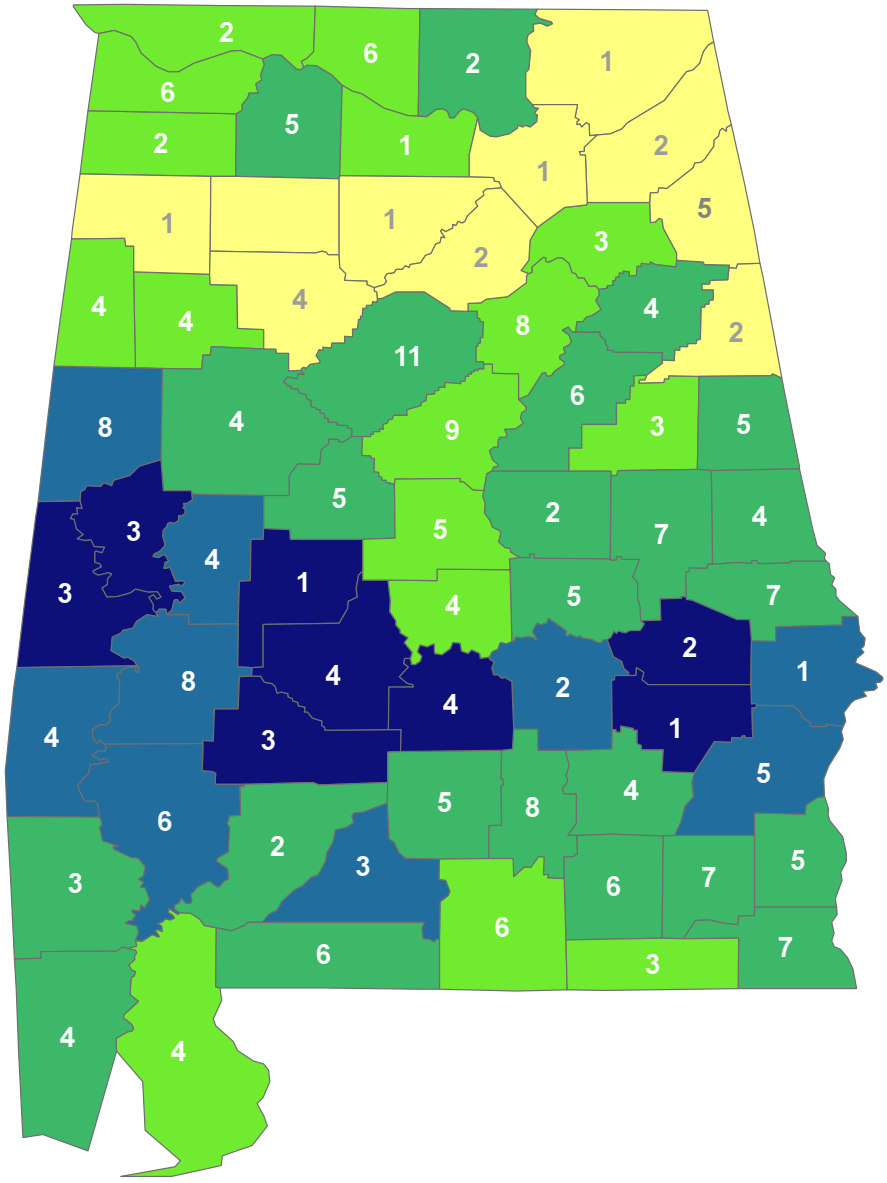
MAP 13B
Number of Times Alabama Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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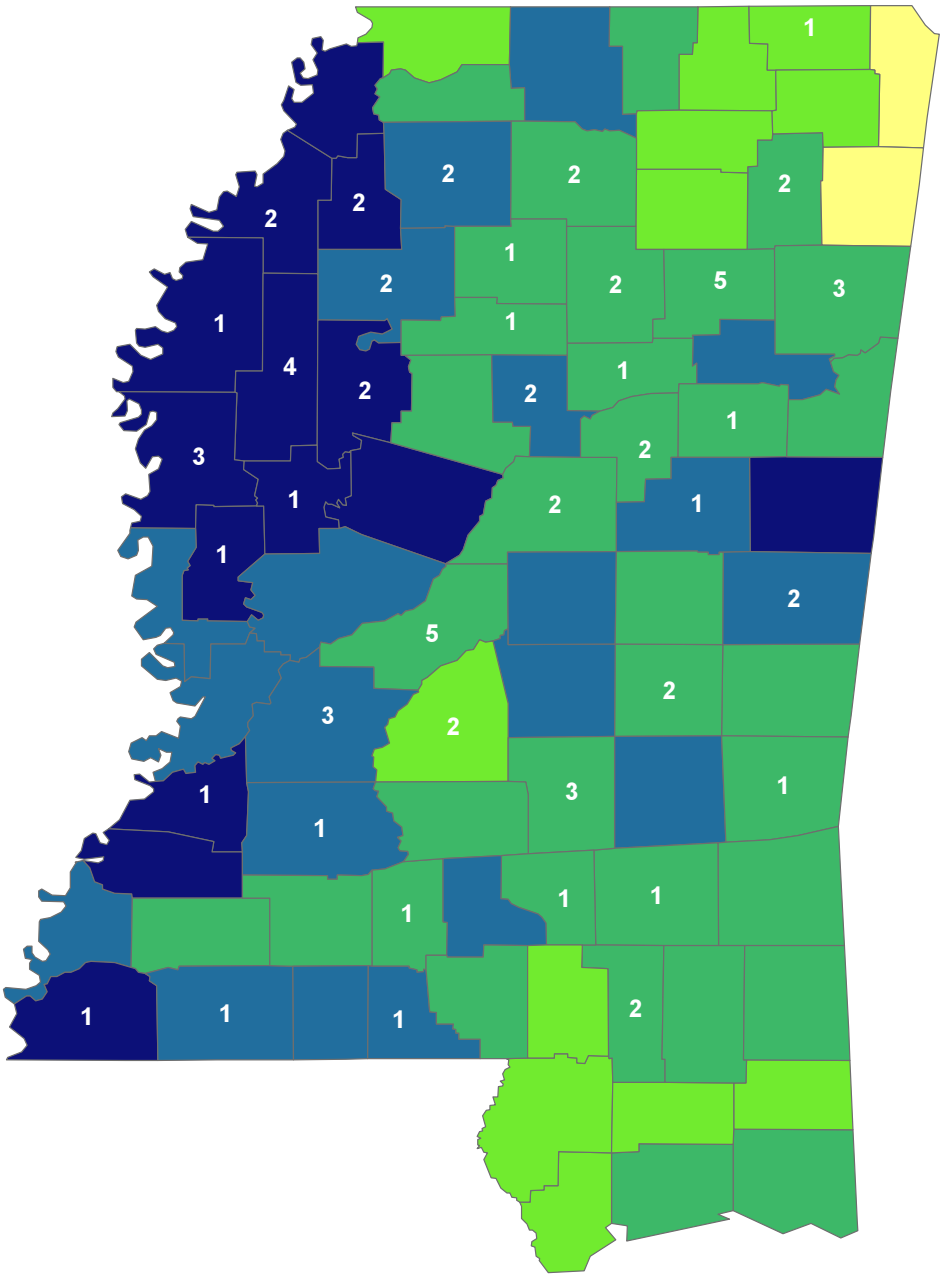
MAP 13C
Number of Times Mississippi Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.00 - 10.0
- 10.1 -20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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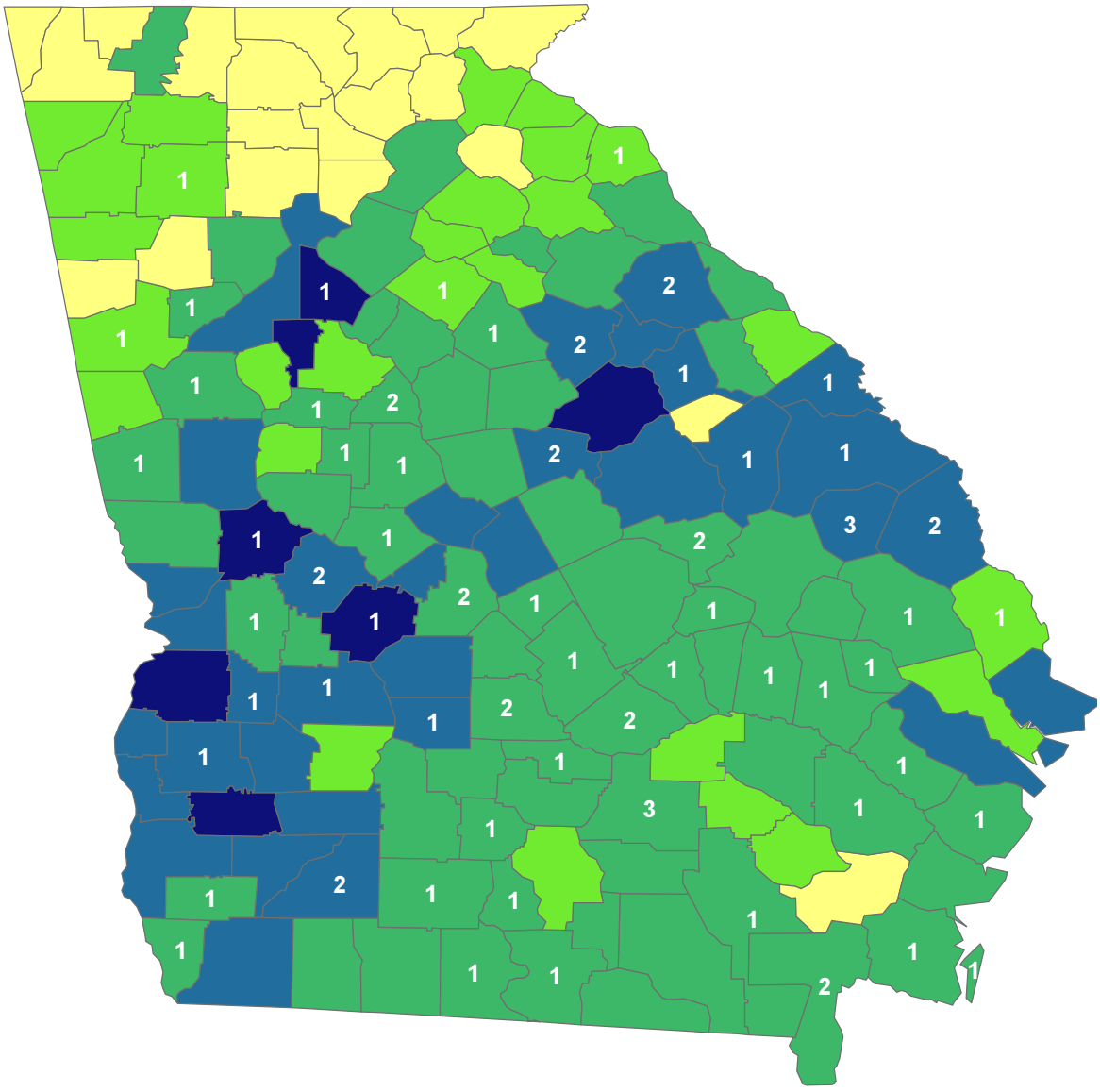
MAP 13D
Number of Times Georgia Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20 1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0

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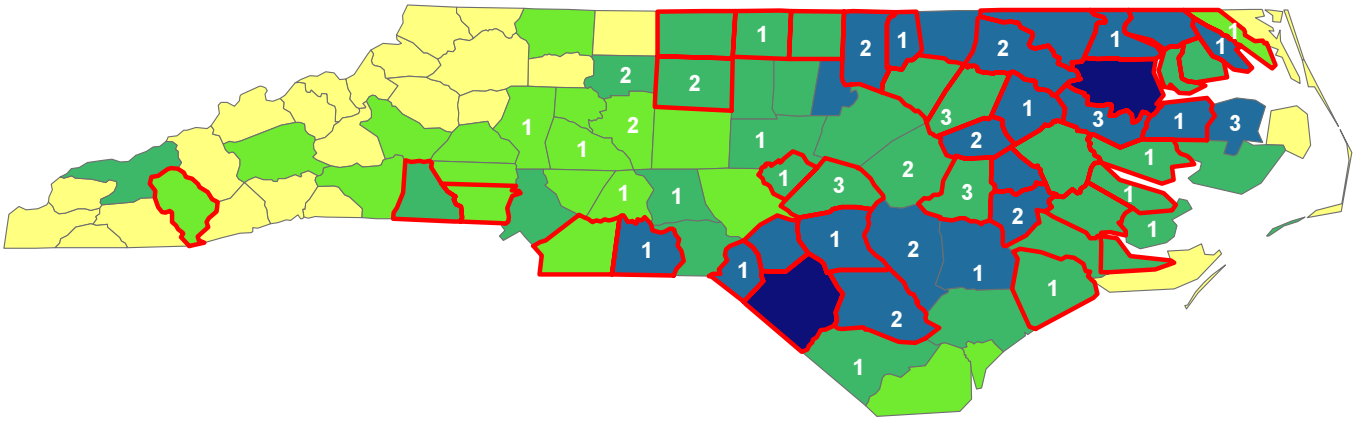
MAP 13E
Number of Times North Carolina Counties Were Affected By Reported and Unreported Section 2 Lawsuits Resolved Favorably To Plaintiffs (June 29, 1982 - December 31, 2005)



Percent Nonwhite Voting-Age Population (2000)

- 0.0 - 10.0
- 10.1 - 20.0
- 20.1 - 40.0
- 40.1 - 60.0
- 60.1 - 100.0
- Section 5 Covered Counties

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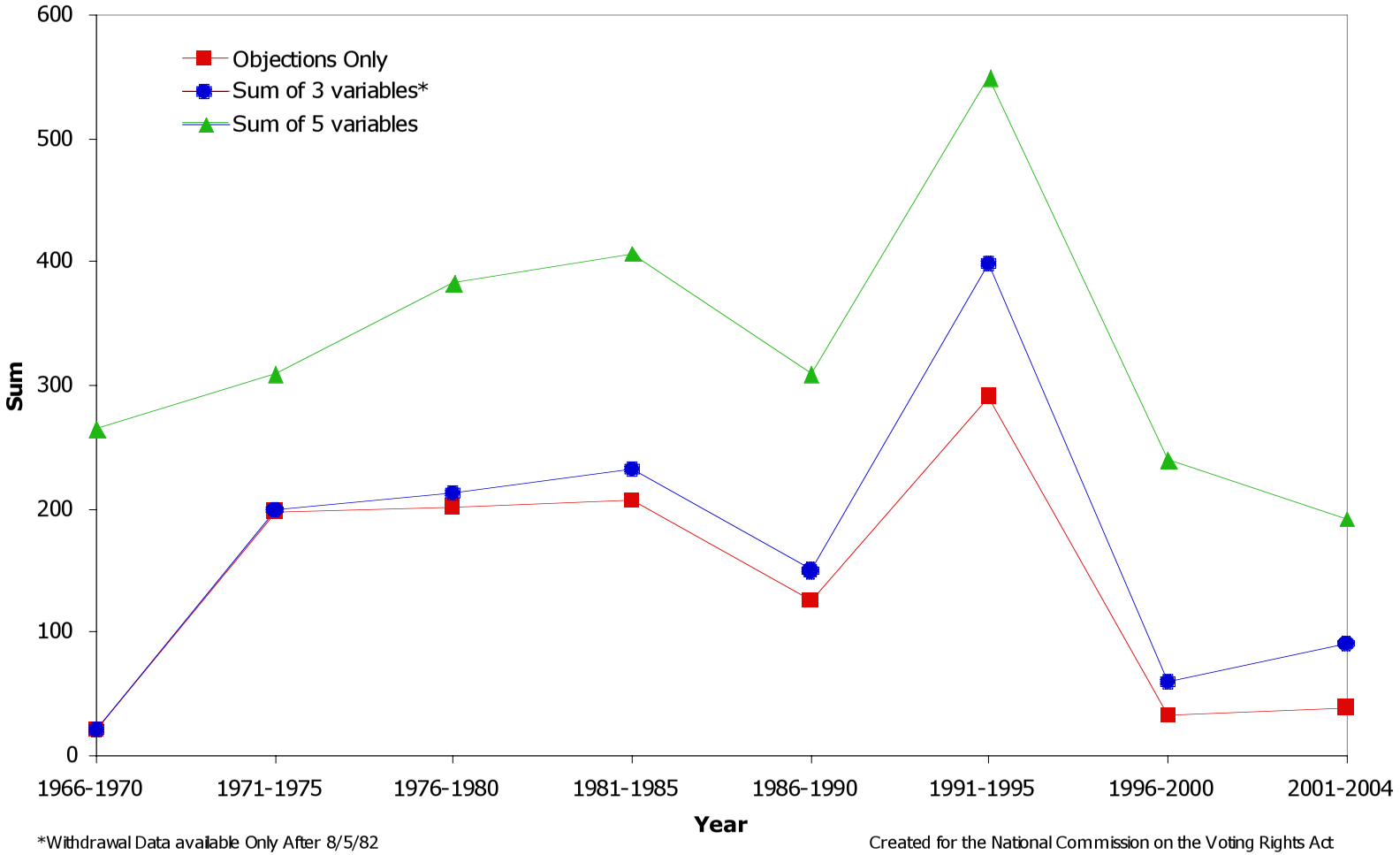
Figure 1 -- Comparison of Three Measures of Federal VRA-Related Activities
All States (1966-2004)*



*Withdrawal Data available Only After 8/5/82

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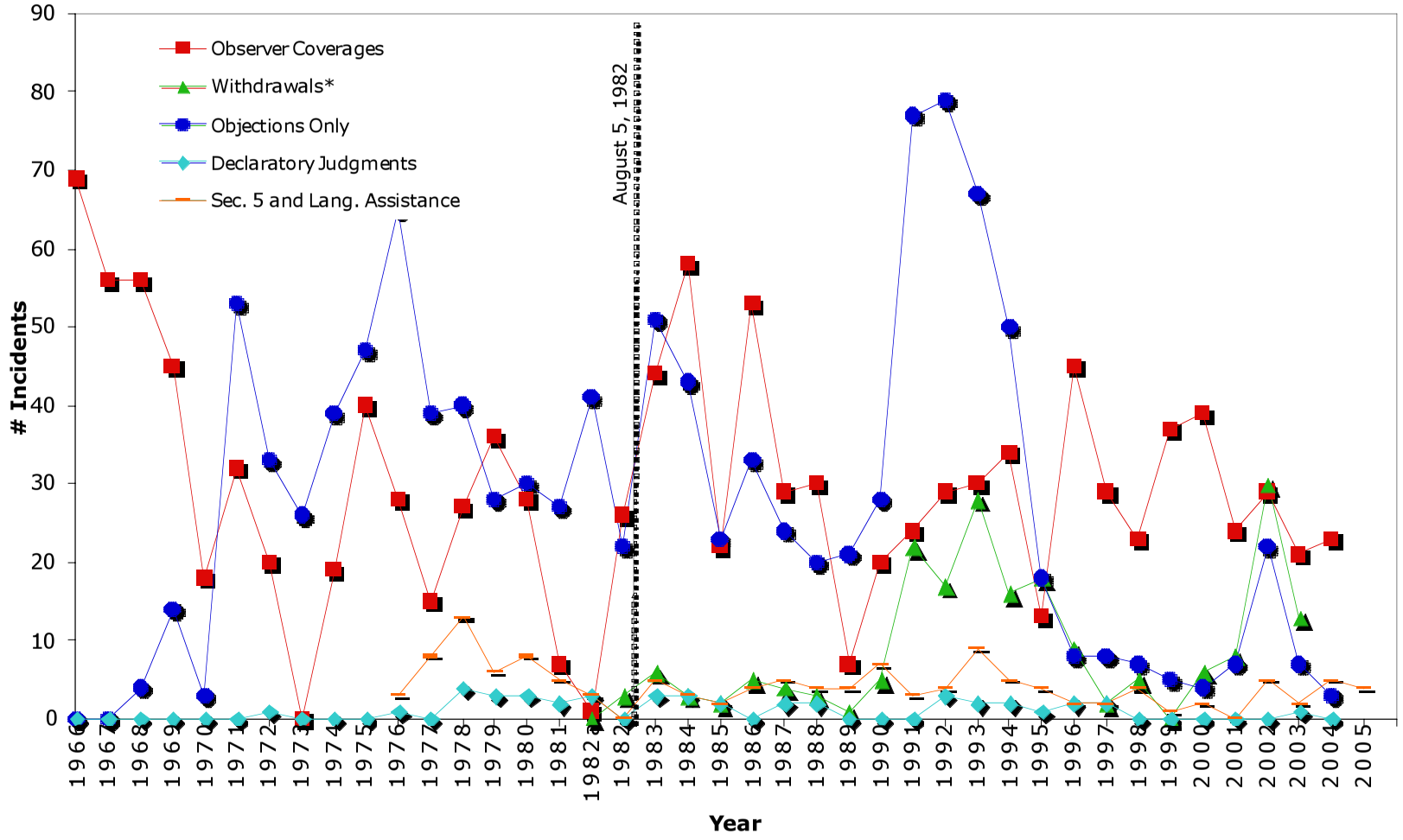
Figure 2 -- VRA-Related Activities (Including Enforcement Actions)
1966 - 2004



*Data for Withdrawals Available only from August 1982

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