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# Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida

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## ARTICLES

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## I. PREFACE

This Article was conceived as a review of the Voting Rights Act of 1965's impact in Florida since the Act's last major re-enactment in 1982. In researching and producing the Article, I had two central purposes. First, I sought to determine to what extent certain Act provisions, set to expire in 2007, were still needed in Florida. Second, in the event those expiring provisions remained necessary, I sought to create a record evincing both their necessity and enduring constitutionality in light of that necessity.

After the Article was completed and undergoing publication editing, Congress enacted the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.<sup>1</sup> The statute extends the Voting Rights Act's language minority provisions and Section 5 preclearance provisions for another twenty-five years.<sup>2</sup> The debate surrounding these provisions is far from over, however. The extension's constitutionality is hotly contested,<sup>3</sup> and litigation challenging the extended provisions has already been filed.<sup>4</sup>

## II. INTRODUCTION TO THE VOTING RIGHTS ACT

The Voting Rights Act of 1965<sup>5</sup> has been described as "the most effective civil rights statute enacted by Congress."<sup>6</sup> The portions of the Act which have had the most impact in Florida are Sections 2, 5, and 203. Two of these provisions – Sections 5 and 203 – are scheduled to expire in 2007 unless reenacted by Congress.<sup>7</sup> This Article reviews and

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1. Pub. L. No. 109-246, 120 Stat. 577 (2006). The unpublished manuscript of this article is cited by the House Report accompanying the legislation. H. REP. NO. 109-478, at 52, n.130 (May 22, 2006).

2. Pub. L. No. 109-246, 120 Stat. 577 (2006). The language minority and Section 5 preclearance provisions are discussed in greater detail *infra* at Part II.

3. See, e.g., Bob Evans, *Associated Press, Two Georgia Lawmakers Urging Lawsuits Against Voting Rights Act*, COLUMBUS LEDGER-ENQUIRER, Sept. 11, 2006, <http://www.ledger-enquirer.com/mld/ledgerenquirer/15493320.htm>; Laughlin McDonald, *Why the Renewed Voting Rights Act Will Pass Constitutional Muster – Despite Predictions that the Roberts Court May Strike It Down*, June 9, 2006, available at [http://writ.news.findlaw.com/commentary/20060609\\_mcdonald.html](http://writ.news.findlaw.com/commentary/20060609_mcdonald.html).

4. Complaint, *Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales*, Civ. No. 1:06-CV-01384-PLF (D.D.C. August 4, 2006).

5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973-1973bb-1 (2000)).

6. U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page: The Statutes We Enforce, <http://www.usdoj.gov/crt/voting/overview.htm> (last visited Feb. 27, 2006). See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson & Bernard Grofman, eds., Princeton University Press 1994).

7. As alluded to in the Preface, this article was written prior to the 2006 congressional extension of portions of the Voting Rights Act. Section 5's effective term currently extends to 2032. Pub. L. No. 109-246, §§ 3(d)(2), (e)(1), 4, 120 Stat. 580 (July 27, 2006) (Congress entitled

analyzes Florida's history under the Voting Rights Act since the Act's last major re-enactment in 1982 and concludes that the special protections afforded Florida's racial and language minorities under Sections 5 and 203 are needed now more than ever.

Section 2 of the Voting Rights Act is a permanent provision that applies to all jurisdictions.<sup>8</sup> As presently enacted, it prohibits all voting practices and procedures that are shown to result in a denial or abridgment of the right to vote on the basis of race, color, or membership in a language minority group.<sup>9</sup> To prevail under Section 2, a plaintiff must show that the challenged practice results in racial or language minorities having "an inequality in the opportunities . . . to elect their preferred representatives."<sup>10</sup> Either the United States Attorney or affected groups and individuals may enforce this section by filing a lawsuit in the United States District Court where the claim arises.<sup>11</sup>

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the 2006 Voting Rights Act Amendments "the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006"). As with Section 5, the 2006 Voting Rights Act Amendments have extended Section 203's effective term until 2032. Pub. L. No. 109-246, §§ 7, 8, 120 Stat. 581 (July 27, 2006). Section 6 (42 U.S.C. § 1973d (2000)) is another Voting Rights Act provision that was scheduled to expire; however, Congress approved the repeal of Section 6 on July 27, 2006. Pub. L. No. 109-246, § 3(c), 119 Stat. 580. That section provided for the appointment of federal examiners for Section 5 covered jurisdictions upon certification by the Attorney General. These federal observers monitored procedures in polling places and at sites where ballots were counted and reported to the Department of Justice. Because the Attorney General never invoked Section 6 in Florida, that section will not be discussed in this Article.

8. 42 U.S.C. § 1973 (2000). "Section 2 is permanent and has no expiration date as do certain other provisions of the Voting Rights Act." U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page: Section 2 of the Voting Rights Act, [http://www.usdoj.gov/crt/voting/sec\\_2/about\\_sec2.html](http://www.usdoj.gov/crt/voting/sec_2/about_sec2.html) (last visited Sept. 17, 2006).

9. Congress amended Section 2 in 1982, thereby providing an "effects" test to establish a violation of the Act, rather than requiring that a plaintiff establish the relevant jurisdiction enacted the voting change for a discriminatory purpose. Voting Rights Act of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982); S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 ("HOWEVER, THE COMMITTEE HAS EXAMINED THE LEGISLATIVE HISTORY OF THE 1965 ENACTMENT, RELEVANT LEGISLATIVE HISTORY FROM THE 1970 EXTENSION OF THE ACT, AND THE GENERAL UNDERSTANDING IN 1965 OF WHAT WAS REQUIRED TO ESTABLISH A FIFTEENTH AMENDMENT VIOLATION. WE FIND NO PERSUASIVE EVIDENCE TO SUPPORT THE ARGUMENT OUTLINED ABOVE THAT CONGRESS MADE PROOF OF DISCRIMINATORY PURPOSE AN ESSENTIAL REQUIREMENT OF SECTION 2 WHEN IT WAS FIRST ENACTED. DURING THE HEARINGS ON THE VOTING RIGHTS ACT OF 1965, ATTORNEY GENERAL KATZENBACH TESTIFIED THAT SECTION 2 WOULD BAN 'ANY KIND OF PRACTICE . . . IF ITS PURPOSE OR EFFECT WAS TO DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR.'") (emphasis and capitalization supplied). *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986) (explaining the congressional intent underlying Section 2's 1982 amendment).

10. *Thornburg*, 478 U.S. at 47; 42 U.S.C. § 1973(a) (Section 2, on race, color, or language minority status).

11. 42 U.S.C. § 1973a (2005).

Section 5 of the Voting Rights Act<sup>12</sup> is presently scheduled to expire in 2007.<sup>13</sup> This section is often referred to as the Voting Rights Act's "preclearance section."<sup>14</sup> Section 5 applies to a limited number of jurisdictions, referred to as "covered jurisdictions."<sup>15</sup> Covered jurisdictions are prohibited from changing any election-related procedures until those changes have been precleared.<sup>16</sup> Preclearance involves a determination that the changes have neither the intent nor the effect of diminishing minority voting strength.<sup>17</sup> Covered jurisdictions may seek preclearance by filing a submission with the Department of Justice or by filing a declaratory judgment action in the United States District Court for the District of Columbia. In either forum, the covered jurisdiction has the burden of proving that the proposed changes have neither a discriminatory purpose nor a discriminatory effect.<sup>18</sup> As a practical matter, covered jurisdictions "almost always . . . seek preclearance" through the Justice Department as opposed to filing a declaratory judgment action.<sup>19</sup> The Attorney General is required to review the submissions and take action within sixty days.<sup>20</sup> The Attorney General preclears the vast majority of proposed changes.<sup>21</sup> If the Department of Justice concludes the covered jurisdiction has not satisfied its burden of demonstrating the proposed change is non-discriminatory, the Attorney General interposes

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12. 42 U.S.C. § 1973c (2002).

13. 42 U.S.C. § 1973b(a)(8) (2000). As mentioned above, Section 5's effective term currently extends to 2032. Pub. L. No. 109-246, §§ 3(d)(2), (e)(1), 4, 120 Stat. 580 (July 27, 2006).

14. Carol R. Godforth, "What is She?" *How Race Matters and Why it Shouldn't*, 46 DEPAUL L. REV. 1, 55 (1996) ("Section 5 is often referred to as the 'preclearance section,' and it requires subject jurisdictions to obtain approval for any changes in congressional districts from the United States Attorney General or the United States District Court for the District of Columbia.").

15. See discussion *infra* Part IV.A.

16. 42 U.S.C. § 1973c (2002).

17. *Id.*

18. *Branch v. Smith*, 538 U.S. 254, 262 (2003) ("Under § 5, a jurisdiction seeking administrative preclearance must prove that the change is nondiscriminatory in purpose and effect. It bears the burden of providing the Attorney General information sufficient to make that proof . . . and failure to do so will cause the Attorney General to object.") (internal citations omitted).

19. MARK A. POSNER, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO?, at 6 (Jan. 2006), available at <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf> (noting "[s]ince 1965, the Department has reviewed over 435,000 voting changes while only sixty-eight declaratory judgment actions have been filed").

20. 42 U.S.C. § 1973c (2002).

21. U.S. Dep't of Justice, Civil Rights Div., About Section 5 of the Voting Rights Act, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Feb. 27, 2006) ("Most voting changes submitted to the Attorney General are determined to have met the Section 5 standard; since Section 5 was enacted, the Attorney General has objected to about one percent of the voting changes that have been submitted.").

an objection.<sup>22</sup> The covered jurisdiction then has three options, it may: (1) forego or amend the proposed change; (2) request that the Department of Justice reconsider its objection; or, (3) file a declaratory judgment action in the United States District Court for the District of Columbia.<sup>23</sup> There is no judicial review of a Department of Justice decision *declining* to object to a proposed change, though such a decision is not a safe harbor for potential Section 2 claims or any subsequent action regarding the proposed procedure.<sup>24</sup>

Section 203 of the Voting Rights Act<sup>25</sup> protects language minorities. Akin to Section 5's provisions, the language minority provisions apply only to those jurisdictions designated as "covered" for Section 203 purposes.<sup>26</sup> Section 203 designations are made following each decennial census.<sup>27</sup> The census data are used in a formula to determine if more than five percent of the covered jurisdiction's voting age population belongs to a single language minority community and has limited-English proficiency ("LEP").<sup>28</sup> Alternatively, the data are used to determine if more than 10,000 of the covered jurisdiction's voting age citizens belong to a single language minority community, have LEP, and that the group's illiteracy rate is higher than the national illiteracy rate.<sup>29</sup> If the data confirm that either of these two situations exists in a given jurisdiction, Section 203 requires that the jurisdiction provide all election materials and information in both English and the minority language.<sup>30</sup> If Congress does not renew Section 203, it will expire in 2007.<sup>31</sup>

In some jurisdictions, Section 4(f)(4) of the Voting Rights Act also protects language minorities against voting discrimination.<sup>32</sup> The 1975 amendments to Sections 4 and 5 provided the formula used to designate these jurisdictions.<sup>33</sup> Jurisdictions are covered for Section 4(f)(4) purposes if: (1) over five percent of the jurisdiction's voting age citizens were members of a single language minority group on November 1,

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22. 28 C.F.R. § 51.52(c) (2006).

23. 28 C.F.R. § 51.52 (2006).

24. 28 C.F.R. § 51.49 (2006).

25. 42 U.S.C. § 1973aa-1a (2002).

26. 42 U.S.C. § 1973aa-1a(b)(1) (2002).

27. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2002).

28. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I) (2002).

29. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II) (2002).

30. 42 U.S.C. § 1973aa-1a(b)(1) (2002).

31. 42 U.S.C. § 1973aa-1a(b)(1) (2000). As previously mentioned, the 2006 Voting Rights Act Amendments have extended Section 203's effective term until 2032. Pub. L. No. 109-246, §§ 7, 8, 120 Stat. 581 (July 27, 2006).

32. 42 U.S.C. § 1973b(f)(4) (2000).

33. Pub. L. No. 94-73, Title I, § 101, Title II, §§ 201-203, 206, 89 Stat. 400-402 (Aug. 6, 1975); S. REP. NO. 94-295, at 44-45 (1975).

1972; (2) the United States Attorney General finds that election materials were provided exclusively in English on November 1, 1972; and, (3) the Director of the Census determines that fewer than fifty percent of the jurisdiction's voting age citizens were registered to vote on November 1, 1972, or that fewer than fifty percent voted in the November 1972 presidential election.<sup>34</sup> Although the language minority provisions appear in different sections of the Act – Sections 203 and 4(f)(4) – and in some instances cover different geographic areas, their requirements for language assistance are identical.<sup>35</sup>

### III. FLORIDA'S EXPERIENCES UNDER THE VOTING RIGHTS ACT

One cannot overemphasize the Voting Rights Act's essential role in protecting the voting rights of Florida's racial and language minorities. Since 1982, the Act's protections have been instrumental in guaranteeing Florida's minority voters access to the ballot box.<sup>36</sup> Reviewing Florida's history under the Voting Rights Act post-1982 reveals that the special protections Sections 5 and 203 afford racial and language minorities are still necessary today.<sup>37</sup> The following report (Sections IV-VI) begins with Section IV, which provides an overview of Florida's unique history as a partially-covered Section 5 jurisdiction, its experiences under that coverage, and the indispensable role Section 5 plays in ensuring electoral fairness throughout the state. Next, Section V reviews the protections afforded language minorities under Section 203 and their critical importance for Florida's increasingly diverse population. Finally, the report concludes with Section VI, which presents a discussion of Florida's voting rights landscape outside the protections of Sections 5 and 203. Reviewing each of these sections provides a powerful testament to Florida's need for congressional renewal of the Voting Rights Act's special coverage provisions.

### IV. FLORIDA AND SECTION 5 OF THE VOTING RIGHTS ACT

Florida's experiences under Section 5's special provisions are unique when compared with those of neighboring southern states.<sup>38</sup> As explored below, it is largely because of these differences that Florida's continued coverage under Section 5 is so important.

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34. 42 U.S.C. § 1973b(b) (2005).

35. 28 C.F.R. § 55.8 (2006).

36. See discussion *infra* Parts IV-VI.

37. See discussion *infra* Parts IV-V.

38. See Parts V.A and V.B, *infra*, discussing Florida's Spanish and Creole speaking populations.

### A. History of Florida's Designation Under Section 5

Congress enacted Section 5 as part of the original Voting Rights Act of 1965, but in that early iteration, Section 5 only applied to jurisdictions identified by a two-part formula set forth in Section 4 of the Act.<sup>39</sup> Specifically, to qualify for Section 5 coverage, the Section 4 formula required: (1) that the state or a political subdivision of the state maintained on November 1, 1964, a "test or device" restricting the opportunity to register and vote;<sup>40</sup> and, (2) that the Director of the Census found less than fifty percent of persons of voting age were registered to vote on November 1, 1964, or that less than fifty percent of persons of voting age voted in the November 1964 presidential election.<sup>41</sup>

In 1965, this formula resulted in the designation of six states as "covered jurisdictions" for Section 5 purposes: Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.<sup>42</sup> In addition, political subdivisions in four additional states – Arizona, Hawaii, Idaho, and North Carolina – were covered.<sup>43</sup> Under the 1965 Act, as originally enacted, neither Florida nor any of its political subdivisions were Section 5 covered jurisdictions.<sup>44</sup>

In 1975, when Section 5 was scheduled to expire, Congress expanded both Section 5's provisions and scope.<sup>45</sup> In doing so, Congress intended to address voting discrimination against members of "lan-

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39. Pub. L. No. 89-110, § 4, 79 Stat. 437 (1965).

40. *Id.*

41. *Id.*

42. Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965 (Public Law 89-110), 30 Fed. Reg. 9897 (Aug. 7, 1965).

43. U.S. Dep't of Justice, Civil Rights Div., About Section 5 of the Voting Rights Act, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Feb. 27, 2006) ("Application of this formula resulted in the following states becoming, in their entirety, 'covered jurisdictions': Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia[.] In addition, certain political subdivisions (usually counties) in four other states[.] . . . Arizona, Hawaii, Idaho, and North Carolina were covered.").

44. *See* Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965 (Public Law 89-110), 30 Fed. Reg. 9897 (Aug. 7, 1965) (note Florida's absence). Congress originally enacted Section 5 in 1965 as a temporary measure that would only last five years. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). In 1970, Congress renewed the provisions for another five years. Pub. L. No. 91-285, §§ 2, 5, 84 Stat. 314, 315 (June 22, 1970). "It also adopted an additional coverage formula, identical to the original formula except that it referenced November 1968 dates to determine maintenance of a test or device, and levels of voter registration and electoral participation. This additional formula resulted in the partial coverage of ten states." U.S. Dep't of Justice, Civil Rights Div., About Section 5 of the Voting Rights Act, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Feb. 27, 2006). Again, Florida was not among them.

45. U.S. Dep't of Justice, Civil Rights Div., About Section 5 of the Voting Rights Act, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Feb. 27, 2006).



guage minority groups.”<sup>46</sup> For example, Congress broadened the definition of a “test or device” sufficient to yield Section 5 coverage, to include the practice of providing election information, including ballots, exclusively in English when members of a single language minority constituted more than five percent of the relevant state or political subdivision’s voting age citizens.<sup>47</sup> This broadened definition resulted in Alaska, Arizona, and Texas’ coverage under Section 5.<sup>48</sup> Additionally, parts of California, Florida, Michigan, New York, North Carolina, and South Dakota fell within Section 5’s expanded ambit.<sup>49</sup> The accompanying Senate Report described Section 5’s expansion as an essential step to remedy low voter participation among language minorities.<sup>50</sup> Thus, Section 5’s coverage expanded to include areas “where (i) there has been evidenced a generally low voting turnout or registration rate and (ii) significant concentrations of minorities with native languages other than English reside.”<sup>51</sup> The Senate characterized the “newly covered areas” as those “where severe voting discrimination [against language minorities] was documented.”<sup>52</sup>

The Attorney General designated five of Florida’s sixty-seven counties as Section 5 covered jurisdictions: Collier, Hardee, Hendry, Hillsborough and Monroe counties (“the preclearance counties”).<sup>53</sup> As a result, Florida must now submit all changes affecting voting in those counties, as well as statewide changes that apply to those counties, to the Department of Justice for preclearance.<sup>54</sup> These five counties received Section 5 designations based on documentation that less than fifty percent of their voting age population was registered to vote or voted in the 1972 presidential election, and that the counties used some form of English literacy test in areas where more than five percent of the population was a language minority.<sup>55</sup> These preclearance requirements were

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46. Congressional expansion of the Voting Rights Act in 1975 also enlarged protections for language minority groups outside of Section 5 covered areas. See discussion *infra* Part V.

47. As before, Congress updated the formula to reference the presence of tests or devices and levels of voter registration and participation as of November 1972. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

48. U.S. Dep’t of Justice, Civil Rights Div., About Section 5 of the Voting Rights Act, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Feb. 27, 2006).

49. *Id.*

50. S. REP. NO. 94-295, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 775.

51. *Id.*

52. *Id.*

53. Voting Rights Act Amendments of 1975, 40 Fed. Reg. 43,746 (Sept. 23, 1975) (designating Hardee, Hillsborough, and Monroe counties); Voting Rights Act Amendments of 1975, 41 Fed. Reg. 34,329 (Aug. 13, 1976) (designating Collier and Hendry counties).

54. See 42 U.S.C. § 1973c (2002) (requiring that covered jurisdictions either seek preclearance from the Attorney General or file a declaratory judgment action in the United States District Court for the District of Columbia).

55. Voting Rights Act Amendments of 1975, 41 Fed. Reg. 34,329 (Aug. 13, 1976) (“For

implemented against a well-documented backdrop of racial discrimination, voter intimidation, and low rates of racial minority voter registration in Florida.<sup>56</sup>

Congress extended Section 5 again in 1982 for a period of twenty-five years, but chose to not alter or update the Section 4 coverage formula.<sup>57</sup> Congress did, however, modify the procedure a covered jurisdiction must follow when seeking declaratory relief to terminate its Section 5 coverage.<sup>58</sup> As the pertinent Senate Report suggests, Congress believed that numerous - perhaps all - jurisdictions subject to Section 5 would, within the twenty-five year period, be eligible for and receive coverage termination. The Senate Report optimistically stated, “[i]f there are any jurisdictions left under the preclearance requirement at the end of this period, this preclearance obligation would terminate unless the Congress amended the act.”<sup>59</sup> Since 1982, however, Florida and

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purposes of this determination test or device is defined as ‘any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than 5 percentum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.’”) (citing 42 U.S.C. 1973b(f)(3)).

56. In 1961, the United States Commission on Civil Rights documented extreme differentials in voter registration between Florida’s white and black populations. Significantly, the rate of black registration was lowest in those Florida counties with the highest percentage of blacks.

In Florida whites comprise 84.8 percent of the population 21 years old or over; nonwhites 15.2 percent. Whites account, however, for 90.9 percent of the total number registered to vote and nonwhites for 9.1 percent. In two Florida counties no Negroes are registered to vote although they represent 15.2 percent and 11.9 percent respectively of the population. In four counties less than 10 percent of the voting age Negroes are registered. The Negro voting age population ranges between 24 percent and 51.1 percent of the total voting age population in these counties. . . . In seven counties from 10 to 24 percent of the voting age Negroes are registered. . . . [T]he median figure [of black voting age population in those counties] is 17.4 percent. In 27 counties between 25 and 49 percent of the voting age Negroes are registered. . . . [T]he median figure [of black voting age population in those counties] is 16.5 percent. In 27 counties 50 percent or more of the voting age Negroes are registered. . . . [T]he median figure [of black voting age population in those counties] is 16 percent.

U.S. COMM’N ON CIVIL RIGHTS, VOTING: 1961 U.S. COMM’N ON CIVIL RIGHTS REPORT, at 106 (1961), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf> (last visited Feb. 24, 2006) (footnote omitted; internal paragraph divisions omitted). The Report also documents Florida voter intimidation in the form of cross burning and fire bombing, along with threats urging registered black voters to remove their names from the voter registration lists. *Id.* at 28-29. See also ALEJANDRO PORTES & ALEX STEPICK, CITY ON THE EDGE 78 (University of California Press 1993) (citing BRUCE PORTER & MARVIN DUNN, MIAMI RIOT OF 1980: CROSSING THE BOUNDS 10 (Lexington Books 1984)) (recounting Klan march incident with cross burning and a dummy hanging by a noose bearing a red lettered sign “this nigger voted,” designed to stop black participation in a primary election).

57. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131-33 (1982).

58. *Id.*

59. S. REP. NO. 97-417, at 75 (1982), reprinted in 1982 U.S.C.C.A.N 177, 254.

other covered jurisdictions' experiences under Section 5 have revealed that the Senate's optimism was misplaced.<sup>60</sup>

### B. *Florida's History Under Section 5*

Florida's experiences have demonstrated Section 5's continued importance in ensuring equal ballot access for the state's growing minority population. In Florida, the Department of Justice's Section 5 supervision is limited to reviewing voting changes affecting the five aforementioned preclearance counties.<sup>61</sup> As a practical matter, however, this supervision involves not only reviewing voting changes that are restricted to one or more of those five counties, but also reviewing all statewide changes, such as altering voter registration requirements, maintenance of eligible voter lists, state reapportionment plans, and other significant state legislation that affects voting.<sup>62</sup> This is the case because such statewide changes will inevitably affect the five preclearance counties.

During the period of 1982-2006, the Department of Justice has objected to five Florida voting changes.<sup>63</sup> Only one of those five objections applied to a change enacted by one of the five preclearance counties, and the Department of Justice later withdrew that objection.<sup>64</sup> The

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60. Since 1982, only a handful of Section 5 designated jurisdictions have successfully "bailed-out" of Section 5 coverage. Those jurisdictions consist solely of eleven Virginia political subdivisions. U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page: Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (see n.1) (last visited Feb. 27, 2006) ("Eleven political subdivisions in Virginia (Augusta, Frederick, Greene, Pulaski, Roanoke, Rockingham, Shenandoah, and Warren Counties and the Cities of Fairfax, Harrisonburg, and Winchester) have 'bailed out' from coverage pursuant to Section 4 of the Voting Rights Act. The United States consented to the declaratory judgment in each of those cases.").

61. U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page: Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm#counties](http://www.usdoj.gov/crt/voting/sec_5/covered.htm#counties) (last visited September 17, 2006).

62. See discussion *infra* Parts IV.B.1-IV.B.3.

63. See *infra* notes 64-65.

64. In 1984, the Department of Justice ("DOJ") objected to certain provisions in a home rule charter enacted by Hillsborough County. DOJ based its objection on the understanding that substantial local governmental powers had been transferred from the Hillsborough legislative delegation, which contained minority representation, to the county commission, which did not contain minority representation, resulting in retrogression of minority voting strength. Letter from Wm. Bradford Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Sara M. Potopulos, Assistant Hillsborough County Att'y (Aug. 20, 1984) (on file with author). Hillsborough County requested that DOJ reconsider the objection, and, following DOJ's review of additional information, DOJ concluded that in fact "the charter does not in any way enhance the powers of the commission or diminish the powers of the legislative delegation." DOJ then withdrew its objection to the charter. Letter from Wm. Bradford Reynolds, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to Joe Horn Mount, Hillsborough County Att'y, at 1 (Jan. 4, 1985) (on file with author).

Department of Justice directed the remaining four objections at state-wide reapportionment plans and legislation affecting the administration of elections.<sup>65</sup> The Department of Justice objected to each of the state-wide reapportionment plans Florida has submitted in response to the two most recent decennial censuses.<sup>66</sup> The significance of these objections is that the reapportionment plans subject to objection applied to the entire state, even though the Department of Justice's Florida preclearance review is limited to examining how voting law changes affect minorities in the five preclearance counties.<sup>67</sup> Preclearance review is important in Florida because, while technically limited in scope, the Department of Justice's Florida preclearance review functionally allows the Department to review voting law changes that impact the entire state.

### 1. THE REAPPORTIONMENT OBJECTIONS

Florida's 1992 and 2002 reapportionment efforts were procedurally complex and fraught with allegations of discrimination and partisan gerrymandering, intense disagreement, and several lawsuits.<sup>68</sup> In both instances, Section 5 was a crucial element in guaranteeing minority voting rights in Florida's statewide reapportionment processes.

When the Florida Legislature convened in 1992, one of the members of the Florida House of Representatives, Miguel DeGrandy, along with other registered voters, filed a complaint in the United States District Court for the Northern District of Florida against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, and other state officials challenging Florida's failure to reapportion its congressional and state legislative districts and claiming those districts, as then comprised, violated both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965.<sup>69</sup> The plaintiffs asked the "court to assert jurisdiction in

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65. "Changes affecting voting" subject to Section 5 review generally fall into four categories: (1) changes in the "manner of voting"; (2) changes in "candidacy requirements and qualifications"; (3) "changes in the composition of the electorate that may vote for candidates for a given office"; and (4) changes "affecting the creation or abolition of an elective office." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 492, 502 (1992).

66. Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 2 (June 16, 1992) (on file with author); Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to John M. McKay, President of the Fla. Senate and Tom Feeney, Speaker of the Fla. House of Representatives (July 1, 2002) (on file with author).

67. See U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page: Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm#counties](http://www.usdoj.gov/crt/voting/sec_5/covered.htm#counties) (last visited September 17, 2006) (noting the DOJ's Florida preclearance review is limited to five counties).

68. See remainder of Part IV.B.1, *infra*.

69. *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1080 (N.D. Fla. 1992) (three-judge district court).

order to [lawfully] redistrict and reapportion the state."<sup>70</sup>

Despite DeGrandy's lawsuit, the Florida Legislature ended its 1992 regular session without adopting either a congressional or a state reapportionment plan.<sup>71</sup> Thereafter, the "three-judge [*DeGrandy*] court convened[,] . . . denied all motions to dismiss and established an expedited scheduling order to adopt congressional and state legislative plans by May 29, 1992."<sup>72</sup> While the District Court did not expressly prevent Florida from enacting its own plans, the Court expressed great concern that "the state legislature would be unable to pass a congressional redistricting plan and have the Justice Department preclear that plan in time for the scheduled candidate qualification date . . . [and as a result] minority voters would not be able to participate meaningfully in the political process and adequately decide on a candidate of their choice."<sup>73</sup>

The Governor of Florida called a special session of the Florida Legislature in April 1992 to develop redistricting plans.<sup>74</sup> The legislature was unable to reach an agreement regarding a congressional redistricting plan.<sup>75</sup> It did, however, adopt Senate Joint Resolution 2-G, thereby reapportioning state legislative districts.<sup>76</sup> The Florida Attorney General submitted this reapportionment plan to the Department of Justice for preclearance on April 17, 1992.<sup>77</sup> In response, the District Court bifurcated the congressional and state reapportionment plans and later stayed its consideration of the state redistricting process.<sup>78</sup> From this point for-

70. *Id.* Miguel DeGrandy's suit was not the only challenge filed in 1992 regarding Florida's discriminatory failure to redistrict. The Florida State Conference of NAACP Branches and numerous African-American voters filed a similar suit which the Court eventually consolidated with the *DeGrandy* matter. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. These proceedings were undertaken pursuant to Article 3, Section 16(a) of the Florida Constitution, which the *DeGrandy* Court stated stood for the following proposition:

If the legislature should fail at its regular session to apportion themselves into the legislative districts as required by Article 3, Section 16, the governor is required to reconvene the legislature within thirty days in a special apportionment session. . . .

If the legislature adopts a reapportionment plan, the constitution requires the attorney general to petition the Florida Supreme Court for a declaratory judgment determining the validity of the apportionment. . . . If the Supreme Court determines that the legislative apportionment is valid, the plan must be precleared by the Department of Justice before it may be considered validly enacted.

*DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1554-55 n.1 (N.D. Fla. 1992) (three-judge district court) (internal citations omitted).

77. *Id.* at 1555.

78. The District Court stayed its proceedings with respect to the state legislative districts following the Florida Supreme Court's initial determination that the apportionment was valid pursuant to Art. 3, § 16(a) of the Florida Constitution. *DeGrandy*, 794 F. Supp. at 1081.

ward, litigation concerning the congressional districts and litigation concerning the state districts proceeded on separate tracks. The District Court determined in fairly short order that Florida's congressional redistricting plan diluted minority voting strength and violated Section 2 of the Voting Rights Act.<sup>79</sup> In contrast, the fate of the state legislative redistricting plan remained undecided and the path towards an eventual resolution proved tortuous.

After reviewing the state reapportionment plan, the Department of Justice objected to the provisions addressing the Florida Senate.<sup>80</sup> The Department observed that

[w]ith regard to the Hillsborough County area, the state has chosen to draw its senatorial districts such that there are no districts in which minority persons constitute a majority of the voting age population. To accomplish this result, the state chose to divide the politically cohesive minority populations in the Tampa and St. Petersburg areas.<sup>81</sup>

In its letter, the Department of Justice noted the Florida redistricting plan presented additional possible violations that lay beyond the scope of its Section 5 preclearance jurisdiction. The letter stated that "allegations have been raised regarding dilution of minority voting strength in an effort to protect Anglo incumbents in non-covered jurisdictions," but because these "legislative choices did not directly impact upon the five covered counties, they [could not] be the basis of" a Section 5 objection.<sup>82</sup>

After the Department of Justice interposed its objection to the Florida Senate reapportionment plan for Hillsborough County, the Florida Supreme Court, acting pursuant to the Florida Constitution, ordered an expedited schedule to address the Department's objection.<sup>83</sup> The Court "encouraged the legislature to adopt a proper reapportionment plan," taking the Section 5 objection into consideration.<sup>84</sup> The Florida Supreme Court also stated that "[i]n the event the Legislature . . . fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse has occurred, and this Court will promptly undertake to make such reapportionment."<sup>85</sup> Rather than address the Department of Justice's objection, the Florida Legislature refused to convene for reap-

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79. *Id.* at 1090.

80. *DeGrandy*, 815 F. Supp. at 1556.

81. Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 2 (June 16, 1992) (on file with author).

82. *Id.* at 4.

83. *DeGrandy*, 815 F. Supp. at 1556.

84. *Id.*

85. *Id.*

portionment and the Governor did not call a special session.<sup>86</sup> The Florida Supreme Court then declared, “we believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the Legislature has declared that it is not going to do so.”<sup>87</sup> The Court considered proposals submitted by interested parties and on June 25, 1992, adopted a Florida Senate redistricting plan that the Court believed cured the Department of Justice’s Section 5 objection.<sup>88</sup>

The parties then returned to the District Court to resolve the remaining state reapportionment issues, and the Department of Justice filed its own lawsuit against Florida alleging that its state legislative reapportionment plans diluted minority voting strength in violation of Section 2 of the Voting Rights Act.<sup>89</sup> The District Court consolidated the Department’s lawsuit with the pending action and “imposed the Florida Supreme Court plan as its own plan for section 5 purposes.”<sup>90</sup> The District Court proceeded to consider the Section 2 claims and determined that Florida’s state reapportionment plan diluted minority voting strength regarding representation in both houses of the Florida Legislature in violation of Section 2.<sup>91</sup> Eventually, the United States Supreme Court determined that plaintiffs were not entitled to relief under Section 2, but the Court affirmed the Florida Supreme Court’s Section 5 adjustments.<sup>92</sup>

Florida’s 1992 voting rights legal battle ultimately resulted in a Tampa Bay/Hillsborough County majority-minority Florida Senate district.<sup>93</sup> If the Section 5 review process had not been available in 1992,

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86. *Id.*

87. *In re* Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So. 2d 543, 545 (Fla. 1992).

88. *Id.* at 547.

89. *DeGrandy*, 815 F. Supp. at 1557-58 n.6 (citing *United States v. State of Florida*, TCA 92-40220-WS (part of the consolidated case)).

90. *Id.* at 1558.

91. *Id.* at 1575-81.

92. *Johnson v. DeGrandy*, 512 U.S. 997, 1022-24 (1994). Remarkably, this litigation was not the final word on the Florida Senate redistricting plan. After the Supreme Court’s decision in *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (“[W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.”), cast doubt on whether “racially gerrymandered” districts were consistent with the Equal Protection Clause, a group of plaintiffs challenged the Tampa Bay area state senate district drawn by the Florida Supreme Court. This claim was ultimately settled without any determination as to whether the district, as drawn, violated the equal protection clause. The settlement provided for some reduction in the minority population in the district and for making the district somewhat more compact. *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 571-73 (1997).

93. *In re* Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So. 2d 543, 546-47 (Fla. 1992) (“The Humphrey-Reaves plan gives minority voters in the Hillsborough County area the greatest opportunity to elect a senator of their choice. The

there would have been no Florida Senate district in the “area in which the total of black and Hispanic persons constituted more than 40.1% of the voting-age population.”<sup>94</sup> Moreover, as the Department of Justice noted, the legislative record demonstrated that the Florida Legislature undertook its redistricting efforts to protect non-minority incumbents.<sup>95</sup>

In 1992, Section 5 served as a crucial check on a Florida redistricting process that favored partisan and incumbent interests to the detriment of minority voting strength.<sup>96</sup> In addition, the 1992 Section 5 review of Florida’s redistricting process has had the salutary effect of ensuring that both the courts and the legislature consider whether districting changes promote racial fairness. This type of consideration is unlikely to occur absent the Department of Justice’s Section 5 review of voting changes affecting the five preclearance counties.<sup>97</sup>

Florida’s 2002 reapportionment process, similar to the 1992 process, involved controversy, allegations of partisan gerrymandering and minority vote dilution, litigation, and a Department of Justice Section 5 objection.<sup>98</sup>

In January 2002, three minority members of the United States House of Representatives and a minority voter challenged Florida’s congressional redistricting plan in Broward County Circuit Court.<sup>99</sup> The defendants removed the action to federal court.<sup>100</sup> In response, the plaintiffs voluntarily dismissed their action and refiled in state court.<sup>101</sup> Once again the defendants removed the action to federal court and the federal court eventually remanded the action to state court.<sup>102</sup> The state

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Senate apportionment plan as heretofore adopted is hereby amended to include the Humphrey-Reaves plan, all of which is set forth in the attached appendix.”)

94. *Id.* at 545.

95. Letter from John R. Dunne, Assistant Att’y Gen, Civil Rights Div., U.S. Dep’t of Justice to Robert A. Butterworth, Fla. Att’y Gen., at 3 (June 16, 1992) (on file with author). *See generally* Bill L. Bryant, Jr., Katherine E. Giddings, & Mark E. Kaplan, *Partisan Gerrymandering: A New Concern for Florida’s 1992 Reapportionment*, 19 FLA. ST. U. L. REV. 265 (1991).

96. *Conference, The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1, 16 (1994) (statement of Donald B. Verrilli, Jr.) (“[T]he panel, the three-judge panel deciding *Johnson v. DeGrandy* in the district court, thought that this legislative plan stunk to high heaven. They thought it was an outrageous effort to manipulate lines for partisan reasons, to protect incumbents. . . .”) (emphasis in original).

97. *See* RICHARD K. SCHER, JON L. MILLS & JOHN J. HOTALING, *VOTING RIGHTS AND DEMOCRACY: THE LAW AND POLITICS OF REDISTRICTING* 51-56 (Nelson-Hall Publishers 1996).

98. *Martinez v. Bush*, 234 F. Supp. 2d 1275 n.4 (S.D. Fla. 2002) (three-judge district court).

99. This history is recounted in *Brown v. Florida*, 208 F. Supp. 2d 1344, 1345-46 (S.D. Fla. 2002).

100. *Brown v. Florida*, No. 02-60267-Civ-Jordan (S.D. Fla. 2002).

101. *Brown v. Florida*, No. 02-60459-Civ-Jordan (S.D. Fla. 2002).

102. *Brown v. Florida*, No. 02-60689-Civ-Jordan (S.D. Fla. 2002); *Brown v. Florida*, 208 F. Supp. 2d at 1345-46 (S.D. Fla. 2002).



court, however, dismissed for lack of subject matter jurisdiction.<sup>103</sup>

In March 2002, another group of plaintiffs filed a separate action in the United States District Court for the Southern District of Florida.<sup>104</sup> Those plaintiffs sought declaratory and injunctive relief against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, the Florida Secretary of State, and the Florida Attorney General.<sup>105</sup> The plaintiffs alleged that the process the Florida Legislature used to adopt the reapportionment plans violated both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>106</sup> Furthermore, they claimed the reapportionment plans diluted black voting power in violation of Section 2.<sup>107</sup> The Governor, the Speaker of the Florida House of Representatives, and the President of the Florida Senate – but not the Florida Attorney General – submitted the reapportionment plans to the Department of Justice for preclearance on April 29, 2002.<sup>108</sup>

Concurrently, the Florida Attorney General filed suit seeking preclearance in the United States District Court for the District of Columbia on May 14, 2002.<sup>109</sup> He later amended his complaint to request a declaration of validity.<sup>110</sup> On June 7, 2002, the Department of Justice pre-cleared Florida's congressional redistricting plan, and at the Florida Governor, Florida Speaker, and the President of the Florida Senate's request, the District Court for the District of Columbia dismissed Florida's preclearance action.<sup>111</sup> "On June 20, 2002, the Department of Justice pre-cleared Florida's State Senate redistricting plan."<sup>112</sup>

The Department of Justice interposed an objection to the Florida House of Representatives' plan on July 1, 2002, stating the plan reduced "the ability of Collier County Hispanic voters to elect their candidate of choice [and] the drop in Hispanic population in the proposed district will make it impossible for these Hispanic voters to continue to do so."<sup>113</sup> In response, the United States District Court for the Southern District of Florida ("the *Martinez* Court") "held an emergency evidentiary hearing

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103. *Brown v. Florida*, 9 Fla. L. Weekly Supp. 546a (Fla. Cir. Ct. 2002) (dismissing for lack of subject matter jurisdiction).

104. *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (three-judge district court).

105. *Id.* at 1278.

106. *Id.*

107. *Id.*

108. *Id.* at 1286.

109. *Id.* at 1287.

110. *Id.* (citing *Florida v. United States*, No. 1:02 CV 00941 (D.D.C. 2002)).

111. *Id.* at 1287.

112. *Id.* at 1288.

113. Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to John M. McKay, President of the Fla. Senate and Tom Feeney, Speaker of the Fla. House of Representatives (July 1, 2002) (on file with author).

and issued an order adopting an interim State House plan that had been proposed by Speaker Feeney.”<sup>114</sup> While the *Martinez* Court ultimately ruled against the plaintiffs on their equal protection and Section 2 claims, the Department of Justice’s Section 5 objection helped preserve the Hispanic minority-majority district in Collier County.<sup>115</sup> Once again, the Section 5 preclearance process resulted in modifications to a controversial Florida reapportionment plan, which had threatened minority voters’ rights.<sup>116</sup>

## 2. SECTION 5 OBJECTIONS TO FLORIDA’S ADMINISTRATION OF ELECTIONS

In addition to entering objections to each of Florida’s post-1982 reapportionment plans, the Department of Justice has twice objected to Florida election legislation that adversely affected minority voters.<sup>117</sup> In the first instance, the Department of Justice objected on Section 208<sup>118</sup> grounds to a legislative change that would have prevented absentee voters from selecting persons to assist them in marking their ballots.<sup>119</sup> The Florida Legislature’s attempt to deny absentee voters this important right would have prevented many absentee voters from casting ballots; this is particularly true regarding illiterate, disabled, or language minority voters, who would not understand the ballot without such assistance. The reluctance of some local Florida jurisdictions to provide or permit this assistance is discussed in Part V below. Without the Department of Justice’s Section 5 review, many vulnerable minority voters would have been functionally disenfranchised due to the Florida Legislature’s restrictions on ballot assistance.

The Department of Justice’s second objection to Florida election procedures addressed changes the Florida Legislature proposed regarding the administration of absentee ballots. Specifically, the objection

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114. *Martinez*, 234 F. Supp. 2d at 1288.

115. *Id.*

116. *See, e.g.*, *Brown v. Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002); *Martinez*, 234 F. Supp. 2d 1275.

117. *See infra* notes 119, 120.

118. Section 208 of the Voting Rights Act, 42 U.S.C. § 1973aa-6, provides that:

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

Although Section 208 does not explicitly mention minority voters, the provision has been used to protect the voting rights of minorities and language minorities in some instances because the inability to read or write is sometimes correlative with minority – particularly language minority – status.

119. Letter from Wm. Bradford Reynolds, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice to Jim Smith, Fla. Att’y Gen., at 2-3 (Jan. 15, 1985) (on file with author).

referenced three out of the thirty-seven absentee ballot changes the Florida Legislature proposed in 1998.<sup>120</sup> The changes were part of a large Voter Fraud Act that made sweeping changes to Florida's electoral systems in response to widespread voter fraud in the City of Miami.<sup>121</sup> The three objectionable provisions respectively dealt with literacy skills, the ability to provide a social security number, and the need for a witness's signature.<sup>122</sup> In reviewing these changes, the Department possessed data showing the objectionable provisions disproportionately impacted minority voters:

Our analysis has revealed that during the limited time the State chose to implement the unprecleared absentee voting requirements<sup>123</sup> . . . the votes of minority electors would have been more likely than white voters to be considered "illegal" and thus not counted. Minority voters were more likely to fail to meet one of the State's new requirements than were white voters. For example, in Hillsborough County twice as many black absentee voters as white absentee voters failed to meet one of the State's new requirements.<sup>124</sup>

As the Department noted, many reasons exist for the minority voters' inability to comply with the state's requirements,

[t]he literacy rate in the five covered counties is significantly higher for the white population than for the minority population. . . . Election supervisors indicated that the absentee ballots were rejected primarily because they were not in compliance with the new witness requirements (e.g., witness is not a registered voter, witness did not include county of registration or voter identification number or did not bear the last four digits of the voter's social security number). Our analysis suggests that it may be more difficult for minority voters to locate registered voters to be witnesses because the pool of available witnesses is made smaller by the fact that minority voters have

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120. Letter from Bill Lann Lee, Acting Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 5 (Aug. 14, 1998) (on file with author).

121. Letter from Mike Cochran, Assistant Gen. Counsel, Fla. Dep't of State to Elizabeth Johnson, Chief, Voting Section, U.S. Dep't of Justice, at 1 (Aug. 6, 1998) (on file with author).

122. *Id.*

123. The records from this period reflect some confusion on the part of Florida elections officials concerning whether it was appropriate to implement certain changes prior to preclearance. As a result, Florida implemented the non-precleared changes throughout the state for a brief period in advance of the September 1998 primary. On August 10, 1998, the DOJ advised Florida that the Voting Rights Act prohibits implementation of non-precleared changes in the five preclearance counties. Letter from Elizabeth Johnson, Chief, Voting Section, U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 4 (Aug. 10, 1998) (on file with author). Thereafter, the Division of Elections instructed Florida elections officials that non-precleared changes should not be implemented in *any* Florida counties. Absentee Voting, Op. Fla. Div. of Elections DE 98-13 (1998), available at <http://election.dos.state.fl.us/opinions/new/1998/de9813.pdf>.

124. Letter from Elizabeth Johnson, Chief, Voting Section, U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 4 (Aug. 10, 1998) (on file with author).

lower registration rates and tend to live in areas with high minority concentrations. Moreover, the ability to meet the proposed requirements appears to be made more difficult for Hispanic voters by virtue of the fact that in two covered counties the Spanish language translation of the voter certificate is inserted in the absentee voting packet rather than appearing on the envelope as part of the absentee voter certificate itself and *in two covered counties there is no Spanish language translation of the certificate at all.*<sup>125</sup>

Thus, even in the face of documented discriminatory impact on minority voters, without Section 5 review, these additional requirements – which raised the burden on voters seeking to cast an absentee ballot – would be in place today. The Department’s objection combined with Florida’s decision to not implement the changes, even outside the preclearance counties, prevented these discriminatory measures from affecting Florida’s voters.

This result further demonstrates a common theme: while Section 5 only applies to the five preclearance counties, the Department of Justice’s Section 5 objections often result in Florida abandoning discriminatory voter legislation altogether, which ensures Section 5 protection for minorities throughout Florida. Florida based its non-implementation decision on the notion that implementing objectionable changes in the remaining sixty-two Florida counties would be inappropriate, both because of the potential discriminatory effects and because implementing the changes in some Florida counties, but not others, would violate the Florida Constitution’s equal protection guarantees.<sup>126</sup>

### 3. SECTION 5’S IMPORTANCE IN ENSURING ELECTORAL FAIRNESS WHERE NO OBJECTION WAS INTERPOSED

The dialogue Section 5 necessitates between and among the Civil Rights Division, state officials, and interested persons and groups is, perhaps, even more important for protecting Florida’s minority voters than the Department of Justice’s objections. The Section 5 implementing regulations require that the Department of Justice guide its decision-making process by reviewing “material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice.”<sup>127</sup> Examples of this dialogue reveal instances where Florida state officials have rethought or clarified their practices as a result of Section 5.

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125. *Id.* (emphasis supplied).

126. Absentee Voting, Op. Fla. Div. of Elections DE 98-13 (1998), available at <http://election.dos.state.fl.us/opinions/new/1998/de9813.pdf>.

127. 28 C.F.R. § 51.53 (2005).

In 1998, among the same group of revisions which produced the objectionable absentee voter forms, were revisions that required voters to show photo identification and revisions that required changes to list maintenance procedures.<sup>128</sup> Correspondence between the Department of Justice and the Florida Attorney General's Office shows that in response to Section 5 review, Florida clarified: (1) its position regarding what constituted acceptable photo identification; and, (2) the procedures required in the covered counties.<sup>129</sup> The Section 5 process also provided an opportunity for the Department of Justice to voice other interested parties' concerns:

[W]e have received information from members of the public and elected officials tending to show that some of the sections relating to absentee ballot procedures may have the discriminatory effect prohibited by Section 5. . . . A summary of the objections and public comments that we have received has been provided to [counsel for the Secretary of State].<sup>130</sup>

In response, Florida later withdrew the submission at issue.<sup>131</sup>

The Section 5 review process involving the Florida Election Reform Act of 2001 ("FERA") also highlights the importance of Section 5 review when the Department of Justice does not interpose an objection. A portion of FERA attempted to improve Florida's voter list maintenance procedures, which had been widely criticized following the 2000 presidential election.<sup>132</sup> After discussion, fact-finding and correspondence with Florida officials and interested parties, the Department of Justice precleared Florida's voter list maintenance changes with the following caveat:

This determination is expressly based on the State's entire Section 5 submission, including the representations and clarifications in your January 29, 2002, letter . . . regarding the State's implementation of the [voter list maintenance] sections. The state represented, for example:

- that there is no longer a presumption favoring the accuracy of any computer database and that the presumption now favors the voter; Jan. 29 letter at 3;

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128. Letter from Elizabeth Johnson, Chief, Voting Section, U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen. (July 27, 1998) (on file with author); Letter from Bill Lann Lee, Chief, Voting Section, U.S. Dep't of Justice to George L. Waas, Fla. Assistant Att'y Gen. (June 1, 1999) (on file with author).

129. *Id.*

130. Letter from Elizabeth Johnson, Chief, Voting Section, U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 3 (Aug. 10, 1998) (on file with author).

131. U.S. DEP'T OF JUSTICE, NOTICE OF PRECLEARANCE ACTIVITY UNDER THE VOTING RIGHTS ACT OF 1965, AS AMENDED, AUG. 14, 1998, <http://www.usdoj.gov/crt/voting/notices/vnote814.html> (last visited Oct. 14, 2006).

132. See discussion *infra* Part VI.B.

- that the appearance of a voter's name on the State's list of potentially ineligible voters does not, by itself, confirm that voter's ineligibility; Jan. 29 letter at 4; . . .
- that through implementation of Fla. Stat. § 98.0977, the burden of proof is shifted from the voter to the supervisor of elections to establish ineligibility by the highest degree of proof consistent with the fact that the fundamental right to vote is at stake; Jan 29 letter at 5; . . . .

Modification of the implementing procedures set forth in your Jan. 29 letter would likely constitute voting changes requiring preclearance under Section 5.<sup>133</sup>

In the next legislative session, Florida again altered its voter list maintenance procedures and submitted those proposed changes to the Department of Justice for preclearance.<sup>134</sup> Through the preclearance process, community and civil rights groups raised concerns with the Department of Justice that some of the proposed changes would in fact shift the burden of proof regarding voter ineligibility from the supervisor of elections to the voter.<sup>135</sup> The Department of Justice then requested that Florida

provide a detailed explanation of how the requirements and procedures established by [the new law] compare with those established by Fla. Stat. § 98.0977 as it was precleared on March 28, 2002. In particular, please address whether and how the new requirements and procedures are consistent with the State's prior representations in its letter dated January 29, 2002, and upon which preclearance was based. . . . Concerns have been raised that the new procedures enacted . . . rely on a presumption that the database is correct, permit voters to be removed from the voter rolls without actual notice and an opportunity to respond, and value process over substantive rights. Any information addressing these concerns would assist us in our review of your submission.<sup>136</sup>

The Florida Attorney General responded, "the burden always remains on the supervisor to establish ineligibility. . . . By way of reiteration, there is no longer a presumption favoring the accuracy of the computer

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133. Letter from Joseph D. Rich, Chief, Voting Section, U.S. Dep't of Justice to Robert A. Butterworth, Fla. Att'y Gen., at 1-2 (Mar. 28, 2002) (on file with author).

134. See Letter from Joseph D. Rich, Chief, Voting Section, U.S. Dep't of Justice, to Robert A. Butterworth, Fla. Att'y Gen. (June 24, 2002) (on file with author).

135. See, e.g., Letter from Dennis C. Hayes, Gen. Counsel NAACP, *et al.* to Joseph D. Rich, Chief, Voting Rights Section, U.S. Dep't of Justice (Mar. 28, 2002) (on file with author); Letter from Fla. Equal Voting Rights Project to Joseph D. Rich, Chief, Voting Rights Section, U.S. Dep't of Justice (June 11, 2002) (on file with author).

136. Letter from Joseph D. Rich, Chief, Voting Section, U.S. Dep't of Justice, to Robert A. Butterworth, Fla. Att'y Gen., at 3-4 (June 24, 2002) (on file with author).

database; the presumption now favors the voter.”<sup>137</sup>

This Section 5 dialogue with the Department of Justice had a demonstrable impact on two subsequent occasions. First in 2003, Florida prepared a manual to assist all county supervisors of elections in using Florida’s newly-created Central Voter Database.<sup>138</sup> Civil rights groups’ advocacy efforts resulted in the state revising the manual consistent with the representations that the Florida Attorney General had previously made during the Section 5 review process.<sup>139</sup> Along with the revised manual, the Division of Elections sent all Florida supervisors of elections a copy of Attorney General Butterworth’s representations, which in substance stated the burden of proof regarding voter ineligibility rests with the supervisors of elections, not the challenged voter.<sup>140</sup> Second in 2004, the Section 5 review and dialogue process avoided litigation on this same issue. Civil rights organizations determined that a communication from the Director of the Florida Division of Elections to supervisors of elections regarding voter list maintenance procedures abrogated Florida’s commitment to maintain the burden of proof on the supervisor of elections rather than the voter. These organizations requested that the Division of Elections account for this discrepancy.<sup>141</sup> The Division of Elections immediately retreated from its questionable position – “[a]s stated in our exchanges with the US DOJ, an affirmative determination as to whether a voter is eligible to vote or not must be made by the supervisors of elections prior to removal of any voter from the voter registration rolls.”<sup>142</sup>

As these examples illustrate, the Section 5 review process serves the important function of providing all interested parties – state legislative and administrative officials, Justice Department officials, and interested groups and individuals in the state – with a vital opportunity to take a “second look” at electoral changes and how they could affect

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137. Letter from Robert A. Butterworth, Fla. Att’y Gen. to Joseph D. Rich, Chief, Voting Section, U.S. Dep’t of Justice, at 5 (July 10, 2002) (on file with author).

138. FLA. DIV. OF ELECTIONS, FLA.’S CENTRAL VOTER DATABASE TRAINING WORKBOOK AND USER’S GUIDE, Version 2.0 (Sept. 2003).

139. Letter from Sharon D. Larson, Assistant Gen. Counsel, Fla. Dep’t of State to Anita S. Hodgkiss, Lawyer’s Comm. for Civil Rights Under Law (Sept. 19, 2003) (on file with author); Letter from Edward C. Kast, Dir., Div. of Elections to Fla. Supervisors of Elections (Sept. 30, 2003) (enclosing preclearance correspondence) (on file with author).

140. *Id.*

141. Letter from the Lawyers’ Comm. for Civil Rights Under Law, *et al.* to Edward C. Kast, Dir., Div. of Elections, at 12 (June 3, 2004) (on file with author).

142. Letter from Dawn K. Roberts, Dir., Div. of Elections to Lawyers’ Comm. for Civil Rights Under Law, *et al.*, at 2 (June 17, 2004) (on file with author). In 2004, Florida eventually instructed the supervisors of elections not to use the state-created list of potentially ineligible voters because of serious flaws in the data. *See* discussion *infra* Part VI.B.

minority voters.<sup>143</sup> This process often provides the public with its only opportunity to review and comment on a new electoral law's fairness to minorities. On some occasions, this "second look," occasioned by the Section 5 review process, has resulted in substantive changes that protect minority voting rights, even when the Department of Justice declines to interpose an objection.

## V. PROTECTION OF LANGUAGE MINORITIES IN FLORIDA

Florida has a sizeable native-born population that may require language assistance; this population is primarily composed of voters of Puerto Rican and Native American ancestry.<sup>144</sup> In addition, Florida has a large immigrant population, the majority of which comes from the Caribbean.<sup>145</sup> Rates of educational attainment among these immigrants are significantly lower than Florida's native-born population;<sup>146</sup> and these non-natives are far less likely to be proficient in English.<sup>147</sup> Almost 400,000 Floridians live in linguistically isolated households, where no household member over age 14 speaks English well.<sup>148</sup>

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143. In this regard, Section 5 likewise encourages fairness to minorities in a more subtle way – by encouraging covered jurisdictions to maintain statistical information regarding race and ethnicity to measure voting changes' impact on minorities.

144. According to the 2000 Census, nearly half a million Puerto Ricans live in Florida. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, CENSUS 2000 FLORIDA DEMOGRAPHIC PROFILE HIGHLIGHTS: SELECTED POPULATION GROUP: PUERTO RICAN, <http://factfinder.census.gov> (search "Get a Fact Sheet for your community. . ." for "Florida"; then follow "Fact Sheet for a Race, Ethnic, or Ancestry Group" hyperlink under "Population Finder"; then select "Puerto Rican" under "Select a population group" and click "Go"). Additionally, over 100,000 Native Americans live in Florida. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, CENSUS 2000 FLORIDA DEMOGRAPHIC PROFILE HIGHLIGHTS: SELECTED POPULATION GROUP: AMERICAN INDIAN ALONE OR IN ANY COMBINATION, <http://factfinder.census.gov/servlet> (search "Get a Fact Sheet for your community. . ." for "Florida"; then follow "Fact Sheet for a Race, Ethnic, or Ancestry Group" hyperlink under "Population Finder"; then select "American Indian alone or in any combination" under "Select a population group" and click "Go").

145. Florida's Caribbean immigrants include Spanish speakers from, among other places, Cuba and the Dominican Republic, Creole speakers from Haiti, and immigrants from English speaking countries such as Jamaica and Trinidad. See generally U.S. CENSUS BUREAU, COMING FROM THE AMERICAS: A PROFILE OF THE NATION'S FOREIGN-BORN POPULATION FROM LATIN AMERICA (2000 Update) (2002), <http://www.census.gov/prod/2002pubs/cenbr01-2.pdf>. This report is concerned with the Spanish and Creole speakers.

146. *Id.* at 2.

147. For example, a survey of Haitian entrants in 1983 revealed that "[o]n average, none had advanced beyond the fifth or sixth grade, and about four-fifths spoke little or no English." ALEJANDRO PORTES & ALEX STEPICK, CITY ON THE EDGE: THE TRANSFORMATION OF MIAMI 56 (University of California Press 1993).

148. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, QT-P17. ABILITY TO SPEAK ENGLISH: 2000, <http://factfinder.census.gov> (select "Data Sets"; then select "Decennial Census"; select "Census 2000 Summary File 3 (SF 3) - Sample Data" and "Quick Tables"; set "Geographic Type" to "State"; choose "Florida" as geographic selection, select "Add," and select "Next"; select table "QT-P17," select "Add," and select "Show Result").



Despite low rates in both education and English competency, Caribbean immigrants have a relatively high rate of United States citizenship when compared with other immigrant groups from Latin America. Roughly half of the foreign-born Caribbean population has United States citizenship, compared with twenty-eight percent for other Latin American immigrants.<sup>149</sup> Florida's foreign-born population has a higher than average rate of naturalization, and is therefore more likely to be eligible to vote than other immigrant populations.<sup>150</sup> Indeed, Florida's Hispanic population has a higher rate of voter registration and a higher rate of voting than the national average.<sup>151</sup> It is essential that our legal framework continues to protect the voting rights of new Americans as well as native-born Americans who lack English proficiency.

As mentioned previously, when Congress reauthorized the Voting Rights Act in 1975, it added protections for language minorities.<sup>152</sup> The expansion was based on evidence presented at congressional hearings, which Congress considered "overwhelming evidence of voting discrimination against language minorities."<sup>153</sup> Congress found that this overwhelming discrimination most severely affected persons of Spanish heritage.<sup>154</sup> As a result, Congress expanded Section 5's protections to areas where significant numbers of language-based minorities reside,<sup>155</sup> and made the temporary ban on the use of literacy tests or similar devices permanent.<sup>156</sup> Congress also created Sections 203 and 4(f)(4), which required covered jurisdictions to provide bilingual election assistance to language minorities.<sup>157</sup> The 1975 coverage formula for Section 203 required that jurisdictions provide bilingual assistance

if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy

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149. U.S. CENSUS BUREAU, *COMING FROM THE AMERICAS: A PROFILE OF THE NATION'S FOREIGN-BORN POPULATION FROM LATIN AMERICA* (2000 Update) at nn.1, 3 (2002), available at <http://www.census.gov/prod/2002pubs/cenbr01-2.pdf>.

150. U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION: 2000* at 3 (2003), available at <http://purl.access.gpo.gov/GPO/LPS47197>.

151. 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, <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls> (last visited Feb. 21, 2006).

152. *See supra* Part IV.A.

153. S. REP. NO. 94-295, at 30 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 797.

154. S. REP. NO. 94-295, at 31 (1975).

155. *See supra* Part IV.A.

156. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat 400 (amending Section 4 of the Voting Rights Act of 1965, 42 USC §1973b (2002)).

157. *See supra* Part II.

rate.<sup>158</sup>

In 1992, Congress strengthened Section 203's language minority protections via the Voting Rights Language Assistance Act of 1992.<sup>159</sup> Congress expanded Section 203's coverage formula to require that:

(1)(a) if a jurisdiction has 10,000 or more limited-English proficient voting age citizens of a single language minority or (1)(b) a reservation has 5 percent or more American Indian or Alaska Native limited-English proficient voting age citizens and (2) the single language minorities meet the remaining § 203 requirements, then the jurisdiction must provide language assistance.<sup>160</sup>

Application of the 4(f)(4) and 203 coverage formulas has resulted in 4(f)(4) coverage in the five preclearance counties (Collier, Hardee, Hendry, Hillsborough, and Monroe counties) regarding Spanish<sup>161</sup> and Section 203 coverage in ten Florida counties regarding Spanish or the Seminole language.<sup>162</sup>

These language minority protections are extremely important for Florida. Florida's defining demographic feature during the latter part of the twentieth century was the enormous increase in the state's immigrant population.<sup>163</sup> In a 1994 report, the Governor's Office suggested that Florida's population growth was largely attributable to the increasing arrival of immigrants to the state.<sup>164</sup> As the name of the Governor's report – *The Unfair Burden: Immigration's Impact on Florida* – implies, these recent immigrants have not been completely welcome.<sup>165</sup> The Governor's report chronicled the arrival of almost one million Cuban refugees from 1959 to 1979, but declared the more recent waves of immigration from the Caribbean as the most dramatic:

From April to September of 1980, approximately 125,000 Cubans

158. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat 400 (inserting Title III, Bilingual Election Requirements, Sec. 203, 42 USC §1973aa-1a (2002)).

159. Voting Rights Language Assistance Act of 1992, H.R. REP. No. 102-655, at 3 (1992), reprinted in 1978 U.S.C.C.A.N. 766.

160. H.R. REP. No. 102-655, at 3 (1992), reprinted in 1978 U.S.C.C.A.N. 766, 767-68.

161. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 53 Fed. Reg. 735, 736 (Jan. 12, 1988) (to be codified at 28 C.F.R. app. § 55).

162. Broward (Spanish and Seminole), Collier (Seminole), Glades (Seminole), Hardee (Spanish), Hendry (Spanish), Hillsborough (Spanish), Miami-Dade (Spanish), Orange (Spanish), Osceola (Spanish) and Palm Beach (Spanish). Voting Rights Act Amendments of 1992, Determinations Under Sec. 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

163. See generally EXECUTIVE OFFICE OF THE GOVERNOR & FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, *THE UNFAIR BURDEN: IMMIGRATION'S IMPACT ON FLORIDA* (1994).

164. The report claimed that "[d]uring the last fourteen years, Florida has been the destination of a disproportionate number of immigrants, and each wave has further strained the state's resources as well as its ability to assist these individuals and assimilate them into their communities." *Id.* at i.

165. *Id.*

departed from the Port of Mariel, and arrived in [S]outh Florida in what is now referred to as the Mariel Boatlift. In May, 1980 alone, over 85,000 Cubans arrived on Florida's shores. This, along with approximately 25,000 Haitian refugees, overwhelmed all local, state and federal programs in place at that time in [S]outh Florida. The sheer magnitude of the number of immigrants arriving in [S]outh Florida forced President Carter to declare a state of emergency. The Federal Emergency Management Agency (FEMA) was called into action and a Cuban/Haitian Task Force was appointed to assist in resettlement efforts.<sup>166</sup>

In 1988, when considering a voting rights case in Dade County, a local federal judge remarked that

Dade County presents a dynamic, evolving community. Over the last fifteen years Dade County has experienced a tremendous influx of people from other countries and other states, and the frequency of immigration among the former group has become exceptional in the 1980's. Thus, although the plaintiffs have referred to Dade County as a tri-ethnic community, it is clear that Dade County is multi-ethnic. While the primary groups are Blacks, Hispanics and Non Latin Whites, the Hispanic population, for example, includes not only Cubans, but people from various parts of Central and South America, and both the Hispanic and Black communities have members from Caribbean countries. Dade County has truly become a microcosm of the Western Hemisphere, and is a uniquely situated venue for allegations that a violation of the Voting Rights Act has occurred.<sup>167</sup>

The huge influx of immigrants into Florida, particularly immigrants who did not speak English, led to a significant backlash against immigrants and efforts to require "English only" within the government, schools, and elections.

Miami thus became the birthplace of the contemporary English Only movement in the United States. It happened in November 1980, when voters in Dade County . . . approved a landmark ordinance that reversed the policy of official bilingualism and biculturalism established by the Board of County Commissioners in 1973. The measure, passed overwhelmingly, prohibited "the expenditure of any county funds for the purpose of utilizing any language other than English or any culture other than that of the United States" (Section 1) and provided that "all county governmental meetings, hearings, and publica-

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166. *Id.* at 7. In 1980 alone, "nearly 200,000 Cubans and Haitians landed in Florida." Anthony P. Maingot, *Immigration from the Caribbean Basin: Challenges and Opportunities for Florida*, MIAMI NOW! 34 (Guillermo J. Grenier & Alex Stepick III eds., University of Florida Press 1992).

167. *Meek v. Metropolitan Dade County*, No. 86-1820-CIV-Ryskamp, slip op. at 14 (S.D. Fla. Oct. 5, 1988).

tions shall be *in the English language only*" (Section 2).<sup>168</sup>

Florida's nascent English Only movement was "a vehicle for the expression of mass native white resistance to Latinization."<sup>169</sup> The majority of the non-Hispanic white voters supporting the initiative hoped to "make Miami a less attractive place to live for Cubans and other Spanish-speaking people."<sup>170</sup>

Haitian immigrants encountered even greater hostility. Federal immigration officials devised a special "Haitian Program" designed to repatriate as quickly as possible all Haitian asylum seekers due to what they termed the "HAITIAN THREAT . . . individuals that are threatening the community's well-being-socially & economically."<sup>171</sup> While the majority of arriving Haitians eventually won a series of legal battles permitting them to stay, become permanent residents, and later naturalized citizens, the effects of this discrimination linger among Haitian immigrants. "The policy of persecution, legal confusion, and social isolation have all contributed to Haitians' dismal socioeconomic conditions in the United States. Their employment situation compares unfavorably to any other immigrant population in the country."<sup>172</sup>

Efforts to make immigrants less welcome in Florida have not reduced immigration rates. The 2000 census reported that the Miami metropolitan area was one of the five leading destinations for the foreign-born population in the United States.<sup>173</sup> Florida has the fourth largest foreign-born population in the United States, behind California, New York, and Texas.<sup>174</sup>

#### A. Florida's Spanish-Speaking Population

In the period since Congress incorporated protection of language-based minorities into the Voting Rights Act, Florida's Spanish-speaking population has veritably exploded.<sup>175</sup> From 1980 to 1990, Florida's Hispanic population grew by over eighty percent, from 8.8% of the total

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168. Max J. Castro, *The Politics of Language in Miami*, MIAMI NOW! 119 (Guillermo J. Grenier & Alex Stepick III eds., University of Florida Press 1992) (emphasis in original).

169. *Id.* at 122.

170. *Id.*

171. Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 517 (S.D. Fla. 1980).

172. Alex Stepick, *The Refugees Nobody Wants: Haitians in Miami*, MIAMI NOW! 67 (Guillermo J. Grenier & Alex Stepick III eds., University of Florida Press 1992).

173. U.S. CENSUS BUREAU, COMING FROM THE AMERICAS: A PROFILE OF THE NATION'S FOREIGN-BORN POPULATION FROM LATIN AMERICA (2000 Update), at nn.1, 2 (2002), available at <http://www.census.gov/prod/2002pubs/cenbr01-2.pdf>.

174. U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION: 2000, at 3 (2003), available at <http://purl.access.gpo.gov/GPO/LPS47197>.

175. In its objection to Florida's 2002 reapportionment plan, the DOJ noted that "[o]ne of the most significant changes to the state's demography has been the increase in the Hispanic population." Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of

population to 12.2%.<sup>176</sup> From 1990 to 2000, the Hispanic population once again increased dramatically, from 12.2% to 16.8% of the state's total population. There are twelve Florida counties in which the Hispanic population exceeds fifteen percent,<sup>177</sup> many of them among the most populous and fastest-growing counties in the state.<sup>178</sup> Almost one-third of Florida's Hispanic population reported during the 2000 census that they either could not speak English "at all" (269,785), or that they did not speak English well (432,977).<sup>179</sup>

The United States Census Bureau has designated eight Florida counties as Section 203 covered jurisdictions for the Spanish language because of documentation that a significant number of Spanish-speaking voters are unable to speak or understand English well enough to participate in the electoral process.<sup>180</sup> Under this designation, Broward, Hardee, Hendry, Hillsborough, Miami-Dade, Orange, Osceola, and Palm Beach counties are required to provide voters Spanish language assistance.<sup>181</sup> The bilingual assistance provision requires that these eight counties provide all "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" in the language of the minority group as well as English.<sup>182</sup>

Despite the requirement of bilingual election materials in much of Florida, many Florida jurisdictions have repeatedly ignored their constituents' language assistance needs, which has resulted in language minor-

Justice to John M. McKay, President of the Fla. Senate and Tom Feeney, Speaker of the Fla. House of Representatives (July 1, 2002) (on file with author).

176. FLORIDA COUNTY PERSPECTIVES 91 (National Data Consultants 1992-93).

177. Broward (16.7%), Collier (19.6%), DeSoto (24.9%), Glades (15.1%), Hardee (35.7%), Hendry (39.6%), Hillsborough (18%), Miami-Dade (57.3%), Monroe (15.8%), Okeechobee (18.6%), Orange (18.8%), and Osceola (29.4%). U.S. CENSUS BUREAU, AMERICAN FACTFINDER, QT-P3. RACE AND HISPANIC OR LATINO: 2000, <http://factfinder.census.gov> (select "Data Sets"; select "Decennial Census"; select "Census 2000 Summary File 1 (SF 1) 100-Percent Data" and "Quick Tables"; set "Geographic Type" to "County"; set "State" to "Florida"; choose appropriate counties as geographic selections, select "Add," and select "Next"; select table "QT-P3," select "Add," and select "Show Result").

178. More than thirty-six percent of Florida's population lives in Miami-Dade, Broward, Orange and Hillsborough counties alone. *Id.* Osceola County, which had one of the highest growth rates in the state between the last two censuses, also had the highest Hispanic growth rate. FLA. COUNTY PERSPECTIVES, *supra* note 176.

179. U.S. CENSUS BUREAU, AMERICAN FACTFINDER, QT-P17. ABILITY TO SPEAK ENGLISH: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=Y&-state=QT&-context=QT&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP17&-ds\\_name=DEC\\_2000\\_SF3\\_U&-tree\\_id=403&-all\\_geo\\_types=N&-redoLog=true&-caller=geoselect&-geo\\_id=04000US12&-search\\_results=01000US&-format=&-\\_lang=EN](http://factfinder.census.gov/servlet/QTTable?_bm=Y&-state=QT&-context=QT&-qr_name=DEC_2000_SF3_U_QTP17&-ds_name=DEC_2000_SF3_U&-tree_id=403&-all_geo_types=N&-redoLog=true&-caller=geoselect&-geo_id=04000US12&-search_results=01000US&-format=&-_lang=EN).

180. Voting Rights Act Amendments of 1992, Determinations Under Section. 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

181. Three other counties – Collier, Glades, and Broward counties – are Sec. 203 designated jurisdictions for Native American (Seminole) language assistance. *Id.*

182. 42 U.S.C. § 1973aa-1a(c) (2002).

ity disenfranchisement. In its exhaustive report on the 2000 Presidential election in Florida, the United States Commission on Civil Rights found that

[d]espite the requirements that non-English-proficient voters be provided with some form of language assistance, large numbers of limited English-speaking voters were denied this assistance at polling places all around Florida. This occurred in counties and precincts where bilingual ballots and language assistance are mandated. Because of this failure to provide proper language assistance, voters faced problems understanding the ballots or the fundamental procedure for voting. The groups disproportionately affected were Haitian Americans and Spanish-speaking Latinos. Many poll workers were not properly trained to handle language assistance issues. Some voters found that even when volunteers were available to provide assistance, the volunteers or precinct workers were prevented from providing language assistance. In some instances, bilingual poll workers were directed to not provide language assistance to voters who were in need of that assistance. Thus, these non-English minority voters found their polling places to have ballots that were, essentially, inaccessible to them.<sup>183</sup>

An especially dramatic example of Florida officials' intransigence with respect to providing necessary language assistance to Spanish speakers occurred in central Florida in 2000. The United States Commission on Civil Rights found that during the 2000 election

[i]n some central Florida counties, Spanish-speaking voters did not receive bilingual assistance and some of these counties were subject to section 203 of the Voting Rights Act. This failure to provide proper language support led to widespread voter disenfranchisement of possibly several thousand Spanish-speaking voters in central Florida.<sup>184</sup>

Osceola County in central Florida experienced the highest growth rate in Hispanic population in the state. From 1980 to 1990, Osceola County's Hispanic population increased 1219.6%.<sup>185</sup> From 1990 to 2000, it increased dramatically again, from roughly 12,000 to over

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183. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA. DURING THE 2000 PRESIDENTIAL ELECTION: CH. 6 ACCESSIBILITY ISSUES (2001), <http://purl.access.gpo.gov/GPO/LPS17743> (follow the "Report on Voting Irregularities in Florida During the 2000 Presidential Election" hyperlink; then follow the "Chapter 6: Accessibility Issues" hyperlink) (internal paragraph divisions omitted).

184. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA. DURING THE 2000 PRESIDENTIAL ELECTION: CH. 9 FINDINGS AND RECOMMENDATIONS (2001), <http://purl.access.gpo.gov/GPO/LPS17743> (follow the "Report on Voting Irregularities in Florida During the 2000 Presidential Election" hyperlink; then follow the "Ch 9: Findings and Recommendations" hyperlink).

185. FLA. COUNTY PERSPECTIVES, *supra* note 176.

50,000 persons.<sup>186</sup> In the twenty-year period from 1980 to 2000, Osceola County changed from having a Hispanic population of merely two percent (fewer than 1,000 persons)<sup>187</sup> to being nearly one-third Hispanic (over twenty-nine percent of the total population).<sup>188</sup>

Osceola County's voting discrimination against Hispanic voters was so pronounced that the Department of Justice filed suit against county officials in 2002, alleging widespread violations of minority voting rights, including: poll workers making hostile remarks to Spanish-speaking voters to discourage them from voting, the failure of poll officials to communicate effectively with Spanish-speaking voters which prevented them from voting, failure to staff polling places with bilingual poll officials, and failure to translate ballots and other election materials into Spanish.<sup>189</sup> The parties resolved the case by a Consent Decree, requiring Osceola County to undertake a number of remedial actions. The Decree called for: (1) the creation of a Spanish Language Coordinator position; (2) the hiring of bilingual poll workers; (3) the availability of all election materials and ballots in Spanish; and (4) future Department of Justice monitoring to ensure compliance.<sup>190</sup>

Ironically, at the time the lawsuit was filed in 2002, Osceola was not a Section 203 covered county because the Hispanic population had grown so rapidly since the designations were made in 1992 based on the 1990 census. The regulatory designations had not yet caught up with the population demographics.<sup>191</sup> Within months of the Consent Decree, Osceola County became a Section 203 covered jurisdiction as a result of the 2002 designations based on the 2000 Census.<sup>192</sup>

The Department of Justice brought a similar action against neighboring Orange County alleging that county officials failed to furnish "in the Spanish language, the information and assistance necessary to com-

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186. *Id.*

187. *Id.*

188. U.S. CENSUS BUREAU, OSCEOLA COUNTY, FLORIDA-QT-P9. HISPANIC OR LATINO BY TYPE: 2000, <http://factfinder.census.gov> (select "Data Sets"; select "Decennial Census"; select "Census 2000 Summary File 1 (SF 1) 100-Percent Data" and "quick tables"; set "Geographic Type" to "County"; set "State" to "Florida"; choose "Osceola County" as geographic selection, select "Add," and select "Next"; select table "QT-P9," select "Add," and select "Show Result").

189. Complaint at ¶ 7, *United States v. Osceola County*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. June 28, 2002).

190. Consent Decree, *United States v. Osceola County*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002).

191. Voting Rights Act Amendments of 1992, Determinations Under 203, 57 Fed. Reg. 43,213, 43,215 (Sept. 18, 1992).

192. Voting Rights Act Amendments of 1992, Determinations Under 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

ply with Section 203 of the Voting Rights Act.”<sup>193</sup> In particular, Orange County failed to “recruit, appoint, train and maintain an adequate pool of bilingual poll officials capable of providing Hispanic citizens with limited English proficiency with effective language assistance,” and failed to translate into Spanish election-related information both at polling places and in communications disseminated from the registrar’s office.<sup>194</sup> Additionally, the Department of Justice alleged that “Orange County did not permit poll watchers to provide assistance to [Hispanic voters in need of language assistance] at the November 2000 election, and they did not receive assistance from other persons,” in violation of Section 208 of the Voting Rights Act.<sup>195</sup>

The parties settled this action with a Consent Decree requiring, *inter alia*, that Orange County: (1) provide election information in Spanish in addition to English; (2) create a group of Spanish Language Assistance Coordinators; (3) provide bilingual poll workers; (4) consult with Orange County’s Hispanic community; and, (5) accommodate federal election monitoring.<sup>196</sup> Perhaps most tellingly, the Consent Decree also stated that Orange County election officials

shall investigate any allegations of poll worker hostility toward Spanish-speaking and/or Hispanic voters in any election. . . . Where it reasonably has been found that poll workers have engaged in inappropriate treatment of Spanish-speaking and/or Hispanic voters, the Supervisor shall remove these poll workers, and these poll workers shall not be eligible to be poll workers in future elections.<sup>197</sup>

Even in Miami-Dade County, where a majority (57.3%) of the population is of Hispanic origin,<sup>198</sup> election officials have violated Section 203 by producing and distributing an election pamphlet in English only that explained “changes in the election format,” and also “inform[ed] voters when to register, when to vote, and where to vote in the elec-

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193. Complaint at ¶ 7, *United States v. Orange County*, No. 6:02-CV-00737-ORL-22JGG (M.D. Fla. June 28, 2002).

194. *Id.*

195. *Id.* at ¶¶ 8, 14.

196. Consent Decree ¶¶ 1, 2, 4, 6, 15, *United States v. Orange County*, No. 6:02-CV-00737-ORL-22JGG (M.D. Fla. Oct. 9, 2002).

197. *Id.* at ¶ 10.

198. Broward (16.7%), Collier (19.6%), DeSoto (24.9%), Glades (15.1%), Hardee (35.7%), Hendry (39.6%), Hillsborough (18%), Miami-Dade (57.3%), Monroe (15.8%), Okeechobee (18.6%), Orange (18.8%), and Osceola (29.4%). U.S. CENSUS BUREAU, AMERICAN FACTFINDER, QT-P3. RACE AND HISPANIC OR LATINO: 2000, <http://factfinder.census.gov> (select “Data Sets”; select “Decennial Census”; select “Census 2000 Summary File 1 (SF 1) 100-Percent Data” and “Quick Tables”; set “Geographic Type” to “County”; set “State” to “Florida”; choose appropriate counties as geographic selections, select “Add,” and select “Next”; select table “QT-P3,” select “Add,” and select “Show Result”).



tion.”<sup>199</sup> The Department of Justice sued Miami-Dade County, alleging a violation of Section 203 and the District Court found that the county’s failure to publish the pamphlet in Spanish violated the statute.<sup>200</sup> The court entered a Temporary Restraining Order requiring the county to undertake remedial action to accommodate Spanish-speaking voters before the election.<sup>201</sup>

As these cases illustrate, continuing the Voting Rights Act’s protections for Florida’s language minorities is critically important to ensuring that Florida’s burgeoning Spanish-speaking population has ballot access. As explained below, the protections Section 203 currently affords Spanish and Native American language speakers also highlights an important gap in the statute’s reach – it fails to protect Creole speakers as a recognized language minority.<sup>202</sup>

### B. *Discrimination Against Florida’s Haitian-American Voters*

When Congress amended the Voting Rights Act in 1975 – thereby creating the Section 203 protections for language minorities – it specified that the only protected “language minorities” were “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”<sup>203</sup> Over 233,000 Haitian-Americans now live in Florida,<sup>204</sup> with the majority residing in the three most populous southern counties. Almost half (over 95,000) of Florida’s Haitian-American population lives in Miami-Dade County.<sup>205</sup> Most of Florida’s remaining Haitian-Americans live in Palm Beach (over 30,000) and Broward Counties (over 62,000).<sup>206</sup> Haitian-Americans are a growing segment of Florida’s

199. *United States v. Metro. Dade County*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993).

200. *Id.*

201. *Id.*

202. See discussion *infra* Part V.B.

203. 42 U.S.C. § 1973aa-1a(e) (2002).

204. U.S. CENSUS BUREAU, FLORIDA-QT-P13. ANCESTRY: 2000, <http://factfinder.census.gov> (select “Data Sets”; select “Decennial Census”; select “Census 2000 Summary File 3 (SF 3) - Sample Data” and “Quick Tables”; set “Geographic Type” to “State”; choose “Florida” as geographic selection, select “Add,” and select “Next”; select table “QT-P13,” select “Add,” and select “Show Result”).

205. U.S. CENSUS BUREAU, MIAMI DADE COUNTY, FLORIDA-QT-P13. ANCESTRY: 2000, <http://factfinder.census.gov> (select “Data Sets”; select “Decennial Census”; select “Census 2000 Summary File 3 (SF 3) - Sample Data” and “Quick Tables”; set “Geographic Type” to “County”; set “State” to “Florida”; choose “Miami-Dade County” as geographic selection, select “Add,” and select “Next”; select table “QT-P13,” select “Add,” and select “Show Result”). In 2000, Haitian-Americans constituted 4.2% of Miami Dade County’s total population. *Id.*

206. U.S. CENSUS BUREAU, BROWARD AND PALM BEACH COUNTIES, FLORIDA-QT-P13. ANCESTRY: 2000, <http://factfinder.census.gov> (select “Data Sets”; select “Decennial Census”; select “Census 2000 Summary File 3 (SF 3) - Sample Data” and “Quick Tables”; set “Geographic Type” to “County”; set “State” to “Florida”; choose “Broward County” and “Palm Beach County”

population.<sup>207</sup> The primary language spoken by Haitian immigrants is Haitian Creole,<sup>208</sup> and their literacy rate and ability to speak English is significantly below that of native-born Americans and is even below that of other immigrant groups.<sup>209</sup>

The United States Commission on Civil Rights found that Florida's widespread failure to provide proper language assistance in the 2000 Presidential election disproportionately affected "Haitian Americans and Spanish-speaking Latinos."<sup>210</sup> The Commission's findings regarding the Haitian Creole speaking population were based in part on the Florida Attorney General's testimony conceding that "there might not have been enough handouts in Creole or enough interpreters there to assist."<sup>211</sup> The Commission also heard and credited testimony that even where polling places were required by local law to provide voting assistance in Creole, they failed to do so and "[m]any Haitian American voters were, in effect, turned away from their polling places without the opportunity to vote."<sup>212</sup>

The Department of Justice drew similar conclusions, and sued Miami-Dade County for Voting Rights Act violations against Haitian-American voters, alleging that "[d]uring the November 2000 Presidential election, Defendants, acting through their employees and agents, engaged in practices which prevented Creole-speaking Haitian-American voters in Miami-Dade County with limited ability to understand English from securing assistance at the polls, in violation of Section 208 of the Voting Rights Act . . . ."<sup>213</sup>

Unfortunately, Section 203 does not recognize Creole speakers as "language minorities."<sup>214</sup> This is undoubtedly attributable to the fact that when Congress originally considered and enacted the language

as geographic selections, select "Add," and select "Next"; select table "QT-P17," select "Add," and select "Show Result").

207. ANGELA BRITTINGHAM AND G. PATRICIA DE LA CRUZ, ANCESTRY: 2000, CENSUS 2000 BRIEF, at 4 (June 2004), available at <http://www.census.gov/prod/2004pubs/c2kbr-35.pdf> (Haitian population in the United States increased by 89% from 1990 to 2000).

208. U.S. DEP'T OF STATE: BUREAU OF PUBLIC AFFAIRS, BACKGROUND NOTE: HAITI (Feb. 2005), <http://www.state.gov/r/pa/ei/bgn/1982.htm>.

209. A survey of Haitian entrants in 1983, for example, revealed that "[o]n average, none had advanced beyond the fifth or sixth grade, and about four-fifths spoke little or no English." ALEJANDRO PORTES & ALEX STEPICK, CITY ON THE EDGE 56 (1993); See also Consent Order, United States v. Miami-Dade County, Civ. No. 02-21698 (S.D. Fla. June 17, 2002) (recognizing "the unique difficulties encountered by Creole-speaking voters," who require language assistance to effectively participate in the voting process).

210. U.S. COMM'N ON CIVIL RIGHTS: CH. 6 ACCESSIBILITY ISSUES, *supra* note 183.

211. *Id.*

212. *Id.* "[M]any Haitian American voters were denied the opportunity to vote." U.S. COMM'N ON CIVIL RIGHTS: CH. 9 FINDINGS AND RECOMMENDATIONS, *supra* note 184.

213. Complaint ¶ 6, United States v. Miami-Dade County, No. 02-21698 (S.D. Fla. 2002).

214. See 42 U.S.C. § 1973aa-1a(e) (2006) ("For purposes of this section, the term 'language

minority protections, Creole speakers were – at best – a negligible portion of the eligible voting population.<sup>215</sup>

Since Section 203 does not cover Haitian Creole speakers, the Department of Justice was forced to rely on Section 208 of the Voting Rights Act to protect Haitian-Americans' voting rights.<sup>216</sup> It is not an ideal fit for addressing discrimination that is so clearly language-based. Section 208 does not offer protections on the basis of language *per se*, nor does it require bilingual ballots or other bilingual election materials.<sup>217</sup> Instead, Congress created Section 208 to protect voters who were disabled, blind, or illiterate.<sup>218</sup> It provides, “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”<sup>219</sup>

In its Section 208 suit, the Department of Justice claimed that Miami-Dade County

denied certain voters assistance from persons of the voters’ choice. At several precincts, only pollworkers were permitted to assist voters. Oftentimes, the only pollworkers available to provide assistance did not speak Creole. . . . In those circumstances where Miami-Dade County permitted voters assistance from persons of the voters’ choice, the County limited the scope of the assistance assistors of choice could provide. Many of these precincts limited such assistance to reviewing sample ballots with the voters and standing next to them during pollworker demonstrations. This limited assistance was of little value to voters once they entered the voting booth.<sup>220</sup>

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minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”).

215. The Senate Report accompanying the 1975 expansion of the Voting Rights Act to protect language minorities states

[t]he definition of those groups included in ‘language minorities’ was determined on the basis of the evidence of voting discrimination. Persons of Spanish heritage was the group most severely affected by discriminatory practices, while the documentation concerning Asian Americans, American Indians and Alaskan Natives was substantial. No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups: German, 79 percent; Italian, 77.5 percent; French, 72.7 percent; Polish 79.8 percent; and Russian, 85.7 percent.

S. REP. NO. 94-295, at 797 (1975). *See also id.* at 803-05.

216. *See* 42 U.S.C. § 1973aa-6 (2000).

217. *Id.*

218. *Id.*

219. 42 U.S.C. § 1973aa-6. (2000).

220. Complaint ¶ 6, *United States v. Miami-Dade County*, No. 02-21698 (S.D. Fla. June 28, 2002).

The case was eventually settled by a Consent Order that required Miami-Dade County to take a number of steps to “redress” the harm caused to its “Haitian-American voters during the 2000 Presidential election.”<sup>221</sup> Due to Section 208’s inherent limitations, the relief the Consent Order provided was not as comprehensive or as helpful to the Creole speaking community as Section 203 relief would have been had Congress deemed Creole speakers a statutorily protected language minority. For example, the Consent Order enjoined the county defendants from “denying Haitian-American voters with limited English-speaking proficiency assistance from persons of the voters’ choice . . . including interpreting the ballot.”<sup>222</sup> There was, however, no requirement that Miami-Dade County provide Haitian-American voters interpretation services. Under the Consent Order, the best these Creole-speaking voters can hope for is the unobstructed right to bring their own interpreters to the polls.<sup>223</sup>

These vignettes concerning Florida’s recent discrimination against non-English speaking voters demonstrate the vital importance of legal safeguards protecting the fundamental right to cast a ballot irrespective of English fluency. The relatively recent influx of Creole-speaking Haitians and their experiences in South Florida provide ample evidence of the need for congressional expansion of Section 203’s “language minority” definition – if Congress does not act, Haitian-Americans will continue to receive lower levels of voter protection in South Florida than their Spanish-speaking and Native American counterparts.

The dissenting views expressed in the House Report accompanying Section 203’s 1992 amendments suggested that it is appropriate to require English competency to cast a ballot, since prospective citizens must demonstrate English competency to naturalize.<sup>224</sup> This assertion is, however, factually inaccurate and ignores the demographic realities in states like Florida, where even native-born Americans may possess limited English proficiency.<sup>225</sup>

First, a large number of Florida’s Caribbean citizens who need language assistance are native-born United States citizens. For example, sixty percent of Osceola County’s Hispanic population is of Puerto Rican origin.<sup>226</sup> Those voters are native-born United States citizens with

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221. *Id.* ¶¶ 2, 3.

222. *Id.* ¶ 2.

223. *Id.*

224. H.R. REP. NO. 102-655, at 21 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 783.

225. *See, e.g., infra* note 144.

226. U.S. CENSUS BUREAU, OSCEOLA COUNTY, FLORIDA-QT-P9. HISPANIC OR LATINO BY TYPE: 2000, <http://factfinder.census.gov> (select “Data Sets”; select “Decennial Census”; select “Census 2000 Summary File 1 (SF 1) 100-Percent Data” and “Quick Tables”; set “Geographic

a constitutional right to vote that is not predicated on any naturalization process or English language skills.<sup>227</sup> In addition, a sizeable Native American population exists in portions of Florida that are Section 203 covered jurisdictions.<sup>228</sup> As the United States Commission on Civil Rights observed, “[t]he majority of non-English-speaking Americans are native-born citizens constitutionally entitled to vote.”<sup>229</sup>

Moreover, our naturalization laws are far more nuanced than a simple “one size fits all” approach to English proficiency. Aged immigrants who have lived in the United States for many years are not required to demonstrate any English proficiency to naturalize,<sup>230</sup> nor are the disabled if their disability prevents them from learning English.<sup>231</sup> Florida’s population, including its immigrant population, is older on average than the United States population as a whole,<sup>232</sup> increasing the probability that many of Florida’s naturalized citizens will not speak English fluently. It is no accident that Florida was the jurisdiction where a group of plaintiffs filed and successfully litigated a class action on behalf of thousands of aged and disabled naturalization applicants who sought immigration officials’ waiver of the English language naturalization requirement.<sup>233</sup> Finally, even though these individuals may have some basic English proficiency, presumably we want voters to read and understand complex ballot questions such as constitutional amendments — and these matters are often best understood in the voter’s primary language, which is increasingly not English.<sup>234</sup> Language minorities should not possess circumscribed citizenship rights, including a circumscribed right to vote, simply because they possess limited English skills.

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Type” to “County”; set “State” to “Florida”; choose “Osceola County” as geographic selections, select “Add,” and select “Show Result”).

227. See, e.g., 42 U.S.C. § 1973b(e) (2005) (exempting native-born United States citizens who were educated “in American-flag schools in which the predominant classroom language was other than English” from any English language voting requirements).

228. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002) (designating Broward, Collier, and Glades counties as Section 203 covered jurisdictions with respect to the Seminole population).

229. U.S. COMM’N ON CIVIL RIGHTS: CH. 6 ACCESSIBILITY ISSUES, *supra* note 183.

230. 8 U.S.C. § 1423(b)(2) (2000).

231. 8 U.S.C. § 1423(b)(1) (2000).

232. U.S. CENSUS BUREAU, UNITED STATES AND FLORIDA-QT-P1. AGE GROUPS AND SEX: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=Y&-state=QT&-context=QT&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-tree\\_id=4001&-all\\_geo\\_types=N&-redoLog=true&-caller=geoselect&-geo\\_id=01000US&-geo\\_id=04000US12&-search\\_results=01000US&-format=&-\\_lang=EN](http://factfinder.census.gov/servlet/QTTable?_bm=Y&-state=QT&-context=QT&-qr_name=DEC_2000_SF1_U_QTP1&-ds_name=DEC_2000_SF1_U&-tree_id=4001&-all_geo_types=N&-redoLog=true&-caller=geoselect&-geo_id=01000US&-geo_id=04000US12&-search_results=01000US&-format=&-_lang=EN).

233. See generally CAMPOS v. I.N.S., 188 F.R.D. 656 (S.D. Fla. 1999).

234. HYON B. SHIN AND ROSALIND BRUNO, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, U.S. CENSUS BRIEF 2000, at 4-5 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

## VI. FLORIDA'S VOTING RIGHTS LANDSCAPE

Below, the Article discusses instances of minority voting rights infringement, including violations of Section 2 of the Voting Rights Act, violations of the United States Constitution, and other documented discriminatory voting practices that occurred in Florida after Congress amended the Voting Rights Act in 1982. Although Section 2 is a permanent provision (i.e. there is no sunset clause),<sup>235</sup> discussing the breadth of Florida's voting rights problems provides valuable context regarding the need for congressional reenactment of the Voting Rights Act's non-permanent provisions – Sections 5 and 203.

### A. Section 2 Litigation Establishing Voting Rights Violations

#### 1. AT-LARGE ELECTION SYSTEMS

Since Congress amended the Voting Rights Act in 1982, minority voters across Florida have successfully established in eleven separate instances that the at-large election systems various jurisdictions employed discriminated against minority voters on the basis of race.<sup>236</sup> Pure at-large election systems continue to exist in well over half of Florida's sixty-seven counties.<sup>237</sup>

Significantly, this litigation was geographically widespread, but closely correlated with concentrations of Florida's African-American population as measured by the 1990 census,<sup>238</sup> revealing a systemic and state-wide dilution of African-American votes. The litany of discrimination in these cases is a powerful testament to the ongoing need for voting rights protections in Florida. In fact, as the Eleventh Circuit Court of Appeals recognized in 1982, the at-large election systems found throughout Florida were the result of a state-wide scheme to disenfranchise black voters.

In 1945 . . . the Florida Supreme Court outlawed the white primary. *Davis v. State ex rel. Cromwell*, 156 Fla. 181, 23 So. 2d 85 (1945) (en banc). In the very next legislative session, the Florida legislature

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235. 42 U.S.C. § 1973 (2000).

236. *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982); *Aziz v. City of Ft. Myers*, No. 79-57 Civ-FtM-H (M.D. Fla. Feb. 22, 1983); *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984); *Williams v. City of Leesburg*, No. 83-66-CIV-OC-14, 1985 U.S. Dist. LEXIS 14890 (M.D. Fla. Oct. 15, 1985); *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985); *NAACP v. Madison County*, No. TCA-84-7234-WS, 1986 U.S. Dist. LEXIS 24786 (N.D. Fla. May 30, 1986); *Potter v. Washington County*, 653 F. Supp. 121 (N.D. Fla. 1986); *NAACP v. Leon County*, 827 F.2d 1436 (11th Cir. 1987); *NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. 1989); *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (en banc); *Meek v. Metropolitan Dade County*, 985 F.2d 1471 (11th Cir. 1993).

237. Thirty-six of Florida's sixty-seven counties, or nearly fifty-four percent, continue to elect their county commissions through at-large systems. FLORIDA ASS'N OF COUNTIES, COUNTY INFO. BY COUNTY, <http://www.fl-counties.com/flmap.htm>. (last visited Feb. 21, 2006).

238. See *infra* Appendix I.

enacted statutes requiring both primary and general elections to be conducted at-large. 1947 Fla. Laws, ch. 23726, §§ 7, 9. . . . [T]he change had been made to dilute the growing strength of the black vote.<sup>239</sup>

The Eleventh Circuit concluded that in Gadsden County “the at-large election plan was adopted with the motivation of diluting the votes of the minority,” and that “black candidates *have* lost solely because of their race. . . . Blacks comprised 48.5 percent of the registered voters in the county . . . yet they have been consistently unable to elect candidates of their own race due to the extremely high degree of racial polarization in the voting patterns.”<sup>240</sup>

Two years later, a United States Court of Appeals,<sup>241</sup> this time the Fifth Circuit, similarly recognized that at-large election systems in Escambia County for county commission and school board “had their genesis in the midst of a concerted state effort to institutionalize white supremacy.”<sup>242</sup>

State-enforced segregation has created two separate societies in Escambia County in which churches, clubs, neighborhoods and, until recently, schools in the county have remained segregated by race. The lower court found that this ‘continued separation [of blacks] from the dominant white society’ not only has ‘left blacks in an inferior social and economic position, with generally inferior education,’ but has ‘helped reduce black voting strength and participation in government.’<sup>243</sup>

And again, in 1983, along Florida’s southwestern coast in Lee County, a federal District Court found that “purposeful discrimination in the adoption and maintenance of at-large elections for the City Council in Ft. Myers has been established. . . . [A]ctual differential impact and dilution of the minority’s voting power . . . has also been established.”<sup>244</sup>

In 1985, in west-central Florida after years of litigation, the Sarasota City Commission admitted that its at-large election system violated the Voting Rights Act and the federal District Court agreed, finding that “Sarasota elections have been marked by racially polarized voting.”<sup>245</sup>

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239. *Id.*

240. *Id.* (emphasis in original).

241. The Eleventh Circuit Court of Appeals would have ordinarily decided *McMillan v. Escambia County*, 748 F.2d 1037 (5th Cir. 1984). The case, however, had a long and protracted history within the former Fifth Circuit, thus it remained docketed as a Fifth Circuit case pursuant to Section 9(1) of Public Law 96-452, Oct. 14, 1980. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 9(1), 94 Stat. 1994 (1980).

242. *McMillan*, 748 F.2d at 1044.

243. *Id.* (citing *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 17).

244. *Aziz v. City of Ft. Myers*, No. 79-57 Civ-FtM-H, slip op. at 11 (M.D. Fla. Feb. 22, 1983).

245. *James v. City of Sarasota*, 611 F. Supp. 25, 28 (M.D. Fla. 1985).

In a significant coda to the Sarasota case, the Court noted that “[i]n accordance with this Court’s Order of January 25, the city held municipal elections [using single-member districts] on April 9, 1985. For the first time in the city’s history, a black was elected to the city commission.”<sup>246</sup> In a similar 1985 case from Lake County in central Florida, city officials agreed to convert their at-large city commission elections to a system of three single-member districts with two at-large representatives to address allegations that black citizens were denied equal opportunity in city elections.<sup>247</sup>

The next year two counties in north Florida, Madison and Washington counties, admitted liability in response to Voting Rights Act challenges, and agreed to eliminate their at-large county election systems.<sup>248</sup> In Madison County, the federal District Court found

[t]hat because of the lingering effects of historical racial discrimination within Madison County and the State of Florida and racially polarized voting in elections within Madison County, the at-large election system used to elect the Madison County Commission . . . has had the effect of denying black citizens of Madison County an equal opportunity to elect candidates of their own choice in violation of Plaintiffs’ rights under the Voting Rights Act.<sup>249</sup>

The Court enjoined the defendants from providing county-wide at-large elections and required that all “elections henceforth will proceed on a single member district basis.”<sup>250</sup> Leon County, also in north Florida, conceded liability in a similar suit and abandoned at-large elections in favor of five commission districts and two at-large members.<sup>251</sup>

The United States District Court for the Middle District of Florida, when considering voting rights claims originating in central Florida’s Bradford County, observed that “the State of Florida has a long and well documented history of discrimination against black individuals.”<sup>252</sup> The discrimination against blacks was perpetrated not only by the state, but also by the local jurisdictions in Bradford County (specifically the City of Starke).<sup>253</sup>

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246. *Id.* at 32.

247. *Williams v. City of Leesburg*, No. 83-66-CIV-OC-14, 1985 U.S. Dist. LEXIS 14890 (M.D. Fla. Oct. 15, 1985).

248. *NAACP v. Madison County*, No. TCA-84-7234-WS, 1986 U.S. Dist. LEXIS 24786 (N.D. Fla. May 30, 1986); *Potter v. Washington County*, 653 F. Supp. 121 (N.D. Fla. 1986) (elections for county commission and county school board).

249. *NAACP v. Madison County*, 1986 U.S. Dist. LEXIS 24786, at \*2-\*3.

250. *Id.* at \*3.

251. *NAACP v. Leon County*, 827 F.2d 1436, 1437 (11th Cir. 1987).

252. *NAACP v. City of Starke*, 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

253. At the same time plaintiffs filed their lawsuit against the City of Starke, plaintiffs sued the Bradford County Commission and School Board claiming that the relevant at-large election



[T]he evidence is clear that black residents of Starke have suffered from pervasive racial discrimination. Perhaps the clearest example of city-sponsored discrimination can be found in the City Charter of 1927. The Charter explicitly empowered the City Council to establish and set aside separate and distinct districts within the city where blacks and whites could reside.<sup>254</sup>

Starke's *de jure* housing segregation resulted in a concentration of black residents in Starke in the city's northeastern "Reno" area.<sup>255</sup> Even though the black community was geographically compact and accounted for almost one third of the city's total population,

[n]o black person ha[d] ever been elected to serve on the Starke City Commission. Similarly, no black ha[d] ever been elected to serve in any other elected city office which includes the positions of City Clerk and Chief of Police.<sup>256</sup> Additionally, prior to the implementation of a single member district election system for the Board of County Commissioners of Bradford County and the Bradford County School Board in 1986, no black had ever been elected to serve in any elective office in Bradford County.<sup>257</sup>

Continuing the theme of a complete absence of minority representation in Florida local governments elected via at-large systems, the Eleventh Circuit Court of Appeals observed that

[n]ot a single black has ever been elected in Liberty County. The most cross-over support any black candidate has ever received is 40.5% of the white vote. That candidate would have been defeated even if he had received 100% of the black vote. Thus, black voters have never had an opportunity to elect a black representative, despite their manifest preference for those black candidates that have presented themselves.<sup>258</sup>

The Eleventh Circuit held, "as a matter of law" that "the at-large method of electing county commissioners and school board members in Liberty County, Florida denies black voters a fair opportunity to participate in the political process and to elect candidates of their choice."<sup>259</sup>

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schemes discriminated against black voters. Those cases were settled by consent final judgments providing for single-member districts for both bodies. *Id.* at 1529 n.5.

254. *Id.* at 1537.

255. *Id.* at 1529.

256. *Id.* at 1528 (numbering omitted).

257. *Id.* at 1528-29 (footnote omitted; numbering omitted). A visit to Bradford County's website in August 2006 revealed that minority representation continues on the County Commission with Ross Chandler as Commissioner for District 1. <http://www.bradford-co-fla.org> (last visited Aug. 17, 2006) (follow the "County Commissioners" hyperlink; then follow the "District 1" hyperlink).

258. *Solomon v. Liberty County*, 899 F.2d 1012, 1021 (11th Cir. 1990) (en banc) (Kravitch, J., specially concurring) (footnotes omitted).

259. *Id.* at 1013.

A case from Miami-Dade County, located in South Florida, concludes this series of victories eliminating discriminatory at-large election systems. The United States District Court for the Southern District of Florida found and the Eleventh Circuit Court of Appeals affirmed the finding that “the at-large voting system used by Dade County, Florida (‘Dade County’), to elect the members of its County Commission dilutes black and [H]ispanic voting power in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.”<sup>260</sup> The Eleventh Circuit noted that “Dade County’s history of official discrimination, along with the presence of other Senate Report factors, supported a finding of racial bias motivating voting in Dade County.”<sup>261</sup>

At present, an especially interesting case in this same vein involves a challenge the Department of Justice brought on behalf of Hispanic voters in Osceola County, which addresses an allegedly discriminatory at-large electoral system.<sup>262</sup> As previously discussed, Osceola County’s Hispanic population has grown substantially in the last two decades.<sup>263</sup> As of 2004, Hispanics accounted for thirty-five percent of the county’s population.<sup>264</sup> Osceola was one of many Florida counties that maintained an at-large election system for its Board of County Commissioners. “In 1992 the Board voted to place a referendum question on the ballot regarding whether the county should amend its home rule charter to provide for election of the Board from single member districts.”<sup>265</sup> Osceola voters elected to enact this change, and single-member district elections were held for the Board of County Commissioners in 1994 and 1996.<sup>266</sup> “The first Hispanic commissioner in the history of the county was elected under this single-member district system in 1996.”<sup>267</sup> At about the same time, at the urging of some of the commissioners, the county considered returning to the at-large method of electing commissioners, and enacted a referendum returning to the at-large method effective in 1998.<sup>268</sup> “Although numerous candidates have run, no Hispanic candidate has ever been elected to the Board of Commissioners under the at-large method of election, or to any other Osceola County office

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260. *Meek v. Metro. Dade County*, 985 F.2d 1471, 1474-75 (11th Cir. 1993).

261. *Id.* at 1487.

262. Complaint, *United States v. Osceola County*, No. 6:05-CV-1053-ORL-31DAB (M.D. Fla. July 18, 2005).

263. *Id.* at ¶ 8. See also discussion *supra* Part V.A.

264. Complaint ¶ 8, *United States v. Osceola County*, No. 6:05-CV-1053-ORL-31DAB (M.D. Fla. July 18, 2005).

265. *Id.* ¶ 19.

266. *Id.* ¶¶ 19-20.

267. *Id.* ¶ 20.

268. *Id.* ¶¶ 21-23.

elected on a countywide basis.”<sup>269</sup> According to the Department of Justice, among the reasons for the Board of Commissioners favoring the return to at-large elections was the fact that

the members of the Board of Commissioners recognized that there was substantial growth in the Hispanic population between 1992 and 1996. . . . A majority of Board members in 1994-1996 recognized that the growth of the Hispanic population would result in Hispanic voters achieving the ability to elect a candidate of their choice in one or more districts under the single-member district method of election.<sup>270</sup>

This is the kind of retrogressive change that Section 5 review would have likely prevented if such review had been available in Osceola County to hold local authorities accountable for preserving their minority citizens’ electoral rights. Moreover, scrutiny of Florida’s remaining and recurring at-large election schemes and their potentially discriminatory effects is far from over. More than half of Florida’s counties maintain at-large systems even after the Florida Legislature abolished the requirement that they do so in 1984.<sup>271</sup> Many of the remaining thirty-six counties have high minority populations.<sup>272</sup>

269. *Id.* ¶ 13.

270. *Id.* ¶¶ 23-24 (internal numbering omitted).

271. The Eleventh Circuit summarized this history as follows:

Until 1984 the at-large election system was the only method of election available to non-charter counties. . . . Fla. Const. Art. VIII, § 1(e). In that year the constitution was amended to permit commissioners to be elected ‘as provided by law.’ In 1985, § 124.011(1), Fla. Stat. 1985 was enacted, the effect of which was to give non-charter counties the option of adopting an alternate method for electing county commissioners: a five-person board with all elected from single-member districts or a seven-person board with five elected from single-member districts and two elected at-large.

*NAACP v. Leon County*, 827 F.2d at 1444. (Godbold, J., dissenting).

272. For example, Glades County’s population is 10.5% black and 15.1% Hispanic, Marion County’s population is 11.5% black and 6% Hispanic, Okeechobee County’s population is 7.9% black and 18.6% Hispanic, Osceola County’s population is 7.4% black and 29.4% Hispanic. U.S. CENSUS BUREAU, *GLADES, MARION, OKEECHOBEE AND OSCEOLA COUNTIES-QT-P3. RACE AND HISPANIC OR LATINO: 2000*, <http://factfinder.census.gov> (select “Data Sets”; select “Decennial Census”; select “Census 2000 Summary File 1 (SF 1) 100-Percent Data” and “Quick Tables”; set “Geographic Type” to “County”; set “State” to “Florida”; choose appropriate counties as geographic selections, select “Add,” and select “Next”; select table “QT-P3,” select “Add,” and select “Show Result”).

Each of these counties elects its county commission by at large vote. FLORIDA ASS’N OF COUNTIES, *ABOUT FLORIDA’S COUNTIES*, <http://www.fl-counties.com/flmap.htm> (last visited Feb. 26, 2006) (follow the hyperlinks to the individual counties). None of their county commissions contain minority representation. *GLADES COUNTY FLORIDA BOARD OF COUNTY COMM’RS.*, <http://www.myglades.com/> (last visited Feb. 27, 2006) (follow the “Commissioners” hyperlink); *MARION COUNTY FLA. BD. OF COMMISSIONERS*, [http://www.marioncountyfl.org/CO211/CO\\_home.htm](http://www.marioncountyfl.org/CO211/CO_home.htm) (last visited Feb. 27, 2006) (follow the “District 1-5” hyperlinks); *BD. OF COUNTY COMM’RS, OKEECHOBEE*, <http://www.co.okeechobee.fl.us/> (last visited Feb. 27, 2006); *OSCEOLA COUNTY*,

Whether voters and civil rights advocates will ever undertake the Herculean task of systemically analyzing and addressing these potentially discriminatory systems is an open question,<sup>273</sup> and it is worth considering that Congress originally enacted Section 5 precisely because “Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”<sup>274</sup>

## 2. LITIGATION DOCUMENTING OTHER DISCRIMINATORY VOTING PRACTICES

Despite the fact the Eleventh Circuit Court of Appeals ultimately denied the plaintiffs’ requested relief, two cases from that Court addressing challenges to Florida’s judicial election schemes provide additional evidence of discrimination against minority voters.<sup>275</sup> In *Nipper v. Smith*,<sup>276</sup> the Court recounted the following history:

Florida employed various franchise restrictions – from the poll tax to the white primary – for decades in an attempt to restrict the access of black voters to the ballot. . . . Transportation facilities in Florida were segregated until the 1950s, and many area school systems still have not achieved unitary status. Moreover, until 1958, Florida refused to permit black students to attend the University of Florida College of Law. Florida A & M Law School was created in 1951 for black students but was not accredited until several years later. When the state opened another law school in Tallahassee in 1967 at Florida State University, it closed the law school at Florida A & M. . . . Despite the removal of overt badges of segregation, the district court nonetheless found that “black citizens in Florida still suffer in some ways from the effects of Florida’s history of purposeful discrimination,” particularly in terms of socio-economic disparities, such as family income and high school graduation rates. Black citizens in the region covered by the Fourth Circuit have lower median incomes than whites and are more likely to be unemployed and to fall below

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MEET YOUR COMM’RS, <http://www.osceola.org/index.cfm?lsFuses=department/BCC/BCCBios> (last visited Feb. 27, 2006).

273. The only pending challenge to an at-large system is the *Osceola County* case discussed above. See Complaint, United States v. Osceola County, *supra* note 262.

274. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (citing H.R. REP. NO. 89- 439, at 9-11 (1965); S. REP. NO. 89- 162, pt. 3, at 6-9 (1965)). See also 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 (forthcoming 2006), available at <http://sitemaker.umich.edu/votingrights/files/finalreport.pdf>.

275. See generally *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc); *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998).

276. *Nipper*, 39 F.3d 1494.

the poverty line. In addition, the limited evidence presented at trial (reflected in a consensus among the experts) suggested that, although little disparity exists in voter registration, black voter turnout appears to be slightly lower than white turnout. And the ‘rolloff’ effect – which measures the number of voters who sign in at the polls but fail to cast a vote for a particular election on the ballot – is greater among black voters than white voters.<sup>277</sup>

The Court also found that “the record reveals that sufficient racial bloc voting exists in Fourth Circuit and Duval County Court elections, such that the white majority usually defeats the minority’s candidate of choice.”<sup>278</sup>

Similarly, in *Davis v. Chiles*,<sup>279</sup> the Eleventh Circuit held that minority plaintiffs had established that the two judicial districts challenged in that case

share a history of racially polarized voting. In the few elections in which black candidates have competed against white candidates (prior to *Davis*’s initiation of this litigation), no black lawyer has ever won election to either the Second Circuit or Leon County Courts. In each of these black-versus-white elections, the overwhelming majority of black voters supported the black candidates. Notwithstanding this political cohesion among black voters, however, white voters did not supply enough crossover votes for the black candidates to prevail, but instead provided overwhelming support to the white candidates. In 1992, for example, black voters in Leon County gave approximately 98% of their support to a black candidate, but a white candidate who received 68% of the white vote still won the election. As a result of this dynamic, racial bloc voting has become ‘a well-known political reality’ in elections between black and white candidates for the Second Circuit and Leon County Courts.<sup>280</sup>

While the plaintiffs were unsuccessful in securing a remedy in these two cases, circumstances unique to the challenged judicial election systems governed the Court’s decisional rationales.<sup>281</sup> The Eleventh Circuit, however, did not overrule the lower courts’ findings of discrimination, vote dilution, and racially-polarized voting.<sup>282</sup> Moreover, one cannot discount those findings in reviewing Florida’s history. Those findings echo the findings of the three-judge District Court in *DeGrandy v. Wetherell*:<sup>283</sup>

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277. *Id.* at 1507-08, 1507 n.26 (internal citations omitted).

278. *Id.* at 1541.

279. 139 F.3d 1414 (11th Cir. 1998).

280. *Id.* at 1417 (footnotes omitted).

281. *Id.* at 1423-24 (citing *Nipper*, 39 F.3d at 1530-31, 1543-45).

282. *Davis*, 139 F.3d at 1416.

283. 794 F. Supp. 1076 (N.D. Fla. 1992) (three-judge court).

A longstanding general history of official discrimination against minorities has influenced Florida's electoral process. In 1885, Article VI, Section 8 of the Florida Constitution imposed a poll tax which disenfranchised poor minority voters. Additionally, Article XII, Section 12 of the 1885 Florida Constitution segregated African-American and white school children. Article XXVI, Section 24 of that same Florida Constitution also outlawed the intermarriage of white with African-Americans. As recently as 1967, § 350.20, Fla. Stat. provided in part: "The Florida Public Service Commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier." Additionally, § 1.01(6), Fla. Stat. (1967) provided that "the words 'Negro,' 'colored,' 'colored persons,' 'mulatto,' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or Negro blood." Federal precedent has also addressed numerous recent discriminatory election practices in Florida, including at-large election schemes, white primaries, majority vote requirements, and candidate filing fees. Such official state discrimination has adversely affected the ability of minorities to participate in the political process. The parties agree that racially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting. *See In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992*, No. 79-674, slip op. at 34-37 (Fla. May 13, 1992) (Chief Justice Shaw dissenting). In areas such as education, employment and health care, Florida's minorities have borne the effects of discrimination. The 1990 census figures demonstrate that among persons sixteen years or older, African-Americans are more than twice as likely to be unemployed as whites. In Florida, the poverty rate for African-Americans is more than three times higher than the rate for whites. Additionally, we note that voting studies have consistently indicated the strong relationship between socio-economic status and political participation. Thus, the legal barriers and the economic barriers which the legacy of racism has created in the state of Florida, have prevented African-Americans from fully participating in the political process.<sup>284</sup>

The Justice Department has also documented the existence of racially-polarized voting adversely affecting Hispanic voters in central Florida – "[r]acially polarized voting patterns prevail in elections for the Board of Commissioners, and white voters have voted sufficiently as a bloc to enable them usually to defeat the Hispanic voters' preferred

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284. *Id.* at 1079 (internal paragraph divisions omitted).

candidates.”<sup>285</sup>

This strong evidence of racially-polarized voting, persistent use of at-large election schemes that adversely affect minority voters, and the discriminatory practices discussed below illustrate why Section 2’s piecemeal approach to ensuring electoral fairness, standing alone without the additional protections offered by Sections 5 and 203, is simply inadequate in a state as large, diverse, and historically problematic as Florida.

### B. *Other Evidence of Discrimination*

Other evidence of ongoing discrimination against Florida’s minority voters is found in a review of the United States Commission on Civil Rights Report on the 2000 presidential election and in litigation that was filed related to that election.<sup>286</sup> Florida’s administration of the 2000 presidential election and the debacle that followed are synonymous with a governmental electoral system that utterly failed the electorate at every level.<sup>287</sup>

Among that failed electoral process’ most disturbing aspects was the persistent and well-documented racial and ethnic disparity.<sup>288</sup> In its comprehensive investigation of the 2000 presidential election in Florida, the Commission on Civil Rights found evidence of the disparate and unlawful treatment of language minorities discussed above.<sup>289</sup> The Commission also found widespread and disproportionate disenfranchisement of Florida’s minority voters with respect to spoiled ballots, and that “[t]his disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans. Statewide, based on county-level statistical estimates, African American voters were nearly 10 times more likely than white voters to have their ballots rejected in the November

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285. Complaint ¶ 11, *United States v. Osceola County*, No. 6:05-CV-1053-ORL-31DAB (M.D. Fla. July 18, 2005).

286. *See infra* text accompanying notes 287-304.

287. *See, e.g.*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* 44-49 (Foundation Press rev. ed. 2001).

288. *See, e.g.*, U.S. COMM’N ON CIVIL RIGHTS, *VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, APPENDIX VII: REPORT BY DR. ALLAN J. LICHTMAN ON THE RACIAL IMPACT OF THE REJECTION OF BALLOTS CAST IN THE 2000 PRESIDENTIAL ELECTION IN THE STATE OF FLA.*, Allan J. Lichtman (2001) (hereinafter “LICHTMAN REPORT”), <http://purl.access.gpo.gov/GPO/LPS17743> (follow the “Report on Voting Irregularities in Florida During the 2000 Presidential Election” hyperlink; then follow the “Appendices” hyperlink; then follow the “Appendix VII: Report by Dr. Allan J. Lichtman on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida” hyperlink; follow the “Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida” hyperlink).

289. *See* discussion *infra* Part VI.B.

2000 election.”<sup>290</sup> In reaching this conclusion, the Civil Rights Commission relied on the expert testimony and report of Dr. Allan Lichtman, who conducted a comprehensive statistical analysis of Florida’s spoiled ballots in the 2000 election.<sup>291</sup> Dr. Lichtman found that “blacks were far more likely than non-blacks to experience the rejection of ballots cast in Florida’s 2000 election.”<sup>292</sup>

There were also problems at the polls due to Florida’s flawed procedures regarding eligible voter list maintenance, and those problems had a disproportionate impact on minority voters.<sup>293</sup> Florida permanently disenfranchises former felons, “which produces a stark disparity in disenfranchisement rates of African American men compared with their white counterparts.”<sup>294</sup> While the advisability of such a state policy and its discriminatory effects is debatable,<sup>295</sup> there is no debate that in the list maintenance (or “voter purge”) process leading up to the 2000 election, something went terribly wrong and thousands of voters who should not have been disenfranchised ended up on Florida’s “purge list.”<sup>296</sup> A private data corporation contracted by Florida created the now infamous list. The corporation, acting on Florida election officials’ instructions, purposely utilized extremely broad matching criteria guaranteed to produce “false positives” or partial data matches.<sup>297</sup> The corporation then gave the purge lists to supervisors of elections in Florida’s sixty-seven counties with few instructions and little oversight, though, at the time, Florida election law put the onus on the voter to establish their voter eligibility.<sup>298</sup> Supervisors of elections in the various counties treated the list differently, but there is widespread agreement that the

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290. U.S. COMM’N ON CIVIL RIGHTS: CH. 9 FINDINGS AND RECOMMENDATIONS, *supra* note 184. Florida Highway Patrol troopers also conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominately African American neighborhood. *Id.*

291. LICHTMAN REPORT, *supra* note 288.

292. *Id.*

293. *Id.*

294. U.S. COMM’N ON CIVIL RIGHTS: CH. 9 FINDINGS AND RECOMMENDATIONS, *supra* note 184. The Report also notes that “[t]hirty-one percent of the Florida disenfranchised population consists of African American men.” *Id.*

295. See generally *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (suit against Florida Clemency Board alleging that Florida’s felon disenfranchisement law violates the Florida Constitution, the United States Constitution’s Equal Protection Clause, and 42 U.S.C. § 1973).

296. The voter exclusion list was designed to include not only persons convicted of a felony in Florida, but also persons who had been determined mentally incompetent, persons who had duplicate registrations in more than one Florida county, and persons who were convicted of felonies in other states. U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION: CH.5, THE REALITY OF LIST MAINTENANCE (2001), <http://purl.access.gpo.gov/GPO/LPS17743> (follow the “Report on Voting Irregularities in Florida During the 2000 Presidential Election” hyperlink; then follow the “Chapter 5, The Reality of List Maintenance” hyperlink).

297. *Id.*

298. *Id.*



list's numerous errors disproportionately affected African-American voters. In Hillsborough County it was reported that the "supervisor of elections estimated that 15 percent of those purged were purged in error and they were disproportionately African American. . . . [A]nother source estimated that 7,000 voters [in Hillsborough County], mostly African Americans and registered Democrats, were removed from the list."<sup>299</sup> "[I]n Miami-Dade County, over half of the African Americans who appealed from the Florida felon exclusion list were successfully reinstated to the voter rolls."<sup>300</sup>

Florida's flawed voter list maintenance procedures, its spoiled ballots, and other shortcomings that disproportionately affected minority voters formed the basis for a Voting Rights Act challenge filed by the NAACP and African American voters against Florida agencies, the supervisors of elections in seven counties, and the corporation which produced the purge list.<sup>301</sup> The litigation resulted in a series of settlement agreements with the various defendants which provided, among other things, that the private corporation re-run the purge data with more exacting matching criteria, and that Florida state officials undertake remedial action to restore those voters who may have been erroneously purged from the voter lists as a result of the prior overbroad matching criteria.<sup>302</sup> The settlement agreement with state officials also required that Florida conduct future voter list maintenance procedures with more exacting data-matching criteria.<sup>303</sup> Settlement agreements between plaintiffs and supervisors of elections in the various counties also provided for remedial actions in future elections.<sup>304</sup>

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299. *Id.*

300. *Id.*

301. Amended Complaint Class Action, NAACP v. Harris, No. 01-0120 (S.D. Fla. July 6, 2001) (on file with author) (naming the Florida Secretary of State, the Director of the Florida Division of Elections, the Director of the Florida Department of Highway Safety and Motor Vehicles and the Secretary of the Florida Department of Children and Families as defendants as well as the supervisors of elections in Miami-Dade, Broward, Duval, Hillsborough, Leon, Orange, and Volusia counties).

302. Order Granting Plaintiffs' and Defendant Choicepoint's Motion for Approval of Settlement Agreement, NAACP v. Harris, No. 01-0120-CIV-GOLD (S.D. Fla. July 9, 2002) (on file with author) (settlement between Plaintiffs and Defendant ChoicePoint Inc., d/b/a Database Technologies, Inc.); Settlement Agreement at ¶¶ A.6-A.7, NAACP v. Harris, No. 01-0120-CIV-GOLD (S.D. Fla. July 28, 2002) (attached to aforementioned Order as "Exhibit A"); Settlement Agreement, NAACP v. Smith, No. 01-0120-CIV-GOLD (S.D. Fla. July 10, 2002) (on file with author) (settlement between Plaintiffs and Defendants Jim Smith, Secretary of State of Florida and Edward G. Kast, Director of the Division of Elections); Letter from Richard E. Doran, Fla. Att'y Gen. to Joseph D. Rich, Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice (Dec. 9, 2002) (on file with author) (letter and accompanying attachments refer to Submission of Settlement Agreements in *NAACP v. Harris*, Section 5 Submission Nos. 2002-2520 and 2002-5023).

303. *Id.*

304. Order Granting Plaintiffs' and Defendant David C. Leahy's Motion for Approval of

Despite these agreements and electoral reform legislation that followed the 2000 election,<sup>305</sup> there is ample evidence that Florida's difficulties with voter list maintenance and election administration mechanics are far from over and that problems in those areas continue to disenfranchise minority voters at a disproportionately high rate. For instance, Florida's list maintenance procedures in anticipation of the 2004 presidential election present an especially concerning case. In supposed accord with both legislative changes and the settlement agreement with the *NAACP v. Harris* plaintiffs, the Florida Division of Elections undertook the creation of a new purge list.<sup>306</sup> When civil rights groups screened the list, however, they discovered that as many as 25,585 former felons who had received clemency remained on the purge list.<sup>307</sup> After news organizations obtained copies of the purge list from state officials, they discovered – and reported – that “[i]t did not include the names of Hispanic voters, while it included many black voters who had actually had their voting rights restored.”<sup>308</sup> When these gross disparities were revealed, state election officials instructed county supervisors of elections not to use the list<sup>309</sup> and requested an audit by the Department of State's Inspector General.<sup>310</sup> The audit concluded that, although there was no evidence of a purposeful effort to disenfranchise African-American voters, the list had been created in such a way that African-Americans were overrepresented and Hispanics were virtually non-existent. Furthermore:

\* The department relied on flawed data from the Office of Executive Clemency when drawing up the felons list. For example, the office

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Settlement Agreement, *NAACP v. Katherine Harris*, No. 01-120 (S.D. Fla. 2002) (on file with author) (Settlement Agreement dated Aug. 6, 2002, providing, *inter alia*, for adequate staffing and equipping of precincts).

305. Florida Election Reform Act of 2001, 2001 Fla. Sess. Law Serv. Ch. 2001-40 (C.S.S.B. 1118) (West).

306. Press Release, Fla. Dep't of State, Statement on Potential Felon Database (July 10, 2004), available at [http://www.dos.state.fl.us/press/oss/hood\\_felon\\_data.html](http://www.dos.state.fl.us/press/oss/hood_felon_data.html).

307. Jim Ash & George Bennett, *Study Raises Issue About Data Used in Purge of Felons*, PALM BEACH POST, June 9, 2004, at 1A, available at 2004 WLNR 3042107. See also Abby Goodnough, *In Florida, Wrestling Again Over Felons and Voting*, N.Y. TIMES, June 9, 2004, at A16, available at 2004 WLNR 5603633; Erika Bolstad, Jason Grotto, & David Kidwell, *Thousands of Eligible Voters Are on the Felon List*, MIAMI HERALD, July 2, 2004, at 1A, available at 2004 WLNR 19456198.

308. Gary Fineout & Marc Caputo, *State Ceases Felon Voting Purge*, MIAMI HERALD, Aug. 14, 2004, at 6B, available at 2004 WLNR 19465033. See also Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N. Y. TIMES, July 10, 2004, at A13, available at 2004 WLNR 4782830 (“Of nearly 48,000 Florida residents on the felon list, only 61 are Hispanic. By contrast, more than 22,000 are African-American.”).

309. Fineout & Caputo, *supra* note 308.

310. S.V. Date, *Second Probe Ordered of Felon List Barring Vote*, PALM BEACH POST, July 24, 2004, at 3A, available at 2004 WLNR 3026947.

did not initially turn over the names of more than 5,000 felons whose civil rights were restored before 1977 because the office did not have birth dates for those people. In June, when asked about this possible flaw, state officials denied that it was a problem.

\* The department did not ensure that some changes to the central voter database were approved by the U.S. Department of Justice, which must sign off on any new procedures that affect voting rights of minorities.

\* The department did not always comply with a legal agreement it reached in 2002 with the NAACP over how to use the central voter database and the felons list.<sup>311</sup>

In the September 2002 primary election, a more local but no less significant systems failure occurred in Miami-Dade County. The County Inspector General described this election “as nothing less than a debacle.”<sup>312</sup> This systems problem also disproportionately affected black voters, who were far more likely to have their votes “lost” than other voters.<sup>313</sup>

## VII. CONCLUSION

The lingering effects of Florida’s recent – and nationally prominent – voting failures have eroded confidence in Florida’s electoral system, particularly among its minority voters.<sup>314</sup> While Section 5 is not a panacea, maintaining a framework of federal scrutiny for Florida’s voting changes is important in regaining and retaining public confidence in the electoral system. Section 5 is also vital in ensuring that voting changes are scrutinized regarding their fairness to minority voters. Furthermore, Sections 203 and 4(f)(4) continue to guarantee a vital opportunity for Florida’s language minorities to meaningfully participate in the electoral process. In sum, congressional reenactment of the Voting Right’s non-permanent sections is an essential step in providing Florida’s minority voters access to the ballot box.

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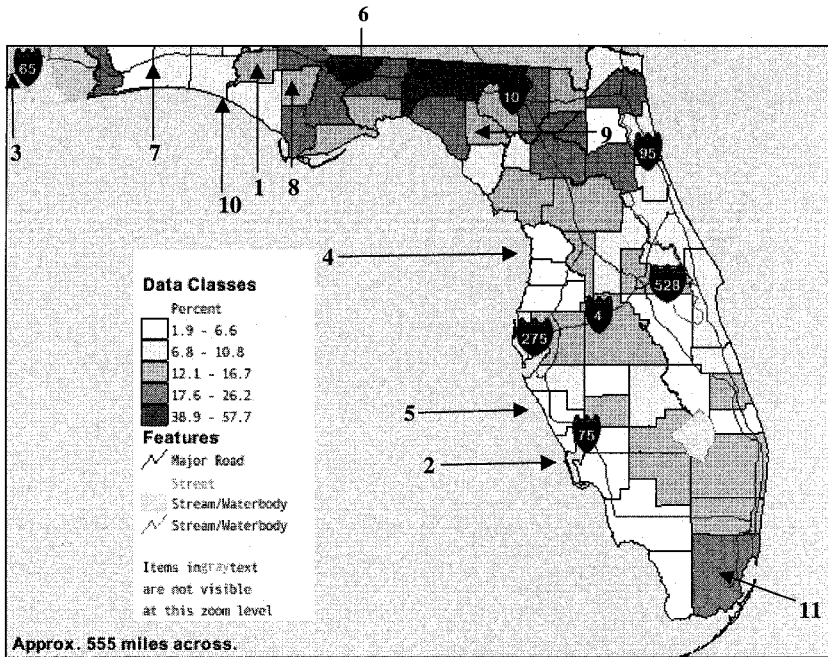
311. Gary Fineout, *Felons List Audit Faults State*, MIAMI HERALD, Nov. 23, 2004 at 1B, available at 2004 WLNR 19388043.

312. Memorandum and Office of the Inspector Gen. Report from Christopher Mazzella, Inspector Gen., to Alex Penelas, Mayor Miami-Dade County, *et al.*, at 1 (Sept. 20, 2002), available at <http://www.miamidadeig.org/archives/Sept102002election.pdf>.

313. HUGH GLADWIN, ANALYSIS OF DATA ON PRECINCTS REPORTING PROBLEMS WITH I-VOTRONICS VOTING MACHINES IN MIAMI-DADE COUNTY (2002), <http://www.acluf.org/pdfs/RacialImpactReportFINAL.pdf>.

314. Indeed, a recent survey commissioned by Florida indicates that Florida’s black and Hispanic voters are far less confident that their votes will be counted than their white counterparts. COLLINS CENTER FOR PUBLIC POLICY, 2004 VOTER SATISFACTION SURVEY (2004), at 3, available at [http://www.collinscenter.org/usr\\_doc/2004\\_voter\\_survey\\_tables.pdf](http://www.collinscenter.org/usr_doc/2004_voter_survey_tables.pdf) (black and Hispanic voters reported “excellent” confidence levels at 40% and 42% respectively, while white voters reported excellent confidence levels at 66%).

**Appendix I**  
**1990 CENSUS: Concentration of Black Persons by County**  
*Showing Where Cases of Vote Dilution in At-Large Elections Was Established*



In the eleven years following the 1982 amendments to the Voting Rights Act, minority voters across the state of Florida successfully established that the at-large election systems employed by various jurisdictions discriminated against them on the basis of race eleven times. The following is a chronological list of the cases and the counties where they arose:

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|--|-------------------|
| 1. <i>NAACP v. Gadsden County School Board</i> , 691 F.2d 978 (11th Cir. 1982):                | Gadsden County    |
| 2. <i>Aziz v. City of Ft. Myers</i> , No. 79-57 Civ-FIM-H (M.D. Fla. Feb. 22, 1983):           | Lee County        |
| 3. <i>McMillan v. Escambia County</i> , 748 F.2d 1037 (5th Cir. 1984):                         | Escambia County   |
| 4. <i>Williams v. City of Leesburg</i> , 1985 U.S. Dist. LEXIS 14890 (M.D. Fla. Oct 15, 1985): | Lake County       |
| 5. <i>James v. City of Sarasota</i> , 611 F. Supp. 25 (M.D. Fla. 1985):                        | Sarasota County   |
| 6. <i>NAACP v. Madison County</i> , 1986 U.S. Dist. LEXIS 24786 (N.D. Fla. May 30, 1986):      | Madison County    |
| 7. <i>Potter v. Washington County</i> , 653 F. Supp. 121 (N.D. Fla. 1986):                     | Washington County |
| 8. <i>NAACP v. Leon County</i> , 827 F.2d 1436 (11th Cir. 1987):                               | Leon County       |
| 9. <i>NAACP v. City of Starke</i> , 712 F. Supp. 1523 (M.D. Fla. 1989):                        | Bradford County   |
| 10. <i>Solomon v. Liberty County</i> , 899 F.2d 1012 (11th Cir. 1990):                         | Liberty County    |
| 11. <i>Meek v. Metropolitan Dade County</i> , 985 F.2d 1471 (11th Cir. 1993):                  | Dade County       |