

VOTING RIGHTS IN TEXAS: 1982–2006

NINA PERALES, LUIS FIGUEROA AND CRISELDA G. RIVAS*

INTRODUCTION

The Voting Rights Act of 1965 (VRA) has been indispensable to guaranteeing minority voters access to the ballot in Texas. Texas has experienced a long history of voting discrimination against its Latino and African-American citizens dating back to 1845.¹ The enactment of the VRA in 1965 began a process of integrating Latinos, African-Americans and, more recently, Asian-Americans into the political structures of Texas. Yet, a review of the minority voting experience in Texas since the 1982 VRA reauthorization indicates that this process remains incomplete. Infringements on minority voting rights persist, and noncompliance with the VRA continues at the state and local level. The VRA has proven to be an essential tool for enhancing minority inclusion in Texas.

Texas is home to the second-largest Latino population in the United States, and demographic projections show that by 2040, Latinos will constitute the majority of citizens in the state.² Texas also possesses a growing Asian-American population and an African-American population of more than two million.³ The increasing number of racial and ethnic minority citizens in Texas highlights the need to protect vigilantly the voice and electoral rights of the state's minority electorate.

Section 5 of the VRA, the preclearance requirement, was extended to Texas in 1975⁴ due to the state's history of excluding Mexican-Americans

* Nina Perales, Southwest Regional Counsel for the Mexican American Legal Defense and Educational Fund. Luis Figueroa, Legislative Staff Attorney for the Mexican American Legal Defense and Educational Fund. Criselda G. Rivas, Master's Candidate, Department of Sociology, The University of Texas at San Antonio.

¹ See *infra* Part II.

² See *infra* Part III.

³ See *infra* Part III.

⁴ See Voting Rights Act Amendments of 1975: Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 18, 1975).

from the political process. According to the U.S. Department of Justice (DOJ), since 1982, Texas has had the second highest number of Section 5 objections interposed by the DOJ—including at least 107 objections since 1982, ten of which were for statewide voting changes.⁵ Only Mississippi, with 120 objections, has had more.⁶ Moreover, the majority of the DOJ's objections to discriminatory changes actually occurred after 1982. Only ninety-six objections—including seven for statewide voting changes—occurred between 1965 and 1982, compared to the 107 since the VRA's 1982 reauthorization.⁷

Texas leads the nation in several categories of voting discrimination, including recent Section 5 violations and Section 2 challenges. Since 1982, there have been at least twenty-nine successful Section 5 enforcement actions in which the DOJ has participated.⁸ For example, in 1997, the Supreme Court held that Dallas County wrongly failed to submit a rule limiting poll worker selection that had a discriminatory impact on Latino citizens.⁹

Section 5 preclearance has had important deterrence effects in Texas. For example, Texas had far more Section 5 withdrawals, following the DOJ's request for information to clarify the impact of a proposed voting change, than any other jurisdiction during the 1982 to 2005 time period. These withdrawals include at least fifty-four instances in which the State eliminated discriminatory voting changes after it became evident they would not be precleared by the DOJ. Finally, at least 206 successful Section 2 cases have been brought in Texas since 1982, many of which were unreported. These cases constitute nearly one-third of all such cases in the nine states covered statewide by Section 5.¹⁰

Today's Section 5 objections offer a concise snapshot of the remaining challenges to minority voting rights in Texas. Discriminatory voting changes that have been stopped by Section 5 range from statewide voting changes, such as redistrictings, to local changes involving changes in election rules, polling place re-locations and the method of electing officials. Since 1982, the ninety-seven local objections affected nearly 30% (72) of Texas's counties, where 71.8% of the state's non-white voting age popula-

⁵ See *infra* Part IV.

⁶ See Department of Justice, Section 5 Objection Determinations: Mississippi, http://www.usdoj.gov/crt/voting/sec_5/ms_obj2.htm (last visited Dec. 29, 2007).

⁷ See *infra* Part IV.

⁸ See *infra* Part IV.

⁹ See *Foreman v. Dallas County*, 521 U.S. 979 (1997).

¹⁰ See *infra* Part IV.

tion reside. Additionally, ten statewide objections worked to protect the voting rights of citizens across the state.¹¹

The language assistance provisions of the VRA, enacted in 1975, have also played an important role in increasing Latino and Asian-American voter access to the political process in Texas. These provisions provide for translated voting materials, public notice and assistance at the polls for Texas voters who are limited-English proficient (LEP). Texas's coverage under the language minority provisions addresses the historical discrimination that impeded Latino voters from learning English and ensures that new Latino and Asian-American citizens can participate fully in civic life.¹²

Disparities in English proficiency between Anglos and language minorities in Texas continue today. According to the July 2002 Census determinations, 818,185 people, or 6.15% of all voting age citizens in Texas, are LEP Spanish-speaking voting-age citizens. In El Paso and Maverick Counties, LEP American-Indian voting-age citizens make up more than 24% and 59%, respectively, of the voting age citizens. In Harris County, which includes the city of Houston, there are nearly 17,000 LEP Vietnamese voting-age citizens.¹³

Unequal education and lack of English language learning opportunities have resulted in high illiteracy rates among covered language groups in Texas. Statewide, about 20% of LEP Spanish-speaking voting-age citizens are low-literate, over fourteen times the national illiteracy rate. In Maverick County, over 86% of LEP American Indian voting-age citizens are low-literate. Vietnamese LEP voting-age citizens in Harris County have a low-literacy rate nearly six times the national rate.¹⁴

An assessment of the availability of translated voting materials and language assistance in Texas conducted by the Mexican American Legal Defense and Educational Fund (MALDEF) provides a stark indicator of the failure of county election officials to make voting accessible to LEP Texans. In connection with the MALDEF study, of the 101 counties investigated, 80% were unable to produce voter registration forms, official ballots, provisional ballots and their written voting instructions; only one county was able to produce evidence of full compliance with the language minority provisions of the Voting Rights Act. Recent DOJ enforcement activities

¹¹ See *infra* Part IV.

¹² See *infra* Part VII.

¹³ See *infra* Part VII.

¹⁴ See *infra* Part VII.

in Ector, Hale and Harris Counties confirm that there is widespread non-compliance with the language assistance provisions in Texas.¹⁵

This non-compliance, combined with low rates of English proficiency and literacy, contributes significantly toward depressed voter registration and turnout for Latino voting-age citizens in Texas. According to the U.S. Census Bureau, in the November 2004 presidential election, 58% of Latino voting-age citizens reported that they were registered to vote, compared to 75% of all non-Hispanic white voting-age citizens.¹⁶ Latino turnout also lagged about 15% behind non-Hispanic white turnout in that election.¹⁷

Texas also has been underserved by the federal observer provisions of the VRA, despite widespread documented voting discrimination. Currently, seventeen counties in Texas are designated for federal observers, yet observers were present in just ten elections between August 1982 and 2004. Despite these problems, the recent designation of Ector County for observer coverage as part of a consent decree¹⁸ shows that the federal observer provisions continue to play an important role in enforcing the Voting Rights Act in Texas.

The recent 2004 election offers insight into continuing voter discrimination in Texas. In conjunction with other organizations, MALDEF served as a resource center to address election irregularities. Fielding complaints throughout the voting period, MALDEF learned of several voting rights violations, including: the closing of a polling place in a predominately African-American precinct, contrary to state law and despite the fact that voters remained in line; minority voters being turned away from their polling locations and asked to return at a later time; election judge intimidation through demands for identification, contrary to Texas law, and threats of jail time if it was determined that voters had outstanding warrants; disproportionately stringent voter screening and questioning; and a racial slur directed at a minority voter by an election judge.¹⁹

The Voting Rights Act has made a significant difference in Texas, particularly in light of Texas's growing Latino voting population. According to data from the U.S. Census Bureau, in the 1984 presidential election, there were about 681,000 Latino voters in Texas, representing about 11%

¹⁵ See *infra* Part VII.

¹⁶ U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004 7 (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>.

¹⁷ See *id.* at 4 tbl.B.

¹⁸ See *infra* Part VII.

¹⁹ MALDEF staff recorded these incidents on voter complaint and voter intimidation incident report forms (on file with authors).

of the state's total voters.²⁰ In the November 2004 presidential election, there were 1,533,000 Latino voters, representing nearly 18% of the state's total voters.²¹

The VRA also has contributed to increased political representation for Latinos, African-Americans, Asian-Americans and other under-represented minority groups in Texas. For example, in 1973, there were 565 Latino elected officials in the state. By 1984, the number had grown to 1427.²² In January 2005, the number had increased to 2137 Latino elected officials, nearly four times the number in 1973.²³ The growth of Latino elected officials elected to Congress and to the Texas Legislature has been particularly significant. Between 1984 and 2003, the number of Latino Members of Congress doubled from three to six, and the number of state-level elected officials increased from twenty-five to thirty-eight.²⁴ Additionally, between 1970 and 2001, the number of African-American elected officials in Texas rose from twenty-nine to 475, including two members of Congress (up from zero in 1970).²⁵ Despite these substantial gains, Latinos and African-Americans continue to be vastly underrepresented at every level of federal, state and local government. This under-representation demonstrates that despite the progress made, Texas still has far to go.

The evidence discussed in this report makes clear that racially discriminatory and exclusionary practices continue to plague the Texas electoral system, despite legal challenges and gradual progress. The reauthorization of Sections 5, 203 and the federal observer provisions is of paramount importance to secure the fundamental right to vote for minority citizens in Texas. Accordingly, the expiring provisions of the Voting Rights Act should be renewed for an additional twenty-five years.²⁶

²⁰ U.S. CENSUS BUREAU, TABLE 2: REPORTED VOTING AND REGISTRATION BY RACE, SPANISH ORIGIN, AND SEX FOR STATES (Nov. 1984).

²¹ U.S. CENSUS BUREAU, TABLE 4A: REPORTED VOTING AND REGISTRATION OF THE TOTAL VOTING-AGE POPULATION, BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES: NOVEMBER 2004 (2004), <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>.

²² Texas Politics, Voting, Campaigns, & Elections, <http://texaspolitics.laits.utexas.edu/html/vce/0503.html> (last visited Apr. 5, 2008) (select "Latino Elected Officials in Texas, 1974–2003" hyperlink).

²³ See Email from Rosalind Gold, Senior Director, Policy Research and Advocacy, NAELO Educational Fund, to authors (Mar. 11, 2008) (on file with authors).

²⁴ Texas Politics, *supra* note 22.

²⁵ *Id.* (select "Black Elected Officials in Texas, 1970–2000" hyperlink).

²⁶ After this report was written and submitted to Congress, the expiring provisions of the VRA were, in fact, renewed. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

I. INTRODUCTION TO THE VOTING RIGHTS ACT AND TEXAS'S COVERAGE

The VRA is comprised of both temporary and permanent provisions. The temporary provisions were designed with expiration dates to address specific discriminatory issues that Congress felt could be eradicated over time. The focus of this report, Sections 5²⁷ and 203²⁸ and the federal observer provisions,²⁹ are key provisions of the VRA that must be reauthorized by 2007 if they are to continue to protect minority voters at the polls.

Section 5 requires “preclearance”³⁰ by the DOJ or the U.S. District Court for the District of Columbia of all voting changes proposed in covered jurisdictions.³¹ “Voting changes” include any type of change in the manner of voting, including redistricting plans, annexations, the use of at-large election methods, voter registration and polling place or ballot changes.³² By requiring administrative or judicial review of election changes, Section 5 ensures that new election changes do not place minority voters in a position worse than that occupied before the change; that is, Section 5 effectively prevents changes that have a “retrogressive effect” or that are motivated by discriminatory intent.³³

Section 5 coverage is based on whether a state or political sub-division has a history of discrimination and disproportionately low minority voter participation.³⁴ In response to discrimination against and low registration and voter turnout among Latinos, Congress extended Section 5 to cover jurisdictions with English literacy tests and other evidence of discrimination against Latinos, Alaska Natives and American Indians.³⁵ By placing the burden of proof on the governmental body proposing the election change, Section 5 protects the franchise of minority voters and protects all citizens from the unnecessary burden of litigation costs.

Texas was designated for Section 5 coverage in 1975 because it satisfied the requirements of Section 4(b), sometimes called “the language mi-

²⁷ 42 U.S.C. § 1973c (2006).

²⁸ *Id.* § 1973aa-1a.

²⁹ *Id.* §§ 1973d–1973g (sections d, e and g repealed 2006).

³⁰ 28 C.F.R. § 51.2 (2007). “Preclearance” can be obtained through a declaratory judgment (described in Section 5), the failure of the Attorney General to interpose an objection pursuant to Section 5 or the withdrawal of an objection by the Attorney General pursuant to section 28 C.F.R. § 51.48(b).

³¹ 42 U.S.C. § 1973c.

³² *See* *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502 (1992).

³³ *See* 42 U.S.C. § 1973c.

³⁴ *Id.* § 1973b(b).

³⁵ *See* S. REP. NO. 94-295, at 31–32 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 796–98.

nority trigger.”³⁶ Texas became covered because, as of November 1972: (1) over 5% of its voting-age citizens were Latinos; (2) its election materials were in English only; and (3) fewer than 50% of all of its voting-age citizens were registered to vote or turned out to vote.

Since its enactment in 1965, the provisions of Section 5 have withstood extensive re-evaluation by Congress during the 1970, 1975 and 1982 reauthorizations. Each time, Congress has determined that, based on continuing discrimination, the protections of Section 5 must be extended.³⁷

The VRA was further enhanced in 1975 to reach additional minority voter impediments. Congress enacted the language assistance provisions in Sections 4(f)(4) and 203 after finding that:

[T]hrough the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. 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, and by prescribing other remedial devices.³⁸

A jurisdiction is covered by Section 203 where: (1) a single language minority group has limited-English proficient voting-age citizens who comprise more than 5% of the voting-age citizen population or number more than 10,000; and (2) the illiteracy rate, defined as the failure to complete at least the fifth grade, of the voting-age citizens in the language minority group is higher than the national illiteracy rate.³⁹ Section 203 applies to four language minority groups that Congress found to have faced discrimination in the voting process: Alaska Natives, American Indians, Asian-Americans and persons of Spanish heritage.⁴⁰

The language assistance provisions ensure that voting-age citizens who are LEP are not denied access to the electoral process. Consequently,

³⁶ Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1975); Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 23, 1975).

³⁷ See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

³⁸ 42 U.S.C. § 1973aa-1a(a).

³⁹ *Id.* § 1973aa-1a(b)(2). The national illiteracy rate was 1.35% in 2000. JAMES THOMAS TUCKER & RODOLFO ESPINO, *MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS* 37 (2006).

⁴⁰ 42 U.S.C. § 1973aa-1a(e).

jurisdictions must provide translated voting-related materials, oral language assistance throughout the election process and outreach and publicity regarding the availability of these services.⁴¹ For historically unwritten languages, including some Alaska Native and American Indian languages, Sections 4(f)(4) and 203 require language assistance in the form of “oral instructions, assistance, or other information relating to registration and voting.”⁴²

II. HISTORY OF VOTING DISCRIMINATION IN TEXAS

The Latino and African-American populations in Texas have experienced a turbulent history of voting discrimination and political exclusion. Efforts to disenfranchise U.S. citizens of Mexican origin in Texas date back to 1845, the year that Texas gained its statehood.⁴³ Early laws focused on prohibiting new Texas citizens from using their native Spanish language and organizing political rallies.⁴⁴ These laws also prohibited Mexican-Americans from serving as election judges.⁴⁵ During the early 1900s, poll taxes, direct primaries and white primaries were adopted with the purpose of establishing voting requirements that the vast majority of Mexican-Americans could not meet, although they already constituted a decisive voting bloc in many areas of the state.⁴⁶

At the time of emancipation in 1865, African-Americans were systematically denied the right to vote, hold office, serve on juries and even intermarry with whites.⁴⁷ African-Americans achieved significant political participation during Reconstruction, but the end of Reconstruction in 1873 brought what one former Texas governor called “the restoration of white supremacy and Democratic rule.”⁴⁸ From then on, African-American Texans struggled to overcome obstacles, such as the gerrymandering of voting districts implemented with the purpose of disenfranchising African-Americans, as well as many other forms of political and social discrimination.⁴⁹

⁴¹ *Id.* § 1973aa-1a(c).

⁴² *Id.*

⁴³ DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986* 18–19 (1987).

⁴⁴ *Id.* at 130.

⁴⁵ *See id.*

⁴⁶ *Id.* at 143.

⁴⁷ Robert Brischetto et al., *Texas*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* 233, 234 (Chandler Davidson & Bernard Grofman eds., 1994).

⁴⁸ *Id.*

⁴⁹ *Id.* at 234–35.

Discriminatory election practices to disenfranchise African-American and Latino voters, such as white primaries and poll taxes, remained commonplace in Texas into the mid-1900s.⁵⁰ The manifestations of voting discrimination in Texas have been both insidious and entrenched.⁵¹ These exclusionary practices were rooted in Anglo Texans' perceptions of minority citizens as "racial inferiors."⁵² When political maneuvers failed to prevent the election of African-American officeholders, local whites resorted to "fraud, intimidation, intrigue, and murder."⁵³ The struggle for political power and land between Mexican-Americans and Anglo Texans similarly escalated into acts of violence by Texas Rangers:

Texas Rangers, in cooperation with land speculators, came into small Mexican villages in the border country, massacred hundreds of unarmed, peaceful Mexican villagers and seized their lands. Sometimes the seizures were accompanied by the formality of signing bills of sale—at the point of a gun.⁵⁴

One major tactic that whites used to disenfranchise both African-Americans and Latinos in Texas was the infamous "white primary," which arose in a patchwork of Texas jurisdictions in the early 1900s. This practice began in 1923, when Texas enacted a state law barring African-Americans from voting in Democratic primary elections.⁵⁵ An African-American El Paso doctor, Lawrence Nixon, challenged this law, and the U.S. Supreme Court found that it violated the Fourteenth Amendment.⁵⁶ However, in 1927, the year after the Court struck down Texas's white primary law, the Texas Legislature passed a law authorizing political parties to set their own voter qualifications, and the Democratic Party simultaneously enacted a rule that only whites could vote in the primary.⁵⁷ Nixon

⁵⁰ MONTEJANO, *supra* note 43, at 143.

⁵¹ *See id.* ("In 1904 the State Democratic Executive Committee approved the Practice of the White Man's Primary Association by suggesting that county committees require primary voters to affirm that 'I am a white person and a Democrat.'").

⁵² *See id.* at 131 ("[T]hese Mexicans belonged to that 'class of foreigners who claim American citizenship but who are as ignorant of things American as the mule.'" (quoting the *Carrizo Springs Javelin*, Aug. 5, 1911)).

⁵³ Brischetto et al., *supra* note 47, at 235.

⁵⁴ MONTEJANO, *supra* note 43, at 127.

⁵⁵ Brischetto et al., *supra* note 47, at 237–38. The statewide white primary law focused on African-Americans, but in some Texas jurisdictions the purpose of the White Man's Primary was that, according to a Texas newspaper, it "absolutely eliminates the Mexican vote as a factor in nominating county candidates, though we graciously grant the Mexican the privilege of voting for them afterwards." MONTEJANO, *supra* note 43, at 144 (citation omitted). In another example, the Dimmit County White Man's Primary Association was formed expressly to exclude Mexican-American voters. *Id.*

⁵⁶ *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁵⁷ Brischetto et al., *supra* note 47, at 238, 274.

again filed suit, and the law was struck down in 1932.⁵⁸ That same year, the Texas Democratic Party passed a new resolution limiting party membership to white citizens.⁵⁹ The lower court permitted the Party to exclude African-Americans from all primaries, treating the Party as a private association.⁶⁰ Thurgood Marshall and the newly-formed NAACP Legal Defense Fund won a reversal of that precedent in the 1944 case *Smith v. Allwright*.⁶¹ The Court later struck down the “Jaybird primary” for good in 1953.⁶² It was not until 1966, however, that the poll tax was eliminated entirely as a prerequisite for voter participation.⁶³ In response, the first Senate bill of the first 1966 Texas legislative session required voters to register annually.⁶⁴ The annual registration requirement was not removed until 1971.⁶⁵

African-American and Latino voters also faced barriers throughout this period that diluted their minority voting strength through the implementation of multi-member districts, racial gerrymandering and malapportionment.⁶⁶ Into the 1970s, Texas demonstrated a steadfast commitment to excluding racial minorities from political life; when forced to abandon one discriminatory measure, the State would enact a new one shortly thereafter.

From the earliest periods of Texas history, Mexican-Americans and African-Americans experienced segregation and unequal access to the privileges enjoyed by Anglos. Ranch owners employed rules that segregated Mexican cowboys from their Anglo workers in a hierarchical structure “in which Anglo stood over Mexican.”⁶⁷ Workplace structures carried over into social arenas. Mexican-Americans, regarded as an inferior race, were refused entry into restaurants, housing, theaters and schools.⁶⁸ African-Americans in Texas also faced extreme segregation and discrimination after emancipation.⁶⁹

In the decades that followed, Latinos and African-Americans also would face exclusion from the education system. When finally allowed to enter Texas schools, minority citizens were segregated into separate and

⁵⁸ *Nixon v. Condon*, 286 U.S. 73 (1932).

⁵⁹ *Brischetto et al.*, *supra* note 47, at 238.

⁶⁰ *Grovey v. Townsend*, 295 U.S. 45, 52 (1935).

⁶¹ 321 U.S. 649 (1944).

⁶² *Terry v. Adams*, 345 U.S. 461, 470 (1953).

⁶³ *Brischetto et al.*, *supra* note 47, at 239.

⁶⁴ *Id.* at 240.

⁶⁵ *Id.*

⁶⁶ *Id.* at 243.

⁶⁷ MONTEJANO, *supra* note 43, at 83.

⁶⁸ *See id.* at 114.

⁶⁹ *Brischetto et al.*, *supra* note 47, at 234.

inferior schools.⁷⁰ At the time of the Texas Revolution, the new state had pledged to provide all citizens with a system of education, but, notwithstanding this pledge to Texas's citizens, minorities were quickly ignored.⁷¹

Article VII, Section 7, of the Texas Constitution of 1876 provided for separate schools for white and African-American students.⁷² From 1902 to 1940, and especially after 1920, many Texas school districts also opened mandatory segregated schools for Latino children. The "Mexican School" segregation spread rapidly.⁷³ Houston, San Antonio and El Paso had "Mexican Schools" by the turn of the century. By 1942, these schools were operated in fifty-nine counties throughout the state.⁷⁴

A 1942 study by Wilson Little found that 50% of the Mexican-American students were segregated through the sixth grade in 122 districts in "widely distributed and representative counties" of the state.⁷⁵ Few Mexican-American students went beyond the sixth grade.⁷⁶ By the 1940s, entire sections of the state had segregated "Mexican School" belts of towns, many having been developed specifically by the growers to isolate Mexican-Americans.⁷⁷

By the mid-1950s, schools across the state segregated Latino students under the ruse of "instructional purposes" and used freedom of choice plans, selected student transfer and transportation plans and classification systems based on language or scholastic ability to maintain segregation.⁷⁸ In response to student walk-outs and boycotts in 1967 and 1970, the U.S. Department of Health, Education and Welfare (HEW) began to take legal

⁷⁰ Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 311–14 (1972); see also Brischetto et al., *supra* note 47, at 234.

⁷¹ MONTEJANO, *supra* note 43, at 391.

⁷² TEX. CONST. of 1876, art. VII, § 7.

⁷³ See *United States v. Texas*, 506 F. Supp. 405, 411 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

⁷⁴ *Id.* at 411–12.

⁷⁵ GUADALUPE SAN MIGUEL JR., LET ALL OF THEM TAKE HEED: MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910–1981 56 (2001).

⁷⁶ See *id.* at 56–57.

⁷⁷ In the Lower Rio Grande Valley, the Edinburg, Harlingen and San Benito school systems were segregated through the fourth and fifth grades, while on Highway 83, Mercedes, McAllen, Mission, Pharr-San Juan and Weslaco schools were completely segregated. On the Gulf Coast in South Texas, Raymondville, Kingsville, Robstown, Kenedy and Taft school districts were segregated, while in the Winter Garden area, Crystal City, Carrizo Springs, Asherton and Frio Town segregated schools through the fifth grade. MONTEJANO, *supra* note 43, at 168; SAN MIGUEL, JR., *supra* note 75, at 56; JULIE LEININGER PYCIOR, LBJ & MEXICAN AMERICANS: THE PARADOX OF POWER 14 (1997); U.S. COMM'N. ON CIVIL RIGHTS, *Report 1: Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest* (April 1971), in MEXICAN AMERICAN EDUCATION STUDY 13 (1971).

⁷⁸ See Rangel & Alcalá, *supra* note 70, at 320–21, 326–33.

action against offending school districts.⁷⁹ By 1972, HEW gained compliance in many South Texas towns, including Bishop, Lyford, Los Fresnos, Beeville and Weslaco, and it put Del Rio under court order to monitor its compliance.⁸⁰

Educational segregation and discrimination continued into the 1970s.⁸¹ In 1975, the Corpus Christi School District was finally forced to implement a remedy for its segregation of Mexican-American students, after the Fifth Circuit declared that “action by the school district here has, in terms of cause and effect, resulted in a severely segregated school system in Corpus Christi.”⁸²

A 1977 report issued by the U.S. Commission on Civil Rights reported that 19% of the Mexican-Americans over age twenty-five in Texas were illiterate.⁸³ Mexican-Americans had twice the Anglo unemployment rate, and 15% of them still lived in overcrowded housing with inadequate plumbing, as compared to 1.7% of Anglos.⁸⁴ A clear holdover of the Texas “Mexican towns” was the 70% of Mexican-Americans in Texas who still lived in *barrios*.⁸⁵ In San Antonio, for example, a 1980 study concluded that the limited residential access of middle-class Mexican-Americans to the three affluent northern Census tracts tended also to limit their educational access.⁸⁶ A nationally publicized report in 1984 by the National Commission on Secondary Schooling for Hispanics reported that in Texas, the majority of Mexican-American students are still in “inferior and highly

⁷⁹ *Id.* at 369.

⁸⁰ *Id.*; SAN MIGUEL, JR., *supra* note 75, at 76, 120, 123, 134.

⁸¹ For example, in 1971, Latino students in Seguin, Texas were expelled for allegedly having lice, despite recurrent nurses' examinations showing the allegations to be greatly exaggerated. These students were subsequently prohibited from speaking Spanish. Rangel & Alcala, *supra* note 70, at 355–56; CHAD RICHARDSON, BATOS, BOLILLOS, POCHOS, AND PELADOS: CLASS AND CULTURE ON THE SOUTH TEXAS BORDER 125, 129 (1999) (chapter co-authored with María Olivia Villarreal-Solano); JAMES A. FERG-CADIMA, MEXICAN AM. LEGAL DEF. & EDUC. FUND, BLACK, WHITE, AND BROWN: LATINO SCHOOL DESEGREGATION EFFORTS IN THE PRE- AND POST-*BROWN V. BOARD OF EDUCATION* ERA 10–11 (2004).

⁸² *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 148 (5th Cir. 1972). The Fifth Circuit affirmed the district court's finding that the school district had: located new schools and renovated old schools in racially segregated neighborhoods; provided an elastic transfer policy that allowed Anglo students to avoid ghetto schools; withheld from African-American and Latino students the option of attending Anglo schools; and assigned minority teachers to minority schools. *Id.* at 149.

⁸³ U.S. COMM'N ON CIVIL RIGHTS, THE UNFINISHED BUSINESS TWENTY YEARS LATER . . . : A REPORT SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS BY ITS FIFTY-ONE STATE ADVISORY COMMITTEES 184 (1977).

⁸⁴ *Id.*

⁸⁵ *Id.* at 185.

⁸⁶ RODOLFO ROSALES, THE ILLUSION OF INCLUSION: THE UNTOLD POLITICAL STORY OF SAN ANTONIO 12 (2000).

segregated schools.”⁸⁷ They are “extremely overage” and “disproportionally enrolled in remedial English classes.”⁸⁸ Texas Mexican-American students still have an unacceptably high dropout rate, and receive poor preparation for college.⁸⁹

As recently as 1981, a federal court declared that the State of Texas continued to fail to meet its obligations to provide compensatory bilingual education to Mexican-American students, noting:

While many of the overt forms of discrimination wreaked upon Mexican-Americans have been eliminated, the long history of prejudice and deprivation remains a significant obstacle to equal educational opportunity for these children. The deep sense of inferiority, cultural isolation, and acceptance of failure, instilled in a people by generations of subjugation, cannot be eradicated merely by integrating the schools and repealing the “No Spanish” statutes. In seeking to educate the offspring of those who grew up saddled with severe disabilities imposed on the basis of their ancestry, the State of Texas must now confront and treat with the adverse conditions resulting from decades of purposeful discrimination. The effects of that historical tragedy linger and can be dealt with only by specific remedial measures.⁹⁰

Today, many Texas counties have entire segregated school districts that have replaced the old “Mexican Schools.” Nueces County, for example, the 94.6% Mexican-American school district in Robstown, which was established by Robert Kleberg as a segregated town for his Mexican-American agricultural labor force, adjoins the Calallen Independent School District, in which the students are 55.6% Anglo.⁹¹ In Bexar County, the Edgewood School District’s students are 93.7% Latino and the San Antonio School District’s students are 93.2% Latino and African-American.⁹² Adjoining the San Antonio School District is Alamo Heights Independent School District, in which the students are 70.2% Anglo.⁹³ The Dallas Independent School District, which is 82.8% Latino and African-American, adjoins Highland Park Independent School District, which is 94.8% An-

⁸⁷ NAT’L COMM’N ON SECONDARY SCH. FOR HISPANICS, MAKE SOMETHING HAPPEN: HISPANICS AND URBAN HIGH SCHOOL REFORM (1984).

⁸⁸ *Id.*

⁸⁹ See GI Forum Exhibit # 92, Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (Expert Report of Dr. Andres Tijerina).

⁹⁰ United States v. Texas, 506 F. Supp. 405, 415 (E.D. Tex. 1981), *rev’d*, 680 F.2d 356 (5th Cir. 1982).

⁹¹ Texas Legislative Council, School Districts with Population, at RED-M635, <http://www.tlc.state.tx.us> (last visited Dec. 28, 2007).

⁹² *Id.*

⁹³ *Id.*

glo.⁹⁴ In Harris County, North Forest Independent School District's students are 73.5% African-American and 24.8% Latino; the adjoining Humble School District is 72.4% Anglo.⁹⁵

The Texas decision *Graves v. Barnes* also highlights the continuing effects of historical discrimination on minority populations in Texas:

Because of long-standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas . . . has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.⁹⁶

Courts have repeatedly noted the various forms of discrimination against minorities in Texas and elsewhere and their relationship to social inequality. In the 2004 decision, *Session v. Perry*, a federal three-judge

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 343 F. Supp. 704, 728 (W.D. Tex. 1972), *rev'd in part sub nom.* *White v. Regester*, 412 U.S. 755 (1973). Cases discussing official discrimination against Mexican-Americans in voting and other aspects of civic life include: *League of United Latin Am. Citizens v. N.E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1085 (W.D. Tex. 1995) ("There is no dispute that Texas has a long history of discrimination against its Black and Hispanic citizens in all areas of public life."); *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994), *aff'd sub nom.* *Bush v. Vera*, 517 U.S. 952 (1996) (upholding creation of Latino-majority districts in South Texas and noting, "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history."); *Overton v. City of Austin*, 871 F.2d 529, 536 (5th Cir. 1989) (noting the "common histories of discrimination" of African-Americans and Mexican-Americans in Austin); *Sierra v. El Paso Indep. Sch. Dist.*, 591 F. Supp. 802, 809 (W.D. Tex. 1984) ("[C]onsidered in conjunction with the history of official discrimination and the pattern of polarized voting, the conclusion is inescapable that Mexican-Americans have less opportunity than do other members of the electorate to participate in the political process . . ."); *Seamon v. Upham*, 536 F. Supp. 931, 987 (E.D. Tex. 1982) (Justice, C.J., dissenting) (referring to West Texas: "even when official discrimination in politics and the political process is viewed in isolation, the legacy is long and almost overwhelming. No one can seriously contend that a catalog of legal actions pertaining to discrimination in voting adequately captures the harsh reality of political racism in Texas."); *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 556 n.16 (5th Cir. 1980) (allowing lawsuit against school district alleging intentional vote dilution and citing Senate Report for 1975 amendments to the Voting Rights Act, stating at-large election schemes "effectively deny Mexican American and black voters in Texas political access in terms of recruitment, nomination, election and ultimately, representation"); *Puente v. Crystal City*, No. DR-70-CA-4 (W.D. Tex. Apr. 3, 1970) (finding that the real property ownership requirement incorporated in the Charter of Crystal City for candidates for city office was invidiously discriminatory against the Mexican-American plaintiffs and their class and, therefore, was unconstitutional); *Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970) (finding exclusion of Mexican-Americans from juries in El Paso); *Indep. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930) (challenging Mexican school); *Delgado v. Bastrop Indep. Sch. Dist.*, No. 388 (W.D. Tex. June 15, 1948) (challenging Mexican school).

panel stated that it was “keenly aware of the long history of discrimination against Latinos and Blacks in Texas, and recogniz[ed] that their long struggle for economic and personal freedom is not over”⁹⁷

With neither constitutional advances nor litigation having ensured the *total* and *complete* protection of the electoral franchise for minority voters in Texas, the ongoing process to protect minority voters’ meaningful political participation will require the continued vigilance of both courts and lawmakers. Texas’s long history of discrimination has resulted in a substantial gap between minority voters and their Anglo counterparts in educational attainment,⁹⁸ health care access⁹⁹ and other important measures of economic and social well-being. Although no longer characterized by violence and brutality, present day voting experiences continue to be plagued by attempts to block and dilute minority voting.

III. TEXAS DEMOGRAPHICS

The U.S. Census reports that in 2005, African-Americans made up 11.7% of the total Texas population, Hispanics 35.1% and non-Hispanic whites 49.2%.¹⁰⁰ The Texas Demographer’s Report for 2006 projected that by 2040, Hispanics will grow to make up approximately 59.2% of the total population in Texas, non-Hispanic whites 32.2%, African-Americans 9.5% and all other racial and ethnic minority groups 8.9%.¹⁰¹

According to the 2000 Census, of the 14.9 million voting age citizens in Texas, 42.65% are racial or ethnic minorities: 28.6% (about 4.3 million) are Hispanic; 10.9% (about 1.6 million) are African-American; 2.8% (about 415,000) are Asian; and .35% (about 51,000) are American Indian.¹⁰²

Minority groups comprise the fastest growing population in Texas. The 1990s saw the Texas population grow by 3.8 million persons, with La-

⁹⁷ 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004), *vacated sub nom.* Henderson v. Perry, 543 U.S. 941 (2004).

⁹⁸ Henry Flores, *Educational Attainment of Latinos 1960-2001*, WILLIAM C. VELASQUEZ INST., Census Project Rep. No. 2, at 5 (Fall 2005).

⁹⁹ HENRY J. KAISER FAMILY FOUND., KEY FACTS: RACE, ETHNICITY & MEDICAL CARE 18 fig.19b (2003), *available at* <http://www.kff.org/minorityhealth/upload/Key-Facts-Race-Ethnicity-Medical-Care-Chartbook.pdf>.

¹⁰⁰ U.S. Census Bureau, Texas Quickfacts, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited June 11, 2006).

¹⁰¹ Texas State Data Center and Office of the State Demographer, Projections of the Population of Texas and Counties in Texas by Age, Sex and Race/Ethnicity for 2000–2040, <http://txsdc.utsa.edu/tpepp> (last visited Dec. 28, 2007).

¹⁰² U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, at tbl.PL4, *available at* <http://factfinder.census.gov> (last visited Dec. 28, 2007).

tinios accounting for the majority of that growth (approximately 2.4 million).¹⁰³ The Asian population alone grew by 80.3%.¹⁰⁴ Texas has the second highest number of Latinos in the United States, trailing only California.¹⁰⁵

The tremendous growth of racial and ethnic minority voting-age citizens in Texas highlights the continuing need for the Voting Rights Act, particularly when combined with evidence of widespread voting discrimination and non-compliance.

IV. SECTION 5 OBJECTIONS IN TEXAS

The persistence and breadth of voting discrimination across Texas reveals the need for continued efforts to protect minority voting rights. It also counsels against the premature removal of the safeguards provided by Section 5 of the Voting Rights Act. Section 5 objections to voting changes in Texas involve a wide variety of discriminatory election rules, procedures and methods of election, including: discriminatory use of numbered posts and staggered terms that ensure that a majority—or even a plurality—of non-Hispanic white voters continue to be overrepresented in elected offices;¹⁰⁶ discriminatory implementation of majority vote and/or runoff requirements;¹⁰⁷ polling place or election date changes that deny minorities equal voting opportunities;¹⁰⁸ discriminatory absentee voting practices;¹⁰⁹ discriminatory annexations or deannexations;¹¹⁰ dissolution of single member districts, reductions in the number of offices or revocation of voting

¹⁰³ Leo Estrada, *Redistricting 2000: A Lost Opportunity for Latinos* (Joint Center for Political and Economic Studies, Voting Rights and Minority Representation Conference Paper, 2002), available at <http://www.jointcenter.org/whatsnew/redistricting-conference/Estrada.pdf>.

¹⁰⁴ U.S. CENSUS BUREAU, *THE ASIAN POPULATION: 2000* 5 tbl2 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>; see also U.S. Census Bureau, 2006 American Community Survey, <http://factfinder.census.gov> (select "Texas") (last visited Apr. 28, 2008).

¹⁰⁵ U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P7, available at <http://factfinder.census.gov> (last visited Dec. 28, 2007).

¹⁰⁶ See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Attorneys for Brenda Adams, City Sec'y, El Campo, Tex. (Nov. 8, 1985) (on file with authors).

¹⁰⁷ See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Max Harris, Superintendent, Liberty-Eylau Indep. Sch. Dist. (Feb. 26, 1985) (on file with authors).

¹⁰⁸ See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to James Finstrom, Marion County Dist. Attorney (April 18, 1994) (on file with authors); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Analeslie Muncy, City Attorney, City of Dallas (Mar. 13, 1991) (on file with authors).

¹⁰⁹ Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Mary Milford, Law Offices of Earl Luna, P.C. (Feb. 27, 1989) (on file with authors).

¹¹⁰ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Cindy Maria Garner, City Attorney, Crockett, Tex. (Dec. 21, 1990) (on file with authors).

rules when minority candidates of choice are about to be elected to office;¹¹¹ election procedures that violate Section 203 of the Voting Rights Act;¹¹² and discriminatory redistricting practices to deny minorities an equal opportunity to elect their chosen candidates.¹¹³

These objections range in time from October 1982,¹¹⁴ immediately after the VRA's reauthorization, to an objection in May 2006 to the discriminatory reduction of polling places in the North Harris Montgomery Community College District.¹¹⁵ The breadth of Section 5 objections made by the DOJ since 1982 illustrates the nature of voting discrimination in Texas, as well as the subtle practices used to keep this political exclusion under the radar. Since 1982, Texas has had the second highest number of objections of any covered state, trailing only Mississippi.¹¹⁶

In total, the DOJ has issued 201 Section 5 objections to proposed electoral changes in Texas since the state was covered in 1976.¹¹⁷ Of those 201 objections, 53% (107) occurred *after* the 1982 reauthorization of Section 5.¹¹⁸ Ten of the post-1982 objections were interposed in response to statewide voting changes.¹¹⁹

Discriminatory election practices in Texas potentially affect a very large number of minority voters. Since 1982, the DOJ has prevented the implementation of discriminatory electoral changes in nearly 30% (72)¹²⁰

¹¹¹ Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert T. Bass, Allison & Assocs. (July 19, 1993) [hereinafter July 19, 1993 Turner Letter] (on file with authors); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Lavon L. Jones, Assistant Criminal Dist. Attorney, Beaumont (Oct. 20, 1983) (on file with authors).

¹¹² Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to The Honorable Ronald Kirk, Sec'y of State, Tex. Elections Div. (Feb. 17, 1995) (on file with authors).

¹¹³ Letter from J. Michael Wiggins, Acting Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Denise Nance Pierce, Bickerstaff, Health, Smiley, Pollan, Keever & McDaniel (June 21, 2002), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_062102.pdf [hereinafter June 21, 2002 Wiggins Letter].

¹¹⁴ See Department of Justice, Section 5 Objection Determinations: Texas, http://www.usdoj.gov/crt/voting/sec_5/tx_obj2.htm (last visited Dec. 29, 2007) (listing subject matter and dates for Section 5 objection letters issued in Texas).

¹¹⁵ See Letter from Wan J. Kim, Assistant Attorney Gen., Dep't of Justice, to Renee Smith Byas, Vice Chancellor and Gen. Counsel, N. Harris Montgomery Cmty. Coll. Dist. (May 5, 2006), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_050506.pdf.

¹¹⁶ NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005 4 (2006) [hereinafter PROTECTING MINORITY VOTERS].

¹¹⁷ See Department of Justice, *supra* note 114.

¹¹⁸ See *id.*

¹¹⁹ See *id.* A summary of all of Texas's Section 5 objections may be found on the DOJ website.

¹²⁰ See *id.* (showing that seventy-two of Texas's 254 counties had proposed electoral changes interposed by the DOJ).

of Texas's 254 counties, where 71.8%¹²¹ of the state's non-white voting-age population resides.

The majority of Texas's proposed changes related to local jurisdictions. For example, in *Foreman v. Dallas County*, the U.S. Supreme Court held that Dallas County wrongfully failed to submit a voting change for Section 5 preclearance.¹²² The voting change had a significant impact on Latino participation as poll workers, limiting the selection of poll workers on the basis of party affiliation.¹²³ In other jurisdictions where party affiliation was used as a prerequisite to serving as a poll worker, the practice had a negative impact on the availability and quality of language assistance under Section 203.

As noted above, repeated Section 5 violations are not limited to local jurisdictions. Ten of Texas' post-1982 objections involved statewide voting changes.¹²⁴ Moreover, 40% (28) of the seventy-two Texas counties cited by the DOJ are repeat offenders, utilizing various strategies to obstruct minority political participation.¹²⁵

From a public policy standpoint, Section 5 is a cost-effective means to prevent discrimination. Each of the 107 objections,¹²⁶ and the 366 voting changes withdrawn, altered or abandoned following DOJ "More Information Requests" (MIRs) since 1982¹²⁷ presented a potential lawsuit; Section 5 removed the need for private parties to spend both judicial and their own resources to block these discriminatory changes. More importantly, litigation would inevitably take years to resolve and would leave minority voters without a remedy until the cases were successfully resolved.

Section 5 also has a strong deterrent effect in Texas. Since 1982, Texas has had the largest number of Section 5 submissions withdrawn by jurisdictions after the DOJ signaled that the submission was inadequate and identified specific deficiencies.¹²⁸ Texas also had the largest number of electoral changes deterred by MIRs, with 366 changes either withdrawn,

¹²¹ U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Dec. 28, 2007).

¹²² 521 U.S. 979 (1997).

¹²³ See *Foreman v. Dallas County*, 193 F.3d 314, 318 (5th Cir. 1999).

¹²⁴ See Department of Justice, *supra* note 114.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 46, 62 tbl.3.3 (Ana Henderson ed., 2006).

¹²⁸ See PROTECTING MINORITY VOTERS, *supra* note 116, at Map 7.

changed or dropped since 1982.¹²⁹ A recent study submitted to the Senate Judiciary Committee in connection with its renewal hearings estimated that the use of MIRs increases the deterrent effect of Section 5 by more than 50% because MIRs frequently lead to withdrawals, superseding changes or “no responses” from jurisdictions proposing changes, all of which prevent the proposed change from being implemented.¹³⁰ Texas’s experience, in particular, illustrates the substantial deterrent effect of Section 5 resulting from the MIR process.

Despite the aforementioned DOJ oversight, compliance with Section 5’s mandates is still a problem in Texas. Since 1982, more successful Section 5 enforcement actions—in which DOJ has participated—have been brought in Texas (13) than in any other state.¹³¹ In addition, Section 5 has been vigorously enforced by private voters in Texas. For example, at least twenty-three additional successful Section 5 enforcement cases were filed by voters since 1982.¹³² Numerous Section 5 enforcement actions were brought against Texas jurisdictions that failed to submit to the DOJ voting changes that typically discriminated against Latinos.¹³³ In summary, Section 5 plays a critical role in protecting minority voters—even when state officials are recalcitrant and fail to comply with it. However, Texas’s failure to comply with Section 5 also shows that the state has a long way to go before it fully ensures equal voting opportunities for all of its voting-age citizens.¹³⁴

A. REDISTRICTING

Redistricting plans often seek to redraw district lines to diminish minority voting strength. Such plans can render minority populations electorally ineffective and unable to elect candidates of their choice.

Of the 107 DOJ Section 5 objections filed since 1982, 57% (61) of those objections have been related to redistricting plans proposed at various levels of government (i.e., state, county, city, school districts and community college districts).¹³⁵ While 87% (53) of these objections have been

¹²⁹ Fraga & Ocampo, *supra* note 127, at 64.

¹³⁰ *See id.* at 50, 57 tbl.3.1.

¹³¹ *See* PROTECTING MINORITY VOTERS, *supra* note 116, at Map 11.

¹³² Memorandum from MALDEF summer intern to Nina Perales, MALDEF Regional Counsel, at 8–22 (1997) [hereinafter 1997 MALDEF Memorandum] (on file with authors) (listing and summarizing cases).

¹³³ *See id.*

¹³⁴ *See* PROTECTING MINORITY VOTERS, *supra* note 116, at Map 11.

¹³⁵ *See* Department of Justice, *supra* note 114.

filed at the local level, eight of these objections relate to redistricting at the state level, culminating with the Texas redistricting in 2001.¹³⁶

Between 1982 and 1991, the DOJ objected to twenty-eight redistricting plans at various levels of government for their dilutive impact on minority voting populations.¹³⁷ Since 1992, there have been at least thirty-three redistricting plans that received DOJ objections for diluting minority voting power.¹³⁸ For example, in 1992, the DOJ objected to a redistricting proposal for Calhoun County Commissioner and Justice of the Peace precincts in which the Latino community was fragmented across four districts and no district afforded Latino voters the opportunity to elect their candidate of choice.¹³⁹

In 1992, the DOJ objected to a Justice of the Peace and Constable redistricting plan in Galveston County that fractured African-American and Latino voters and provided no opportunity districts among the eight districts in the plan, despite the fact that African-Americans and Latinos make up 31% of the county's population.¹⁴⁰

In 1992, the DOJ objected to the redistricting plan for the Castro County Commissioners Court.¹⁴¹ Although Latinos made up 46% of the county population, the two districts with the highest Latino populations were ineffective because they contained a minority of Latino voters.¹⁴² Later that same year, the DOJ objected again to the Castro County Commissioners Court's proposed redistricting plan.¹⁴³ This proposed plan renumbered a Latino opportunity district in order to delay the election of a Latino-preferred candidate.¹⁴⁴ No Latino had ever been elected to the Commissioner Court.¹⁴⁵

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See* Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Michael D. Morrison, Guinn & Morrison (Mar. 17, 1992) (on file with authors).

¹⁴⁰ *See* Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Gary W. Smith, City Attorney, Galveston, Tex. (Dec. 14, 1992) [hereinafter Dec. 14, 1992 Dunne Letter] (on file with authors); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Ray Holbrook, County Judge, Galveston, Tex. (Mar. 17, 1992) (on file with authors).

¹⁴¹ *See* Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Bob Bass, Allison & Assocs. (Mar. 30, 1992) (on file with authors).

¹⁴² *Id.* at 1-2.

¹⁴³ *See* Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert Bass, The Wahrenberger House (Oct. 6, 1992) (on file with authors).

¹⁴⁴ *Id.* at 1-2.

¹⁴⁵ *Id.* at 1.

Finally, in 1993, the DOJ objected to proposed redistricting plans by Bailey County that would have reduced the number of Justice of the Peace and Constable precincts from four to one, and then objected again when Bailey County used the non-precleared district to conduct a local option election.¹⁴⁶

As recently as 2002, the DOJ objected to a redistricting plan proposed by Waller County, stating:

The 2000 Census indicates that Waller County has a . . . voting age population [of] 24,277, of whom 7,601 (31.3%) are black and 3,871 (15.9%) are Hispanic

[T]he proposed [] redistricting plans contain only one district in which minority persons are a majority of the voting age population. According to the information that you provided, the black percentage of the voting age population in proposed Precinct 1 voting age population drops to 29.7 percent. Within the context of electoral behavior in Waller County, the county has not established that implementation of this plan will not result in a retrogression in the ability of minority voters to effectively exercise their electoral franchise. Moreover, the viability of alternative plans demonstrates that the potential retrogression of the proposed plan is avoidable.¹⁴⁷

The DOJ further observed that racially polarized voting served to undermine minority voting strength in Waller County:

Our analysis of county elections shows that minority voters in Precinct 1 have been electing candidates of choice since 1996, and that those candidates are elected on the basis of strong, cohesive black and Hispanic support. Our statistical analysis also shows that white voters do not provide significant support to candidates sponsored by the minority community, and that interracial elections are closely contested. For example, the black candidate for commissioner in Precinct 1 prevailed in the last election by two votes. As a result, the proposed reduction in the minority voting age percentage in Precinct 1 casts substantial doubt on whether minority voters would retain the reasonable opportunity to elect their candidate of choice under the proposed plan, particularly if the current incumbent in Precinct 1 declines to run for office again.¹⁴⁸

¹⁴⁶ See July 19, 1993 Turner Letter, *supra* note 111; Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert T. Bass, Allison & Assocs. (May 4, 1993) (on file with authors).

¹⁴⁷ June 21, 2002 Wiggins Letter, *supra* note 113, at 1–2.

¹⁴⁸ *Id.* at 2.

This objection illustrates an example of a jurisdiction that was committed to structuring electoral competition in ways to disadvantage the minority population.

Local jurisdictions also employ what is known as “packing” to concentrate minority populations into districts, virtually guaranteeing them the ability to elect the candidate of their choice in that specific district, but ultimately serving to minimize their influence in surrounding areas. The end result of this strategy is often that only one minority candidate of choice is elected when two or more could be elected under a fairer plan.

For example, in 1992, the DOJ objected to the Terrell County Commissioners Court redistricting plan. Although the Latino population in the county had increased from 43% to 53%, the proposed redistricting plan diminished the Latino population in one of the two Latino majority districts, while increasing Latino population in the other to 83%.¹⁴⁹

In sum, the use of redistricting strategies to dilute minority voting power is an indicator that jurisdictions forced to guarantee access to the ballot frequently respond with more sophisticated measures to thwart meaningful political participation for minority constituents.

B. ANNEXATIONS

Attempts to implement discriminatory voting changes have found their way into a range of procedures commonly used by governmental bodies, including annexations. On their face, annexations of residential areas outside larger political jurisdictions are often undertaken to provide the outlying area with public services, such as water, sewage and electricity. However, annexations can also be dilutive when the proposed addition of an outlying area with a white majority will have the effect of minimizing existing or growing strength of minority voters. This is a form of minority vote dilution because it serves to minimize the political strength of a growing minority group and is often proposed for that purpose.

A recent example of attempted vote dilution through annexation occurred in 1997 when the DOJ prevented city officials in Webster, Texas (Harris County) from reducing minority voting strength through the annexation of a predominately white outlying area. The DOJ noted:

Hispanic residents constitute 19 percent and black residents constitute 5 percent of the city's total population The annexation in Ordinance

¹⁴⁹ See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert T. Bass, Allison & Assocs. (Apr. 6, 1992).

No. 95-33 adds approximately 1,162 persons to the city's total population, all of whom appear to be white. Thus, the proposed annexation will reduce the city's Hispanic proportion to 15.0 percent and the black proportion to 4.2 percent of the total population.¹⁵⁰

In its review of the annexation change proposed by Webster officials, the DOJ uncovered a predominantly Hispanic outlying area that was not considered for annexation by city officials.¹⁵¹ If annexed in addition to the outlying white area, this tract would have reduced the possibility of minority vote dilution.¹⁵² The DOJ found that:

This block has a significant minority population percentage: Hispanic persons constitute 39 percent and black residents constitute 7 percent of the total population. . . . [T]he annexation of Block 101B alone would have increased the city's Hispanic population to 20.2 percent and the black population to 5.3 percent

[T]he Hispanic councilmember and another leader of the Hispanic community opposed the annexation contained in Ordinance No. 95-33 indicating that if the city was going to annex the all-white residential property . . . , it should also annex the residential property contained in Block 101B, but their requests were refused.¹⁵³

After an extensive investigation into the operation of city government in Webster, the DOJ concluded its review of Webster's Section 5 submission by stating, "the city's application of its annexation policy and the city's annexation choices appear to have been tainted, if only in part, by an invidious racial purpose" and that claims of unawareness of the racial makeup of the block under review were "at best disingenuous."¹⁵⁴

Minority vote dilution in the form of "fracturing" or "cracking" minority voters occurs at all levels of government. One recent statewide example illustrates the point. In 2001, the State of Texas enacted a redistricting plan for the Texas House of Representatives that fractured Latino populations across South and West Texas and resulted in the loss of Latino electoral control in four districts.¹⁵⁵

¹⁵⁰ Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Randall B. Strong, Attorney for the City of Webster, Tex. (Mar. 17, 1997), available at http://www.usdoj.gov/crt/voting/sec_5/ltr/l_031797.pdf.

¹⁵¹ See *id.* at 2.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2, 4.

¹⁵⁵ See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to The Honorable Geoffrey Connor, Tex. Sec'y of State (Nov. 16, 2001), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_111601.pdf.

The DOJ objected to the Texas House plan, noting that the State had reduced by four the number of districts in which Latino voters would be able to elect their candidate of choice.¹⁵⁶ One Latino majority district in San Antonio, which contained close to 70% Latino voting age population, was simply eliminated in the state's new redistricting plan and its Latino voters scattered across other districts.¹⁵⁷ In West Texas District 74, the State reduced the Latino voting age population by more than 15%; the DOJ noted that this reduction rendered the district ineffective for Latino voters and that this change in population was unnecessary because the district fell within the acceptable population deviation at the time of the 2000 Census.¹⁵⁸ In South Texas, the State reduced the Latino-majority District 44 to a bare 50.2% Latino voter registration majority, prompting the DOJ to note that the district no longer allowed Latino voters to elect their preferred candidate.¹⁵⁹ Finally, in the Rio Grande Valley, the State reduced the Latino population in District 38 and rendered it ineffective for Latino voters.¹⁶⁰

The DOJ concluded that although the State had created a new Latino-majority District 80 in South Texas, there was a net loss of three districts in which Latinos could elect their candidate of choice, and thus, the Texas plan was retrogressive.¹⁶¹

Following the DOJ's objection, and because a vote dilution lawsuit challenging this redistricting plan was already pending, a federal court ordered a new map in which these districts were restored.¹⁶²

C. METHOD OF ELECTION

Since 1982, the DOJ has made forty-seven of its 107 objections based on proposed changes to the method of election.¹⁶³ A jurisdiction's method of election is the system it uses to elect representatives, including single member districts, at-large elections, majority vote requirements and numbered place elections. Certain methods of election, when combined with the racial polarization prevalent in many parts of Texas, result in minority vote dilution.¹⁶⁴ Polarized voting patterns transcend partisanship and illus-

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *See id.* at 2–3.

¹⁵⁸ *Id.* at 5.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 3.

¹⁶² *See* Balderas v. Texas, No. 6:01-CV-158, 2001 WL 34104833, at *3 (E.D. Tex. Nov. 28, 2001).

¹⁶³ *See* Department of Justice, *supra* note 114.

¹⁶⁴ *See* League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2615–17 (2006).

trate not only the continuing racial cleavage between Anglo and minority voters, but also the particular challenges that people of color face in electing candidates of their choice.

The numbered post, or numbered place, system of election forces candidates to sign up and run for a particular seat on the governing body when more than one seat is up for election. Numbered post elections often discriminate against minority voters because they result in head-to-head contests, usually between an Anglo and minority candidate. In the context of racially polarized voting, these head-to-head races allow Anglo voters to cast more votes than minority voters in each race. The numbered post system is often intentionally designed to prevent minority voters from electing their candidates of choice. By contrast, when all candidates run in a field for multiple seats on the governing body, minority voters can “single shot vote” for their preferred candidate and prevail in at least one race. Despite their disparate negative impact on minority voters, local governmental bodies continue to propose the implementation of numbered post systems.

In 1990, the DOJ objected to an election change proposed by the State of Texas for the creation of fifteen additional Judicial Districts with numbered post requirements.¹⁶⁵ The DOJ stated in its objection:

The history of the numbered post feature in Texas elections indicates that its adoption and continued maintenance over the years appears calculated to place an additional limitation on the ability of minority voters to participate equally in the political process and elect candidates of their choice. In that regard, we note that it is commonly understood that numbered posts along with other features such as the use of a majority-vote requirement in the context of an at-large election system, have had a discriminatory impact on racial and ethnic minorities. . . . Numerous federal court decisions have chronicled instances where these features have been adopted in Texas for clearly discriminatory motives, and where their use has produced the intended discriminatory effects.¹⁶⁶

In 2000, the DOJ objected to a proposal by the Sealy Independent School District to adopt the numbered post system of election because it would impair the ability of minority voters to successfully single shot vote for their preferred candidate.¹⁶⁷

¹⁶⁵ See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Tom Harrison, Special Assistant for Elections, Elections Div. (Nov. 5, 1990) (on file with authors).

¹⁶⁶ *Id.*

¹⁶⁷ Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to David Méndez, Bickerstaff, Heath, Smiley, Pollan, Keever & McDaniel (June 5, 2000), available at http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_060500.pdf.

The use of at-large elections in the context of racially polarized voting can also dilute minority votes. Because the at-large election system ensures that political contests contain a majority of Anglo votes, it virtually guarantees that the minority group will be unable to elect the candidate of their choice, particularly when this system is coupled with a majority vote requirement. Such systems weaken minority political power by requiring minority voters to vote in circumstances where an identifiable white bloc vote will defeat their preferences.

In comparison, single-member districts subdivide political jurisdictions and their constituencies, allowing for the election of minority candidates, as well as white candidates, resulting in fair and equitable representation.

In 1991, the DOJ objected to election changes proposed for the Refugio Independent School District in Refugio County.¹⁶⁸ The changes included implementing two at-large and five single-member districts for the election of school board members.¹⁶⁹ In its objection, the DOJ noted that this was a repeated attempt to propose a previously rejected plan deemed discriminatory in nature:

On May 8, 1989, the Attorney General interposed an objection under Section 5 to an earlier five district, two at large plan adopted by the school district. In that regard, we found that in light of the electoral circumstances present in the school district (in particular, the apparent pattern of polarized voting), the proposed plan unnecessarily minimized the opportunity of minorities to elect candidates of their choice to office. We noted that our information tended to support a concern that the 5-2 system had been selected over a system of seven single-member districts 'to avoid the potential for fair minority representation in three majority-minority districts.' . . . we note that, even though our May 8, 1989 letter expressed concern over the lack of opportunity for minority citizens to participate in that decisionmaking process, it appears that in developing the instant plan the school district perpetuated this problem. Thus while the district did establish a committee of minority citizens to examine the election method issue, the committee appears to have been excluded from any participation in the process once it made known its preference for a seven single-member district plan.¹⁷⁰

Additionally, in August 2002, the DOJ objected to a change in the method of election proposed by the City of Freeport, which involved aban-

¹⁶⁸ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Attorneys for the Refugio Indep. Sch. Dist. (Apr. 22, 1991) (on file with authors).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

doning single-member districts in favor of an at-large election system.¹⁷¹ The DOJ explained:

Until 1992, the city elected its four-member council on an at-large basis. In that year it began to use the single-member district system, which it had adopted as part of a settlement of voting rights litigation challenging the at-large system. Under the subsequent single-member district method of election, minority voters have demonstrated the ability to elect candidates of choice in at least two districts, Wards A and D. The city now proposes to reinstitute the at-large method of election. Our analysis shows that the change will have a retrogressive effect on the ability of minority voters to elect a candidate of their choice.¹⁷²

At the time of the proposal, Latinos made up 47.3% and African-Americans 12.3% of the city's voting-age population.¹⁷³ Approximately 29% of the city's registered voters were Spanish-surnamed.¹⁷⁴ In its objection letter, the DOJ recognized that within the context of racially polarized voting, at-large elections would impair the ability of minority voters to elect a candidate of their choice.¹⁷⁵

Similar changes were proposed for the Haskell Consolidated Independent School District in Haskell, Knox and Throckmorton Counties. In this submission, the DOJ found that, after successful litigation for single-member districts,¹⁷⁶ county officials sought to revert to at-large elections.¹⁷⁷ County officials cited higher voter turnout statistics under the at-large system, as opposed to the single-member districts, as reason for the reversal; however, the DOJ found that their numbers and "assertion[s] [did] not withstand close scrutiny."¹⁷⁸

These efforts to return to electoral arrangements that are known to disadvantage minority communities demonstrate the persistence of intentional efforts to dilute minority voting power in Texas, and powerfully make the case for the continuing necessity of the state's Section 5 coverage. In the

¹⁷¹ Letter from J. Michael Wiggins, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Wallace Shaw, Attorney for the City of Freeport (Aug. 12, 2002), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_081202.pdf.

¹⁷² *Id.* at 2.

¹⁷³ *Id.* at 1.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* at 2.

¹⁷⁶ *League of United Latin Am. Citizens, Dist. 5 v. Haskell Consol. Indep. Sch. Dist.*, No. 193-CV-0178 (C) (N.D. Tex. Oct. 21, 1994).

¹⁷⁷ Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, Cheryl T. Mehl, Schwartz & Eichelbaum (Sept. 24, 2001), *available at* http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_092401.pdf.

¹⁷⁸ *Id.* at 3.

absence of Section 5, each of these retrogressive efforts would require a costly and time-consuming Section 2 lawsuit to reestablish principles that the Voting Rights Act has long established. Significantly, while the litigation took place, voters would be suffering a loss of their effective voting power.

Other examples of discriminatory methods of elections that were prevented because of Section 5 of the VRA include the following:

In January 1992, the DOJ objected to a proposal by the city of El Campo to eliminate single-shot voting by converting from at-large plurality elections to majority vote requirements.¹⁷⁹ The DOJ had previously objected to other attempts by El Campo to eliminate single shot voting in 1985, 1986 and 1989.¹⁸⁰

In 1992, the DOJ objected to a law passed by the Texas Legislature, which provided that if one of the legislative redistricting plans were to change, there would be no new primary election if a primary had already been held.¹⁸¹ Under the statute, the candidate-designee would be chosen by the party executive committee.¹⁸² In light of the continued domination of Anglos in Texas's political party leadership, allowing party executive committees to select a candidate would place minority voters in a worse position than before.

In the city of Wilmer in Dallas County, Latinos made up 30% of the population and African-Americans 20%, yet no minority had ever been elected to the Wilmer City Council.¹⁸³ The DOJ objected in 1992 to a proposal that would have eliminated single shot voting and prevented minorities from electing their candidate of choice.¹⁸⁴

In 1992, the DOJ objected to the city of Ganado's adoption of staggered terms and numbered post voting, noting that the changes were retrogressive and that the minority community was not afforded the opportunity to participate in the process for adopting these changes.¹⁸⁵

¹⁷⁹ See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Ronald B. Collins, Duckett, Bouligny, Collins, Clapp & Collins (Jan. 7, 1992) (on file with authors).

¹⁸⁰ See Department of Justice, *supra* note 114.

¹⁸¹ See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John Hannah, Jr., Tex. Sec'y of State (Mar. 10, 1992) (on file with authors).

¹⁸² *Id.* at 2.

¹⁸³ Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Preston Parks, Mayor, Wilmer, Tex. (July 20, 1992) (on file with authors).

¹⁸⁴ See *id.* at 2.

¹⁸⁵ See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Frances Vesley, Ganado City Sec'y (Aug. 17, 1992) (on file with authors).

Also in 1992, in Galveston County, the DOJ objected to the adoption of numbered post voting and the change from an at-large election to a 4-2 mixed system.¹⁸⁶ At the time, the combined minority population in the county was 49%.¹⁸⁷

In addition, there is substantial evidence in Texas of non-compliance with Section 5's preclearance requirements. A number of counties proceeded to implement voting plans before the DOJ had an opportunity to object to them—a direct violation of Section 5 of the VRA. The following Texas counties illegally implemented their non-precleared redistricting plans in the March 1992 primary election: Castro, Cochran, Deaf Smith, Hale, Bailey and Terrell.¹⁸⁸ The history of Section 5 enforcement litigation—by both the DOJ and private parties—further demonstrates the extent of non-compliance by jurisdictions across the state.

In many of these changes, the end goal was to remove or exclude minority elected officials from office by repackaging age-old strategies. Without the basic and essential representation afforded to minorities through their ability to elect the candidates of their choice, minority voters will continue to face hurdles not only within the electoral system, but in all social arenas.

D. VOTING PROCEDURES

There have been twelve DOJ objections regarding voting procedures since 1982.¹⁸⁹ Examples of voting procedure changes include changes in polling place locations, the form of ballots and absentee ballots used, election dates and general voter registration requirements.¹⁹⁰

The loss of a traditional polling place in a minority community can result in voter confusion and, ultimately, depressed voter turnout. Unfortunately, many counties make changes in their voting procedures without submitting the changes to the DOJ for preclearance. For example, in August 2003, Bexar County (which includes the city of San Antonio) announced that it would eliminate the five early voting polling places that serve the predominantly-Latino West Side of San Antonio, leaving the area with no early voting polling place for the upcoming September constitu-

¹⁸⁶ See Dec. 14, 1992 Dunne Letter, *supra* note 140, at 1.

¹⁸⁷ *Id.* at 2.

¹⁸⁸ See 1997 MALDEF Memorandum, *supra* note 132, at 19–21.

¹⁸⁹ See Department of Justice, *supra* note 114.

¹⁹⁰ See *id.*

tional amendment election.¹⁹¹ The loss of every early voting polling place on the West Side would have had a devastating impact on the political participation of the area's Latino voters. Because Bexar County did not timely submit its proposed polling place changes to the DOJ, but instead moved ahead with the changes without securing preclearance, MALDEF brought suit and enjoined the polling place closures.¹⁹²

Voter registration requirements also remain an area of contention. Prairie View A&M is a historically African-American university in Waller County whose students comprise 20% of the county's voting population.¹⁹³ In 2003, after two students decided to run for county office, the District Attorney in Waller County, Oliver Kitzman, attempted to prevent Prairie View students from registering and voting.¹⁹⁴ Kitzman argued that "it's not right for any college student to vote where they do not have permanent residency,"¹⁹⁵ and ultimately threatened to prosecute students who declared Prairie View as their residence. Waller County has a history of attempting to restrict the votes of the mostly-African-American students at Prairie View, whose right to register and vote in Waller County was upheld in a precedent-setting case decided by the U.S. Supreme Court in 1979.¹⁹⁶ In the face of that historical experience, and the controlling Supreme Court decision, Prairie View A&M students were indicted in 1992 for "illegally voting," despite the fact that this change in policy was never submitted for preclearance and flew in the face of a court order.¹⁹⁷ The DOJ wrote to Waller County demanding that it comply with the previous injunction.¹⁹⁸ The Texas Secretary of State and the Texas Attorney General also condemned the attempt to unlawfully restrict the students' right to vote.¹⁹⁹ Five students and the local NAACP chapter sued the District Attorney, demanding the right to vote in the 2004 election without improper prosecu-

¹⁹¹ See Miguel Hernandez Chapter of the Am. GI Forum v. Bexar County, No. SA-04-CA-181-FB (W.D. Tex. Aug. 27, 2003).

¹⁹² See *id.*

¹⁹³ *A New Generation Fights Back Against Minority and Student Voter Suppression*, JACKSON ADVOCATE, Mar. 4–Mar. 11, 2004, at 6A.

¹⁹⁴ PROTECTING MINORITY VOTERS, *supra* note 116, at 65.

¹⁹⁵ Rock the Vote, *Campus Campaign: Prairie View Report*, Feb. 23, 2004, http://www.rockthevote.com/rtv_campuscamp_pvreport.php; see also *Voter Suppression Tactics Slapped on Prairie View A&M University Students*, GARLAND J. NEWS, Mar. 2004, available at http://www.garlandjournalnews.com/past_articles/200403.html.

¹⁹⁶ *Symm v. United States*, 439 U.S. 1105 (1979).

¹⁹⁷ AM. CIVIL LIBERTIES UNION, *THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT 842* (2006). The charges were later dropped.

¹⁹⁸ *Id.* at 843.

¹⁹⁹ See *id.* at 842–43.

tion.²⁰⁰ Eventually, Waller County settled and agreed to let the students vote.²⁰¹

However, the issue did not end there. Less than a week after the lawsuit was filed, and a month before the election, the Waller County Commissioners Court voted to greatly reduce the availability of early voting at the polling place near Prairie View A&M—an important change since the primary election date was during the students' spring break.²⁰² In effect, this voting change was an attempt to achieve the same end as the District Attorney's unlawful voter intimidation campaign through another means. It thus presents a textbook example of the brand of persistent and adaptive discrimination that gave rise to Section 5 more than forty years ago. The NAACP filed a Section 5 enforcement action to enjoin Waller County from implementing this change without Section 5 preclearance.²⁰³ County officials abandoned the change, technically mooted the suit, although its objectives were fulfilled.²⁰⁴ Most of the Prairie View students who voted utilized early voting, and the Prairie View student running for a seat on the Commissioners Court won narrowly.²⁰⁵

Racially exclusionary political strategies have plagued Texas since 1845 and continue to do so, despite legal challenges and advances. In light of these ongoing challenges to political empowerment, it is apparent that, despite measurable progress, the racial cleavages that have afflicted this country, and Texas, have not been so easily eradicated. Given these circumstances, the continued protection of Section 5 of the VRA is of paramount importance to ensuring equal voting opportunities for minority voters and, indeed, all voters in Texas.

V. SECTION 2 LITIGATION IN TEXAS

Section 2 of the VRA is a permanent provision that “prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups.”²⁰⁶ Section 2 is an important tool for helping to ensure equal voting opportunities. However, a primary shortcoming of Section 2 of the VRA is the added litigation ex-

²⁰⁰ *Id.* at 843.

²⁰¹ *See id.*; *see also* *Prairie View Chapter of NAACP v. Kitzman*, No. H-04-459 (S.D. Tex. 2004); *Prairie View Chapter of NAACP v. Waller County Comm'n*, No. H-04-0591 (S.D. Tex. 2004).

²⁰² *See* PROTECTING MINORITY VOTERS, *supra* note 116, at 65.

²⁰³ *Id.* at 66.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 65–66.

²⁰⁶ Department of Justice, Section 2 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_2/about_sec2.html#sec2 (last visited Dec. 29, 2007).

penses for all parties involved and the need for private plaintiffs to put significant resources—often not reimbursable under civil rights fee-shifting statutes²⁰⁷—into enforcement litigation.

Since 1982, Texas voting rights plaintiffs have prevailed in or successfully settled more than 150 Section 2 cases—more than in any other state.²⁰⁸ As a result of these post-1982 cases, 197 jurisdictions in Texas have altered their discriminatory voting procedures.²⁰⁹

Section 2 cases represent ongoing and recurring attempts to discriminate against minority voters in Texas. They underscore the continuing need to protect the minority electoral franchise, particularly in light of the aforementioned examples of Texas jurisdictions that continue their attempts to knowingly revert to dilutive electoral arrangements. In 1988, the Fifth Circuit affirmed a ruling that the city of Baytown had violated Section 2 of the VRA by using an at-large election system that diluted the voting strength of Latinos and African-Americans.²¹⁰ The court concluded that at-large elections, conducted with numbered post and majority vote requirements, worked with racially polarized voting to prevent the election of minority candidates to the City Council.²¹¹ Despite the fact that 25% of the city population was Latino or African-American, no minority candidate had ever been elected to the Baytown City Council.²¹² After evaluating rates of racially polarized voting and noting that Latinos and African-Americans suffer the lingering socio-economic effects of past discrimination, the district court concluded that Latinos and African-Americans were not able “to participate fully in the electoral system in Baytown.”²¹³

In the 1990 case *Williams v. City of Dallas*, a federal court ruled that the at-large seats in the Dallas City Council’s mixed system diluted the voting strength of both African-Americans and Mexican-Americans and, therefore, violated Section 2 of the VRA.²¹⁴ Under the 8-3 system, eight

²⁰⁷ The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 6, 120 Stat. 577 (2006), amends Section 14(e) of the VRA to permit the recovery of expert fees and expenses for prevailing parties.

²⁰⁸ Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006). According to the National Commission on the Voting Rights Act, there were at least 206 successful Section 2 cases brought in Texas between August 1982 and the end of 2005. See PROTECTING MINORITY VOTERS, *supra* note 116, at 87.

²⁰⁹ PROTECTING MINORITY VOTERS, *supra* note 116, at 87.

²¹⁰ *Campos v. City of Baytown*, 840 F.2d 1240, 1252 (5th Cir. 1988).

²¹¹ *Id.* at 1249.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ 734 F. Supp. 1317, 1415 (N.D. Tex. 1990).

council seats were elected by district and three were elected at large.²¹⁵ No African-American and only one Mexican-American²¹⁶ had ever won an at-large seat, although as of the 1980 Census, Dallas was 41.67% minority (29.38% African-American and 12.29% Mexican-American).²¹⁷ The 8-3 system was introduced after Dallas's previous all-at-large system was invalidated for violating the VRA.²¹⁸ The court in *Williams* conducted a searching inquiry into the long history of discrimination against African-Americans and Latinos in Dallas and the various ways white majorities ensured that the two groups could only hold political office with the "permission . . . of the white majority."²¹⁹ The court noted severe racial tension relating to police brutality and other issues and continuing patterns of racially polarized voting.²²⁰ In a referendum on how to revise the voting system, the court also found that some of the white at-large council members "simply ignored the minority areas of the city."²²¹ The court held that because of "substantial economic disparities between white and minority residents," it was not possible for minority candidates to raise the large sums of money from their own communities that are necessary to compete in at-large elections.²²² The court also held that the district lines for the eight districted seats under the 8-3 system had diluted the African-American vote by "packing" African-Americans into two concentrated districts and then "cracking" the remaining African-American voters into multiple districts to prevent the election of a third African-American candidate.²²³

Likewise, in 1995, a federal court in San Antonio ruled that the at-large election system used by the North East Independent School District (NEISD) violated Section 2 of the VRA.²²⁴ Although the combined African-American and Latino population of the district was 30%, from 1973 to 1994, Anglo candidates won forty-seven of forty-eight elections, a Latino candidate won one election and African-American candidates won none.²²⁵ The district court noted that "voting in NEISD school board elections is

²¹⁵ *Id.* at 1317.

²¹⁶ According to the court, the one Mexican-American elected at large was elected "due to some very unusual circumstances that will not be repeated" (i.e., there was no white candidate). *Id.*

²¹⁷ *Id.* at 1323.

²¹⁸ *Lipscomb v. Wise*, 399 F. Supp. 782 (N.D. Tex. 1975), *rev'd*, 551 F.2d 1043 (5th Cir. 1977), *rev'd*, 437 U.S. 535 (1978).

²¹⁹ *Williams*, 734 F. Supp. at 1320.

²²⁰ *See id.* at 1325, 1400.

²²¹ *Id.* at 1384.

²²² *Id.* at 1382.

²²³ *Id.* at 1415.

²²⁴ *League of United Latin Am. Citizens v. N.E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1093 (W.D. Tex. 1995).

²²⁵ *Id.* at 1078.

significantly polarized along racial lines [and a]bsent special circumstances, there are not enough Anglo cross-over votes to allow a minority candidate to succeed in the at-large election system presently used in NEISD school board elections.”²²⁶ The district court’s conclusion that the school district violated Section 2 was based on thorough fact findings, including that: persistent socio-economic disparities between Anglos and minorities in the NEISD resulting from past discrimination still impaired the ability of minority voters to participate in the political system; one high school in the NEISD flew the Confederate flag until 1993; the NEISD used a numbered place system that prevented single shot voting by minorities to elect their candidate of choice; and, until 1990, the district provided only eight polling places for a jurisdiction of more than 250,000 people.²²⁷

It is noteworthy that many of the successful Section 2 cases in Texas occurred through settlements, without any reported decision, and are known only to local residents and the parties and counsel who litigated them. The examples described above illustrate the ongoing importance of Section 2 of the VRA as a necessary, but not sufficient, tool for ensuring the political enfranchisement of Texas’s minority citizens.

A. VOTING RIGHTS VIOLATIONS IN THE CITY OF SEGUIN: A CASE STUDY IN PERSISTENT DISCRIMINATION

The experience of minority voters in the city of Seguin provides a notable example of how jurisdictions can use a series of tactics to dilute minority voting strength and how both Section 2 and Section 5 of the Voting Rights Act operate in concert to ensure equal access in voting.

In 1978, Latino plaintiffs sued the city of Seguin for failing to redistrict after the 1970 Census.²²⁸ At the time, the city elected eight council members from four multi-member wards, and the city was 40% Mexican-American and 15% African-American.²²⁹ There had never been more than two minority candidates elected at once to the Seguin City Council.²³⁰ A federal court enjoined the 1978 election, and the following year, adopted a new city-proposed redistricting plan.²³¹ The plaintiffs objected to this plan because it afforded insufficient Latino representation.²³²

²²⁶ *Id.* at 1084–85.

²²⁷ *Id.* at 1086–89.

²²⁸ *See* Ramos v. Koebig, 638 F.2d 838, 840 (5th Cir. 1981).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 841.

Shortly thereafter, the plaintiffs filed a second lawsuit seeking to block implementation of the city's plan until it received the required preclearance from the DOJ.²³³ Ultimately, the plaintiffs won a ruling from the U.S. Court of Appeals for the Fifth Circuit requiring the redistricting plan to be precleared.²³⁴

Following these victories, the city of Seguin failed to redistrict after the 1980 and 1990 Censuses.²³⁵ By 1993, 60% of the city was minority, but only three of nine City Council members were Latino.²³⁶ Latino plaintiffs sued again and won a settlement in 1994 from the City, creating eight single-member districts.²³⁷

Following the 2000 Census, Seguin redistricted, but fractured the city's Latino population across the districts to preserve the incumbency of an Anglo council member and to maintain a majority of Anglos on the City Council.²³⁸ When the DOJ refused to preclear the redistricting plan, Seguin corrected the violation, but then closed its candidate filing period so that the Anglo incumbent would run for office unopposed.²³⁹ Latino plaintiffs sued once again, securing an injunction under Section 5 of the Voting Rights Act. The parties settled after negotiating a new election date, and today, a Latino majority serves on the Seguin City Council.²⁴⁰ The persistence of the opposition to minority voting power in Seguin presents powerful evidence that the equality principles protected by the VRA would not be vindicated in Texas absent vigilant enforcement of all of the VRA's protections.

VI. CONTINUING DISCRIMINATION IN THE 2004 ELECTION

During the November 2004 presidential election, MALDEF served as a legal resource center for coalitions conducting election protection work, including the National Association of Latino Elected Officials (NALEO), the Bexar County Voting Rights Coalition and Texas Election Protection.

²³³ *Id.*

²³⁴ *See id.* at 844–45; *Trinidad v. Koebig*, 638 F.2d 846, 847–48 (5th Cir. 1981).

²³⁵ MEXICAN AM. LEGAL DEF. & EDUC. FUND, LITIGATION DOCKET: MAY 1993–APRIL 1994 79 (1994) (discussing *League of United Latin Am. Citizens Council #682 v. City of Seguin*).

²³⁶ *Id.*; *see also Ramos v. Koebig*, 638 F.2d 838, 840 (5th Cir. 1981) (discussing pre-1982 Census figures and form of government).

²³⁷ *League of United Latin Am. Citizens Council #682 v. City of Seguin*, No. 93-0333 (W.D. Tex. 1994).

²³⁸ *See Complaint* at 5–7, *League of United Latin Am. Citizens v. City of Seguin*, No. 5:02-cv-00369-OLG-ECP (W.D. Tex. Apr. 12, 2002).

²³⁹ *See id.* at 6.

²⁴⁰ *League of United Latin Am. Citizens v. City of Seguin*, No. 5:02-cv-00369-OLG-ECP (W.D. Tex. Apr. 30, 2002) (order granting preliminary injunction).

MALDEF received numerous telephone calls from Latino voters unable to find their polling site, many as a result of language barriers. In addition to these calls, MALDEF received more than thirty calls relating to irregularities, complaints, assistance needed or problems in the voting process from predominantly Latino and African-American voters. Specific reports from callers included:²⁴¹

— At polling places in a predominantly Latino precinct, understaffing of poll workers resulted in long lines and only two voting stalls being put to use. Election judges informed voters they should come back at a later time.

— An elderly Latina voter was told that she was not on the voter registration list and not allowed to vote with a provisional ballot, despite the recently enacted Help America Vote Act (HAVA), which provides for provisional ballots in such situations. She and her family had been voting at the same location for more than twenty years. The election judge refused to unlock a box containing provisional ballots until a MALDEF attorney arrived and negotiated on behalf of the Latina voter.

— An eligible African-American woman was told by an Anglo election judge to “take that doo-rag off your head” before voting.

— Police officers were stationed outside three polling sites in the outskirts of San Antonio’s far west side, an overwhelmingly Latino area. This practice is a familiar form of voter intimidation.

— A polling site closed while voters were still in line in a predominantly African-American precinct, contrary to Texas law, resulting in vote denial.

The Election Protection Coalition issued a report entitled, *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*.²⁴² The report documents the following additional incidents in Texas:

— “During early voting at the Power Center in Harris County, a voter observed Harris County police officers yelling at the 200 or more voters in line that they must show ID and that anyone with a warrant would go to jail. People left the line, including the [reporting voter].”²⁴³ Proof of identity is not required to vote in Texas.

— An African-American voter and her mother were subjected to heightened levels of questioning at their local polling place. At the time they

²⁴¹ MALDEF staff recorded these incidents on voter complaint and voter intimidation incident report forms (on file with authors).

²⁴² ELECTION PROTECTION COMM’N, SHATTERING THE MYTH: AN INITIAL SNAPSHOT OF VOTER DISENFRANCHISEMENT IN THE 2004 ELECTIONS (2004).

²⁴³ *Id.* at 65.

arrived, they were the only black voters present. The poll workers first asked all voters for registration or I.D. and then if they had moved. The voter and her mother were subjected to additional questions, as the workers appeared not to believe their responses. The polling agents took the voters' licenses to check against other records. This, apparently, did not happen to other voters. They were eventually allowed to vote.²⁴⁴

Even with federal legislative efforts such as the National Voter Registration Act and HAVA, the need for the VRA's permanent and temporary provisions cannot be overstated. The 2004 election demonstrated the continuing discriminatory practices that occur on the ground level of elections. Legislative efforts to repress minority voting rights continue to garner support and represent a real threat to the ability of Latinos and African-Americans to elect candidates of their choice.

VII. TEXAS'S VOTER ACCESS RECORD UNDER SECTIONS 4(F)(4) AND 203

Historical discrimination against Latinos in Texas, including the practice of educational segregation, is strongly linked to the limited-English proficiency status of many of Texas's Latino citizens. Additionally, failure to accommodate LEP voters has resulted in low voter participation, especially when elections are conducted only in English.

In *White v. Regester*, the U.S. Supreme Court recognized that discrimination resulted in the social and linguistic isolation of native-born Mexican-Americans in Texas.²⁴⁵ With respect to this history of discrimination, the Court noted:

The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "[A] cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access

²⁴⁴ *Id.* at 65–66.

²⁴⁵ 412 U.S. 755, 768 (1973).

to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.”²⁴⁶

Today, Latinos in Texas continue to suffer language-based discrimination and marginalization in the election process, further demonstrating the need for the protections of Section 203. For example, in 2003, the Chairman of the Texas House Redistricting Committee stated that he did not intend to hold redistricting hearings in the Rio Grande Valley in South Texas, where many U.S. citizens are Latino, because only two members of the Redistricting Committee spoke Spanish. Chairman Crabb stated that the members of the Committee who did not speak Spanish “would have a very difficult time if we were out in an area—other than Austin or other English speaking areas—to be able to have committee hearings to be able to converse with the people that did not speak English.”²⁴⁷ This is a stark example of a situation in which LEP status was invoked as a justification for closing off access to critical governmental functions that bear upon the lives of all of Texas’s citizens. Only after widespread media coverage of his remarks did the Chairman agree to hold hearings in South Texas.²⁴⁸

In Texas, there are still many Mexican-Americans, as well as other racial minorities, who are LEP as a result of educational discrimination. In 2000, the U.S. Census Bureau reported that 473,099 Latino voting-age *native born citizens* in Texas were LEP.²⁴⁹ For similar reasons, many Spanish-speaking American Indians are LEP.²⁵⁰ In addition, naturalized citizens who are LEP benefit from Spanish language assistance in voting. The language assistance provisions—Sections 203²⁵¹ and 4(f)(4)²⁵²—perform the indispensable role of ensuring equal access for Spanish-speaking Texans to the democratic process.

A. SECTION 203 COVERAGE IN TEXAS

Texas must comply with Section 203 because of its coverage under Section 4(f)(4) of the Voting Rights Act.²⁵³ Thus, all political subdivisions

²⁴⁶ *Id.* (citation omitted).

²⁴⁷ See Transcript at 67–70, *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. Dec. 15, 2003) [hereinafter *Session Transcript*]; Molly Ivins, *Bucking the Texas Lockstep*, WASH. POST, May 15, 2003, at A29.

²⁴⁸ See *Session Transcript*, *supra* note 247, at 69–70, 75–77.

²⁴⁹ Data provided by Dr. Jorge Chapa, June 15, 2006, on file with MALDEF.

²⁵⁰ See *infra* Part VII.B.

²⁵¹ 42 U.S.C. § 1973aa-1a (2006).

²⁵² *Id.* § 1973b(f)(4).

²⁵³ See 28 C.F.R. § 55.6, 55 app. (2007).

of Texas must provide language assistance to Spanish-speaking voters where it is needed in statewide elections.²⁵⁴

In addition, 103 counties are separately covered for Spanish in their own right because of high LEP and illiteracy rates among language minority citizens.²⁵⁵ Two of these counties—El Paso and Maverick Counties—also are covered for American Indian languages.²⁵⁶ In addition, Harris County is covered for an Asian language (Vietnamese).²⁵⁷

B. HIGH NUMBER OF LEP CITIZENS

Section 203 of the VRA defines those citizens categorized as having limited-English proficiency as being “unable to speak or understand English adequately enough to participate in the electoral process.”²⁵⁸

According to the Census Bureau’s July 2002 determinations of jurisdictions covered by Section 203, in Texas, there are 818,185 Latino voting-age citizens—or nearly one out of every four Latino voting-age citizens—who are not yet fully proficient in English.²⁵⁹ These numbers are highest in the state’s most populous counties, for example: in Bexar County, there are 98,165 Latino voting-age citizens—or nearly one out of every four Latino voting-age citizens—who are LEP;²⁶⁰ in Dallas and Tarrant Counties, there are 79,335 Latino voting age-citizens—or nearly one out of every three Latino voting-age citizens—who are LEP;²⁶¹ and in Harris County, there are 107,915 Latino voting-age citizens—or nearly one out of every three Latino voting-age citizens—who are LEP.²⁶²

In El Paso and Maverick Counties, over 24% and 59%, respectively, of American Indian voting age citizens are LEP.²⁶³ In Harris County, which includes Houston, there are nearly 17,000 LEP Vietnamese voting-age citizens.²⁶⁴ Overall, about 42% of the 200,000 Asian-Americans in Harris County are LEP.

²⁵⁴ *See id.* 55 app.

²⁵⁵ *See id.*

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ 42 U.S.C. § 1973aa-1a(b)(3) (2006).

²⁵⁹ *See* TUCKER & ESPINO, *supra* note 39, at 30.

²⁶⁰ *Id.* at app. C-6 (summarizing the LEP numbers for Texas and the 103 separately-covered counties).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at app. C-22.

²⁶⁴ *Id.*

C. EDUCATIONAL DISCRIMINATION AGAINST LATINO CITIZENS

Texas has an unfortunate past and present history of providing unequal educational opportunities to Latinos, which has impaired their ability to learn English and has resulted in the high LEP rates described above. In Section 203(a) of the VRA, Congress expressly concluded that educational discrimination results in depressed language minority voter registration and turnout.²⁶⁵ Congress additionally concluded that educational discrimination manifests itself through both “present day barriers to equal educational opportunities” and “the current effect that past educational discrimination has on today’s Hispanic adult population.”²⁶⁶

The most egregious forms of educational segregation against Latinos in Texas precede the last reauthorization of the VRA. Today, 473,099 native born and voting-age Latinos in Texas are LEP as a result of this discrimination.²⁶⁷

In 1981, U.S. District Court Judge William Wayne Justice found the Texas bilingual education plan inadequate and that measures had not been taken to fully “remove the disabling vestiges of past *de jure* discrimination.”²⁶⁸ He ordered corrections to train teachers, identify LEP students and expand the program.²⁶⁹ He noted that many school districts simply ignored their obligation to deliver bilingual education:

Unfortunately, the monitoring conducted by the [Texas Education Agency (TEA)] throughout the state has revealed that these laudable guidelines are frequently ignored by local school districts. A few examples should suffice to demonstrate the wide gap between theory and practice in this field:

A TEA visit to Lockhart Independent School District in 1975 found that the bilingual program was conducted primarily in English.

A TEA visit to Aransas Pass Independent School District in 1977 found that no substantive courses within the bilingual program were being taught in Spanish.

²⁶⁵ See 42 U.S.C. § 1973aa-1a(a) (2006).

²⁶⁶ S. REP. NO. 102-315, at 4. The Senate Report also documented the history of educational discrimination against Asian-American citizens and American Indian and Alaska Native citizens. *Id.* at 4–6.

²⁶⁷ Dr. Jorge Chapa analysis of 2000 Census Public Use Microdata Sample File data, on file with authors.

²⁶⁸ *United States v. Texas*, 506 F. Supp. 405, 434 (E.D. Tex. 1981), *rev’d*, 680 F.2d 356 (5th Cir. 1982).

²⁶⁹ *Id.* at 439–40.

In 1977, the North Forest Independent School District's bilingual program offered no instruction in Spanish for language or reading.

In 1979, the TEA reported that there was no teaching of substantive content in Spanish in the Laredo Independent School District.

A 1978 TEA monitoring report found very little native language instruction in the Fort Worth Independent School District bilingual program.

[The State] stipulated to the existence of these and similar deficiencies in local bilingual programs in at least twenty-five additional school districts throughout the state.²⁷⁰

In short, many Latino voters age forty and over either attended segregated Mexican schools into the 1960s or attended inadequate educational programs into the 1980s, and bear the effects of this discrimination and educational neglect in the form of low literacy and limited-English proficiency.

The youngest cohort of voters, who have exited the public school system more recently, as well as children in public schools today, still face an inferior educational system for LEP students. According to the Department of Education, there are at least 570,022 LEP students in Texas's public schools.²⁷¹ On February 4, 2006, MALDEF and Multicultural Education, Training and Advocacy, Inc. (META) filed a Motion for Further Relief on behalf of Intervenors LULAC and the GI Forum, with the federal court overseeing the desegregation remedy in *United States v. Texas*.²⁷² The motion was denied on July 27, 2007.²⁷³

In the motion, MALDEF and META asserted that the State of Texas had failed to monitor, supervise and enforce the bilingual education program as required by state and federal law.²⁷⁴ The motion was supported by TEA data stating that LEP students in Texas are pushed out of school prior to graduation at rates of more than twice the rate of non-LEP students and are failing the state standardized test at rates in excess of 80% for some grade levels.²⁷⁵ For the class of 2004, 16.3% of LEP students dropped out

²⁷⁰ *Id.* at 422.

²⁷¹ U.S. DEP'T OF EDUC., OFFICE OF ENGLISH LANGUAGE ACQUISITION, LANGUAGE ENHANCEMENT AND ACADEMIC ACHIEVEMENT FOR LIMITED ENGLISH PROFICIENT STUDENTS (OELA), SURVEY OF THE STATES' LIMITED ENGLISH PROFICIENT STUDENTS AND AVAILABLE EDUCATIONAL PROGRAMS AND SERVICES 4, 19 (2002).

²⁷² See Motion for Further Relief, *United States v. Texas*, 6:71-CV-5281 (E.D. Tex. Feb. 9, 2006), available at http://www.maldef.org/pdf/USvTexas_Motion.pdf.

²⁷³ *United States v. Texas*, 6:71-CV-5281, 2007 WL 2177369, at *8-9, 18 (E.D. Tex. July 27, 2007).

²⁷⁴ Motion for Further Relief at 17, *United States v. Texas*, 6:71-CV-5281.

²⁷⁵ *Id.* at 9.

of school statewide, as compared with only 1.9% of white students and 3.9% of all students.²⁷⁶

Even taking into consideration the large number of LEP students who drop out of school by grade eleven, the failure rate among those remaining LEP students on the April administration of the 2004–2005 Texas Assessment of Knowledge and Skills (TAKS) exit exam was 81%.²⁷⁷ According to TEA data in 2004–2005, more than eight out of ten (84%) of Texas LEP students in grade seven failed to meet the state's standards on the TAKS test; more than eight out of ten (86%) of Texas LEP students in grade eight failed to meet the state's standards on the TAKS test; almost nine out of ten (87%) of Texas LEP students in grade nine failed to meet the state's standards on the TAKS test; and more than nine in ten (94%) of Texas LEP students in grade ten failed to meet the state's standards on the TAKS test.²⁷⁸

These English Language Learners (ELLs) have been denied the opportunity to learn English, resulting in a substantial impairment in their ability to be fully literate without receiving assistance in Spanish. They join hundreds of thousands of other LEP Texans who also suffer the lingering effects of educational discrimination, and who will be denied meaningful participation in the voting process without adequate language assistance.

D. HIGH ILLITERACY RATES AMONG LEP CITIZENS

Texas's long history of unequal education has also resulted in depressed literacy and graduation rates for many LEP Texans.

According to the 2000 Census, the following numbers of voting-age citizens in Texas do not have a high school diploma: nearly 1.2 million Latino voting-age citizens (approximately 40% of all Latino voting-age citizens in Texas); more than 43,000 Asian voting-age citizens (16.5% of all Asian voting-age citizens); and nearly 33,000 American Indian voting-age citizens (approximately 22% of all American Indian voting-age citizens).²⁷⁹

Access to higher education for Texas's minority residents has also been restricted by unequal opportunity. Just 9% of all Latino voting-age citizens in Texas have a four-year college degree. In sharp contrast, 86.5% of all

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ TEXAS EDUC. AGENCY, DIV. OF PERFORMANCE REPORTING, ACADEMIC EXCELLENCE INDICATOR SYSTEM: 2004–2005 STATE PERFORMANCE REPORT (2005), available at <http://www.tea.state.tx.us/perfreport/aeis/2005/state.pdf>.

²⁷⁹ See U.S. Census Bureau, 2000 Census Sampled Data Files, available at <http://advancedquery.census.gov> (on file with authors).

Anglo voting-age citizens have a high school diploma and over 27.5% have a four-year college degree.²⁸⁰ As late as 1993, the State of Texas settled a court challenge to its failure to provide equal higher educational opportunities to residents in South Texas by agreeing to improve University of Texas System schools in Brownsville, Edinburg, San Antonio and El Paso, as well as newly acquired Texas A&M University System branches in Corpus Christi, Laredo and Kingsville.²⁸¹

The failure of Texas to educate LEP students in the public schools has contributed to high illiteracy rates among minority voters in Texas. The illiteracy rate, defined as the percent having less than a fifth-grade education, for LEP Latino voting-age citizens is an extraordinarily high 19.46%. This percentage equates to more than fourteen times the national illiteracy rate.

Illiteracy rates are particularly high in the state's most populous counties and are the product of very high dropout rates. For example, in Bexar County (San Antonio), the illiteracy rate among Latino voting-age citizens is 15.22%, over eleven times the national average.²⁸² About 32.7% (145,000) of Bexar County Latino voting-age citizens have not completed high school, with less than 10% (43,685) having at least a four-year college degree.²⁸³ In Dallas County (Dallas), the illiteracy rate among LEP Latino voting-age citizens is 17.42%, nearly thirteen times the national average.²⁸⁴ About 45.3% (82,858) of Dallas County Latino voting-age citizens have not completed high school, with only 8.8% (16,180) having at least a four-year college degree.²⁸⁵ In Tarrant County (Fort Worth), the illiteracy rate among LEP Latino voting-age citizens is 16.33%, more than twelve times the national average.²⁸⁶ About 39.8% (42,231) of Tarrant County Latino voting-age citizens have not completed high school, with only 10.8% (11,507) having at least a four-year college degree.²⁸⁷ In Harris County (Houston), the illiteracy rate among LEP Latino voting-age citizens is

²⁸⁰ *Id.*

²⁸¹ See *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306 (Tex. 1993); see also Handbook of Texas Online, Mexican American Legal Defense and Education Fund, <http://www.tsha.utexas.edu/handbook/online/articles/MM/jom1.html> (last visited Dec. 29, 2007) (providing a description of the *Richards* settlement).

²⁸² See TUCKER & ESPINO, *supra* note 39, at app. C-8.

²⁸³ See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P148H, available at <http://factfinder.census.gov> (last visited Dec. 29, 2007).

²⁸⁴ See TUCKER & ESPINO, *supra* note 39, at app. C-8.

²⁸⁵ See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P148H, available at <http://factfinder.census.gov> (last visited Dec. 29, 2007).

²⁸⁶ See TUCKER & ESPINO, *supra* note 39, at app. C-8.

²⁸⁷ See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P148H, available at <http://factfinder.census.gov> (last visited Dec. 29, 2007).

14.97%, over eleven times the national average.²⁸⁸ About 42.5% (159,233) of Harris County Latino voting-age citizens have not completed high school, with only 9.2% (34,503) having at least a four-year college degree.²⁸⁹

Latino voting-age citizens are not the only ones who suffer from high illiteracy rates as a result of educational discrimination and neglect in Texas. In Maverick County, over 86% of LEP American Indian voting-age citizens are low-literate.²⁹⁰ Vietnamese LEP voting-age citizens in Harris County have an illiteracy rate nearly six times the national illiteracy rate.²⁹¹

In light of these statistics, the importance of providing translated voting materials and election information cannot be understated.

E. NON-COMPLIANCE WITH SECTIONS 203 AND 4(F)(4)

In 2005, MALDEF sent letters to 101 Texas counties covered by Section 203 requesting, under the Texas Open Records Act, copies of translated voting materials and information on language assistance in elections.²⁹² The letters called for voting-related materials or election information relevant to determining whether covered counties in Texas are complying with the language minority provisions. Requested materials included, but were not limited to, voter registration forms, official ballots, polling place notices related to voting locations, days and hours of voting and the availability of Spanish-speaking poll workers.²⁹³

²⁸⁸ See TUCKER & ESPINO, *supra* note 39, at app. C-8.

²⁸⁹ See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P148H, available at <http://factfinder.census.gov> (last visited Dec. 29, 2007).

²⁹⁰ See TUCKER & ESPINO, *supra* note 39, at app. C-22.

²⁹¹ *Id.* at app. C-24.

²⁹² See, e.g., Letter from Nina Perales, MALDEF Reg'l Counsel, to Dorairene Garza, Dist. & County Clerk, McMullen County (June 21, 2005) (on file with authors).

²⁹³ In its request, MALDEF asked for copies of translated voter registration forms; official ballots; applications to vote a ballot by mail; written instructions provided to voters who were sent a ballot by mail; HAVA identification requirements; provisional ballot instructions; election-related material mailed to voters; sample ballots; written voting instructions provided at the polls; notices related to election law provided at the polls; polling place notices informing voters of the availability of Spanish language assistance; polling place notices informing voters of the days and hours of voting; election-related information published in newspapers, radio and/or other media; and election-related information published on the internet. In addition, MALDEF requested information showing: the polling places at which the county posted notices informing voters of the availability of Spanish language assistance to voters; the names of all Spanish-speaking county employees who respond to oral or written requests for election-related information; public notices and advertisements used by the county to recruit Spanish-speaking election judges and clerks; the names of Spanish-speaking election judges and clerks in the county; and all training offered to individuals who provide Spanish language assistance to voters.

Of the 101 requests for translated voting materials, sixty-seven (66%) Texas counties responded to MALDEF's request. Of the sixty-seven counties that responded to the request for records, forty-seven (70%) failed to demonstrate that they provided voter registration forms, a ballot, a provisional ballot and written voting instructions in Spanish. Of the counties that could demonstrate provision of some basic language assistance to voters, only one could show that it complied fully with the requirements of Section 203.

In addition, a substantial amount of Spanish language voting materials provided by covered counties to MALDEF were characterized by incomplete and inaccurate translations, including misplaced gender identifiers and misspellings. For example, one county failed to translate on the ballot the political offices for which the election was being held. In another county, a notice directing voters to contact the county clerk for additional election information did not translate the term "county clerk."

The survey indicates widespread non-compliance with the requirements of Section 203. In light of the failure of most covered counties to provide even the most basic materials guaranteeing access to the ballot for Spanish-speaking voters, the provisions of Section 203 must be reauthorized.

F. DEPARTMENT OF JUSTICE SECTION 203 ENFORCEMENT ACTIONS IN TEXAS

The DOJ has become increasingly active in identifying violations of Section 4(f)(4) and 203 and in bringing enforcement actions to remedy those violations.

In 2005 and 2006, the DOJ filed Section 203 enforcement lawsuits against Hale County and Ector County.²⁹⁴ In Ector County, the County conceded that it had not fully complied with the language minority provisions of the VRA and agreed to a consent decree.²⁹⁵ This decree required the county to immediately implement a Spanish language program for minority voters and to use federal observers during elections to monitor compliance.²⁹⁶

²⁹⁴ See Department of Justice, *Litigation Brought by the Voting Section*, <http://www.usdoj.gov/crt/voting/litigation/caselist.htm> (last visited Dec. 29, 2007).

²⁹⁵ See Proposed Consent Decree, Judgment, and Order, *United States v. Ector County*, No. M005CV131 (W.D. Tex. Aug. 26, 2005), *available at* http://www.usdoj.gov/crt/voting/sec_203/documents/ector_cd.pdf.

²⁹⁶ *Id.* at 4–5, 10.

Opponents of Section 203 argue that naturalized American citizens must be able to speak English as a requirement of naturalization and that efforts to provide minority language voting information are unnecessary and expensive. These arguments fail to account for the fact that some immigrants, particularly the elderly, may naturalize with a level of English proficiency that is often insufficient to be able to understand and vote on a complex ballot. Ballot language can be confusing, even for native English speakers.

On February 27, 2006, the United States filed a complaint, alleging that Hale County violated Section 203 of the Voting Rights Act by failing to provide an adequate number of bilingual poll workers trained to assist Spanish-speaking voters on Election Day and failing to effectively publicize election information in Spanish.²⁹⁷ A month later, the parties entered into a consent decree agreement, which allows the DOJ to monitor future elections in Hale County and requires the County to increase the number of bilingual poll workers, employ a bilingual coordinator and establish a bilingual advisory group.²⁹⁸

On August 23, 2005, the United States filed a complaint alleging that Ector County violated Section 4(f)(4) of the Voting Rights Act.²⁹⁹ As with Hale County, the complaint claimed that the County failed to provide an adequate number of bilingual workers to serve the county's Spanish-speaking population and failed to effectively publicize information to the Spanish-speaking community.³⁰⁰ On the same day that the complaint was filed, the United States also filed a proposed consent decree agreement. The consent decree agreement, which was approved on August 26, 2005, requires the establishment of an effective Spanish language program and authorizes the use of federal observers to monitor the County's elections.³⁰¹

The DOJ also intervened in Harris County, which includes the city of Houston. According to the U.S. Census Bureau, in 2004, 1.8% of the county population was Vietnamese, and about half of these Vietnamese

²⁹⁷ See Complaint at 4, *United States v. Hale County*, No. 5-05CV0043-C (N.D. Tex. Feb. 27, 2006), available at http://www.usdoj.gov/crt/voting/sec_203/documents/hale_comp.pdf.

²⁹⁸ See Consent Decree (Modified), Judgment, and Order at 4–10, *United States v. Hale County*, No. 5:06-CV-043-C (N.D. Tex. Apr. 27, 2006), available at http://www.usdoj.gov/crt/voting/sec_203/documents/hale_cd.pdf.

²⁹⁹ See Complaint at 3, *United States v. Ector County*, No. M005CV131 (W.D. Tex. Aug. 23, 2005), available at http://www.usdoj.gov/crt/voting/sec_203/documents/ector_comp.pdf.

³⁰⁰ See *id.*

³⁰¹ See Proposed Consent Decree, Judgment, and Order at 4–5, 10, *United States v. Ector County*, No. M005CV131 (W.D. Tex. Aug. 26, 2005), available at http://www.usdoj.gov/crt/voting/sec_203/documents/ector_cd.pdf.

households are considered linguistically isolated.³⁰² In 2002, Harris County was required under Section 203 to provide ballots in both Spanish and Vietnamese.³⁰³ The County failed to arrange Vietnamese translations within the voting machines, and a plan to provide backup paper ballots was not implemented.³⁰⁴ The DOJ intervened, and the County signed a Memorandum of Agreement outlining the steps by which it would comply with Section 203.³⁰⁵ In the next election in 2004, Vietnamese turnout doubled, allowing the first Vietnamese candidate in history to be elected to the Texas Legislature, defeating the incumbent chair of the Appropriations Committee by sixteen votes out of over 40,000 cast.³⁰⁶ A community leader involved in bringing the Vietnamese translations to Harris County testified that while the Asian-American community is interested in working with the county to also provide Chinese language translations on a voluntary basis, the county is not “enthusiastic” about any accommodations not mandated by Section 203.³⁰⁷ If Section 203 were to expire, it is likely that some of the jurisdictions currently providing language accommodation would cease to do so.

The continuing need for Sections 4(f)(4) and 203 in Texas is clear. These provisions have a substantial impact in increasing language minority registration and turnout and in ensuring the meaningful participation of Texas’s language minority citizens in the electoral process.

VIII. CONCLUSION

The Voting Rights Act has undoubtedly had a profound impact on securing the rights of minority voters to effectively exercise the franchise in many Texas jurisdictions—jurisdictions with substantial histories of imposing barriers to minority voting power. The reauthorization of the temporary provisions of the VRA for twenty-five years is crucial to ensuring that minority voters’ voices will be heard in Texas and to guarding against the backsliding that would occur if the VRA’s enforcement provisions were weakened or abandoned.

³⁰² ASIAN AM. JUSTICE CTR., *A COMMUNITY OF CONTRASTS: ASIAN AMERICANS AND PACIFIC ISLANDERS IN THE UNITED STATES* 39–39, 44 (2005).

³⁰³ TUCKER & ESPINO, *supra* note 39, at app. C-8, C-24.

³⁰⁴ *Nat’l Comm’n on the Voting Rights Act, Sw. Regional Hearing*, 3–4 (Apr. 7, 2005) [hereinafter *Calvert Testimony*] (testimony of Rogene Gee Calvert), *available at* http://www.votingrightsact.org/hearings/pdfs/calvert_rogene.pdf.

³⁰⁵ *Id.* at 5–6.

³⁰⁶ Email from Karen Loper, Political Advisor to Rep. Hubert Vo., Texas House of Representatives, to authors (May 14, 2008) (on file with authors). For example, in District 149, Vietnamese voter turnout increased from 978 in 2002 to 1987 in 2004.

³⁰⁷ *Calvert Testimony, supra* note 304, at 7.