REDISTRICTING IN TODAY'S SHIFTING RACIAL LANDSCAPE

Abigail Thernstrom*

"*I was shortsighted, naïve and narrow-minded to endorse the concept of drawing Congressional districts to take racial demographics into account.*"[1]

INTRODUCTION

Cynthia Tucker, in her confessional editorial in the South's premier newspaper, was too hard on herself. She had long supported race-conscious districting, but her erstwhile convictions had been those of the entire civil rights community and of elected officials across the political spectrum who saw such districting as one litmus test of a commitment to racial equality.[2] As the only Black editorial page editor of a major newspaper, Tucker could hardly have thought anything else.

*Abigail Thernstrom is the vice-chair of the U.S. Commission on Civil Rights and an adjunct scholar at the American Enterprise Institute. She received her Ph.D. from the Department of Government, Harvard, in 1975, and is the author of two books on minority voting rights.

1. Cynthia Tucker, *Voting Rights Act: I Was Wrong About Racial Gerrymandering*, ATLANTA J.-CONST. BLOGS (June 1, 2011, 8:00 AM), http://blogs.ajc.com/cynthia-tucker/2011/06/01/voting-rights-act-i-was-wrong-about-racial-gerrymandering.

2. In 1993, Justice O'Connor wrote an emotional, arresting opinion for the Court in *Shaw v. Reno*, 509 U.S. 630 (1993), in which she argued that race-based districting "segregates" voters. *Id.* at 630. It prompted an avalanche of criticism, and in his swearing-in ceremony as assistant attorney general for civil rights in March 1994, Deval Patrick promised "to restore the great moral imperative that civil rights is finally all about," with the enforcement of voting rights as one of his priorities. *See Agenda for New Aide at Justice: Chicagoan Takes Civil Rights Reins*, CHI. TRIB., Apr. 15, 1994, at 7. That "moral imperative" evidently included renewing the commitment to race-driven districting that O'Connor had questioned. In a speech before the NAACP National Convention in July 1994, Patrick called *Shaw* "an alternately naïve and venal decision," and accused the Court of starting down the path of "an exclusion of Black and other minority representatives from positions of power." MAURICE T. CUNNINGHAM,

In addition, it was in fact neither shortsighted nor naïve to have regarded the deliberate drawing of districts sure to elect minority candidates to legislative office as important in earlier times. As Tucker herself notes, "[T]he tactic worked. In 1980, there were only 18 Blacks in the U.S. House of Representatives. Now, there are 44, many of them elected from districts drawn to meet the mandates of the Voting Rights Act."[3] They were drawn, that is, to conform to the demands of section 5, the preclearance provision of the statute—as it was *interpreted* in both Democratic and Republican administrations.[4]

The preclearance provision demands that districting maps in jurisdictions considered "covered" (which are mainly in the South) obtain approval from the Justice Department or the District Court of the District of Columbia before being implemented.[5] The districts that sent many new Black

MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE 60 (2001) (quoting Deval Patrick, Remarks at the NAACP National Convention (July 12, 1994)).

That November, Patrick suggested that the 1993 decision and the lower court rulings that followed in its wake were reminiscent of 1901, when the last Black Reconstruction congressman from North Carolina left Washington. *See id.* at 60 (quoting Deval Patrick, remarks for Fall 1994 Rubin Lecture at Columbia School of Law, New York (Nov. 2, 1994)).

Patrick's reaction was far from unique. Two years later years, awaiting decisions on the constitutionality of racially gerrymandered districts in post-*Shaw* cases, Ted Shaw of the NAACP's Legal Defense and Educational Fund warned: "If we lose these cases, the Congressional Black Caucus will be meeting in the back seat of a taxicab." *Is an All White Congress Inevitable?*, N.Y. BEACON, Dec. 13, 1995, at 2. Representative Mel Watt took the point one step further. "Without these districts," he said, "you're not going to have minority representation in Congress. It's just that simple." *Id.*

3. Tucker, *supra* note 1.

4. The fact that Republicans were equally committed to the preclearance provision and to the race-conscious districting that section 5 mandated was evident by the simple fact that it supported repeated renewals of section 5 in 1970, 1975, 1982, and most recently in 2006, where the vote for renewal was almost unanimous in both houses of Congress. In addition, John Dunne, appointed by President George H. Bush, was the assistant attorney general for civil rights from 1990 to 1993 and an unambivalent champion of race-based districting to maximize minority office-holding. His alliance with the ACLU and the state Black caucus served the Republican Party's interests: what the ACLU called a "max-Black" plan was also "max-White"—more Black voters in some districts meant fewer in others, and, in the South particularly, districts that had been "bleached" were fertile ground for Republican political aspirations. William Bradford Reynolds preceded Dunne and throughout the 1980s routinely objected to districting plans that were not "fairly drawn," defined as providing safe minority seats in proportion to the minority population. This history is spelled out in ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 157-91 (1987).

5. 42 U.S.C. § 1973c(a) (2006). A jurisdiction "covered" by section 5 was one that met two criteria: total voter turnout (Black and White) below 50% and the use of a literacy test, which those who wrote the statute knew to be fraudulent in the South. The logic of the statistical trigger was clear. Literacy tests were, in fact, constitutional, the Supreme Court had held in 1959, but the framers of the Act knew the South was using

representatives to Congress would not have been precleared for use in upcoming elections unless the states had been able to prove their plans did not "have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color."[6] Those that have been precleared have usually been drawn to guarantee safe seats for minority candidates.

How many Black House members would have been elected had they not been protected from White competition in the safe majority-minority districts that the Voting Rights Act came to demand? Far fewer, it is safe to say. A number of critics of section 5 began arguing against race-driven electoral maps as early as the 1980s. The balance between costs and benefits was not a simple question when White southern voters would not vote for Black candidates, whatever their credentials.[7]

The importance of descriptive representation—Blacks representing Blacks—cannot be dismissed. The history of Whites-only legislatures in the South made the presence of Blacks both symbolically and substantively important. Shared political power was integral to respect and self-respect. And, in recent decades, Black electoral success never dissipated that yearning for both—which was surely one reason African-American

fraudulent tests to stop Blacks from registering. Blacks were being tested on such questions as the number of bubbles in a soap bar, or their ability to read the *Beijing Daily*. Endless litigation over which tests were legitimate was time-consuming and often only temporarily effective, at best. Nothing could be easier than for jurisdictions to devise another, equally discriminatory test.

Thus, those who designed the legislation took the well-established relationship between literacy tests and low voter participation in the South and used the carefully chosen 50% turnout figure as circumstantial evidence indicating the use of intentionally fraudulent, disfranchising tests. Critics complained that "fair and effective enforcement of the 15th amendment call[ed] for precise identification of offenders, not the indiscriminate scatter-gun technique evidenced in the 50 percent test." But the 50% turnout test *was*, in fact, "precise and effective"—it meant that the Act covered exactly the states where it was most needed, and no others.

From the inferred presence of egregious and *intentional* Fifteenth Amendment violations in any state that had both a literacy test and low voter turnout, several consequences followed. Literacy tests in the covered jurisdictions—all in the South—were suspended and, at the discretion of the attorney general, federal "examiners" and observers were sent to monitor elections. In addition, section 5 stopped all "covered" states and counties (those identified by section 4's statistical trigger) from instituting any new voting procedure without prior federal "preclearance."

6. 42 U.S.C. § 1973c(a) (2006).

7. Among the most prominent of those critics was University of South Carolina Law School professor Katharine Inglis Butler. *See* Katharine Inglis Butler, *Reapportionment, the Courts, and the Voting Right Act: A Resegregation of the Political Process?*, 56 U. COLO. L. REV. 1 (1984). My own critical views were spelled out in THERNSTROM, *supra* note 4.

voters were so euphoric when Barack Obama won the 2008 presidential election.[8]

Racially integrated legislative settings worked to change racial attitudes. Most southern Whites had little or no experience working with Blacks as equals and undoubtedly saw dark skin as a sign of incompetence. When Blacks became legislative colleagues, their presence inhibited the expression of racist sentiments, and conversations in the public arena changed.[9]

And yet not only Ms. Tucker but many spokesmen for Black political interests are today beginning to question their prior commitment to what the ACLU once called "max-Black" districting.[10] The racial zeitgeist is changing as racism wanes. Civil rights advocates no longer predictably embrace a policy that once seemed clearly in the interest of African Americans. In 1995, Representative Melvin Watt (D-N.C.) argued that without racially gerrymandered districts designed to ensure Black office-holding "you're not going to have minority representation in Congress. It's just that simple."[11] Today, by contrast, Watt is arguing that the goal of the Vot-

8. Obama's victory contradicted everything most Black voters had long been led to believe. Even as his candidacy began to take off, the word on the street was still that most Whites would never vote for a Black candidate. America in Black and White, separate and unequal—that was still the conventional wisdom, particularly in African-American circles.

On November 4, 2008, it became clear how dated that picture was, as fears of the "Bradley effect" gave way to returns that closely matched pre-election predictions. Tears flowed, *Washington Post* writer Kevin Merida reported, not only in response to Obama's victory, "but because many were happily discovering that perhaps they had underestimated possibility in America." *See* Kevin Merida, *America's History Gives Way to Its Future*, WASH. POST, Nov. 5, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/05/AR2008110500148.html. In Milton, Massachusetts, novelist Kim McLarin told Merida that she had stood at the polling place overwhelmed. "I've been forced to acknowledge . . . there has been a shift—it's not a sea change. But there's been a decided shift in the meaning of race," she said. *Id.* Countless other such stories were heard in the days after the election. Blacks and Whites alike acknowledged that their fears of racist resistance to a Black president had been misplaced. *Id.*

9. I can think of no empirical evidence that supports the point, but in the 1980s I travelled extensively in the South working on my first book on minority voting rights, THERNSTROM, *supra* note 4, and numerous White legislators expressed astonishment at the change in racial attitudes for which the passage of the Voting Rights Act was responsible. I remember, for instance, an Alabama legislator who said that prior to 1965 he never thought of dining with a Black person, but once Blacks arrived in the legislature, he needed to share meals to discuss mutual legislative business. And by the time I interviewed him, he had brought a Black man into his law firm as a partner. Even a decade earlier, that would have been inconceivable.

10. The "max-Black" description is quoted in *Miller v. Johnson*, 515 U.S. 900, 907 (1995).

11. *Is an All White Congress Inevitable?*, *supra* note 2, at 2.

ing Rights Act was "to level the playing field for African American candidates and voters. It was not designed to create racial ghettos."[12]

Tucker and Watt are not the only Black voices on the political left questioning the old civil rights orthodoxy with respect to race-based districting, although the grounds upon which they break with the old assumptions differ. Tucker's focus was with the politicians elected from safe minority districts who "found that they could indulge in crude racial gamesmanship and left-wing histrionics," while Rep. John Lewis expressed concern that the drive for majority-Black districts was reducing the political power of Democrats.[13] Thus he argued in testimony in a 2002 case that lowering the Black percentages in majority-minority districts would place more Blacks in majority-White settings, helping White liberals get elected.[14] If Democrats became the minority in the legislature, he explained, Black representatives would lose important committee chairmanships. "I happen to believe that it is in the best interest of African American voters . . . to have a continued Democratic-controlled legislature," he said.[15] Almost every African-American member of the state senate, including the majority leader, shared his concern.[16] Republican state legislators drew the post-2010 maps in North Carolina. "Opponents say Republicans have twisted those laws and court rulings to justify packing Black voters into a few districts and preventing them from having broader influence on Election Day," the Raleigh-based *News Observer* reported in September, 2011.[17] "'The Republican effort in this redistricting is offensive,' said Senator Dan Blue, a Raleigh Democrat. 'It is race-based.'"[18] Had Blue just woke up to the fact that Voting Rights Act enforcement had

12. David G. Savage, *Justice Department Walks a Line on Political Redistricting*, L.A. TIMES (Aug. 13, 2011), http://articles.latimes.com/2011/aug/13/nation/la-na-justice-redistricting-20110814.

13. *See* Tucker, *supra* note 1. On Lewis's views, *see infra* note 14.

14. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 92 (D.D.C. 2002). It is important to note, however, that Lewis later took the point back when the proposed 2006 amendments to section 5 were before Congress, and voting rights advocates were successfully working to overturn the Supreme Court's 2003 decision that adopted the view of Lewis and Black state legislators.

15. *Id.* As of 2001, Democrats held every southern congressional district that was at least 40% Black, a testimony to Black political power in the new South. CHARLES S. BULLOCK & MARK J. ROZELL, THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 12 (2d ed. 2003). As Bullock and Rozell have noted, "Since the implementation of the 1965 Voting Rights Act, Black votes have become the mainstay of the Democratic Party—the vote without which few Democrats can win statewide." *Id.*

16. *See Ashcroft*, 195 F. Supp. 2d at 41-44.

17. Lynn Bonner & David Raynor, *Proposed N.C. Voting Maps Confound*, NEWSOBSERVER.COM, (Sept. 25, 2011, 7:35 AM) http://www.newsobserver.com/2011/09/25/1516076/proposed-voting-maps-confound.html. On the Republican commitment to race-based districts, see THERNSTROM, *supra* note 4.

18. Bonner & Raynor, *supra* note 17.

long involved race-based districting and Republicans benefited from the concentration of Blacks, which bleached surrounding areas, giving Republicans additional seats?

As soon as the results of a decennial census are released, allowing states to study the demographic change that the data reveal, the process of drawing new districting lines begins. In the past, new districting maps and other changes in the method of election were normally submitted to the Justice Department.[19] The use of the D.C. Court was the rare exception. The administrative route is faster and cheaper. But for the first time in the life of the 1965 statute, a Democratic Justice Department—one that reportedly has hired numerous new attorneys drawn from the ACLU and other civil rights advocacy groups—is reviewing proposed new lines to determine their compliance with the nondiscriminatory standards of section 5.[20] As a consequence, a number of states have chosen to submit their new districting maps to the seldom-used D.C. District Court; others have decided to forgo the administrative preclearance option or to hedge their bets by submitting the new maps to both the court and the Justice Department.[21]

19. The option of seeking administrative preclearance (DOJ approval) was provided as an alternative to litigation to permit the expeditious handling of submissions. Unexpectedly, however, the use of the D.C. Court quickly became the rare exception for two reasons: time and money. It was faster and cheaper to go to the Justice Department because the process was more collaborative than adversarial. Letters, telephone conversations, and negotiation could replace litigation. But a DOJ decision to approve or object to a proposed change could not be appealed. If preclearance were refused and the state or county wanted to fight on, its only option was to begin anew in the D.C. Court—to start the process all over again, with no weight given to the administrative ruling, and with the United States (as defendant) ready and able to mount a vigorous defense. *See infra* note 21.

In any case, seeking preclearance from the D.C. Court was, as UCLA law professor Daniel Hays Lowenstein has said, an "utterly impracticable" option when the question was the legitimacy of new districting lines—a frequently submitted change in voting procedure. In the wake of a decennial census, there is no time to spare; elections must go forward. The jurisdiction might end up with a map at odds with its own (often legitimate) priorities, but at least the process of negotiation with the Justice Department was limited to sixty days, after which legislators would know what sort of plan would receive federal approval. Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 814 (1998).

20. The charge that the "the most radical, ideologically left-wing advocacy organizations in Washington" have taken control of the Civil Rights Division in the Justice Department has been made by former DOJ attorney Hans von Spakovsky. Hans A. von Spakovsky, *Radicalizing Civil Rights: The People Behind the Civil Rights Division's Politicization*, NAT'L REV. ONLINE (Mar. 9, 2010, 4:00 AM), http://www.nationalreview.com/articles/229277/radicalizing-civil-rights/hans-von-spakovsky?pg=1.

21. The greater use of the D.C. Court for preclearance purposes or, alternatively, the decision to submit changes in districting maps and other aspects of the electoral process has been reported by many news outlets—too many to list here. *But see, e.g.*, Sandhya Somashekhar, *Louisiana Redistricting Seen as Crucial Test of Voting Rights Act*, WASH. POST, June 4, 2011, at A3. She reports that "Virginia and Louisiana took

The voices of Tucker and Representatives Watt and Lewis, breaking with civil rights orthodoxy on the benefits of race-conscious districting, are just one indicator of the extent of racial progress in the almost half century since the 1965 statute was passed. Disfranchisement, as it was then understood, has disappeared as a threat. American politics reserved for White voters and White politicians describes a bygone era. Today's allegations of electoral exclusion involve voter identity, felon enfranchisement, and other issues that are not remotely analogous to the physical and economic danger that Blacks in the Deep South faced if they tried to register to vote in the years before the passage of the Voting Rights Act.

We now live in an America far removed from that of the Jim Crow South where in the summer of 1964 Andrew Goodman, Michael Schwerner, and James Chaney, three courageous young men who had volunteered to register Black voters in Mississippi, were murdered by the Ku Klux Klan.[22] Disfranchisement at the time was a morally simple issue, and the Voting Rights Act, passed the next year, was beautifully designed to achieve a simple goal: ballots for southern Blacks.

The logical and elegant construction of the statute did not last long. The definition of disfranchisement also lost its moral clarity. Before the end of the decade the problem of disfranchisement had been redefined to include at-large voting, district lines disadvantageous to Black voters, and other electoral procedures that "diluted" the power of Black ballots.[23] In 1976 in *Beer v. United States*, the Supreme Court, in its first redistricting case, laid out the standards by which to judge districting maps with a discriminatory impact.[24]

Whether the city could have devised a plan likely to result in more Black councilmen was not the question, Justice Potter Stewart wrote for a majority of five. Courts should ask instead whether the "ability of minority groups to participate in the political process and to elect their choices to

---

the unusual step of sending their plans to Justice as well as the U.S. District Court in Washington, where their application will be reviewed by a three-judge panel." *Id.* A state legislator from Louisiana called these tactics "'two bites at the apple.'" *Id.* The decision of Texas to go straight to the D.C. Court has gotten perhaps the most press attention. *See, e.g.*, Nolan Hicks, *Judges to Ensure Texas Primaries Stay on Schedule*, SAN ANTONIO EXPRESS-NEWS, Oct. 1, 2011, at 1A, *available at* http://www.mysanantonio.com/news/politics/texas_legislature/article/Judges-to-ensure-Texas-primaries-stay-on-schedule-2197189.php#ixzz1ZdTSOBse; Ryan J. Reilly, *DOJ: Rick Perry's Texas Congressional Redistricting Map Violates Voting Rights Act*, TALKING POINTS MEMO (Sept. 19, 2011, 2:57 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/09/justice_department_signals_concerns_with_rick_perrys_texas_redistricting_map.php?ref=fpa.

22. For an extensive discussion of this history, see STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 25-149 (1997).

23. Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969).

24. 425 U.S. 130 (1976).

office [had been] augmented, diminished, or not affected by the change in voting."[25] The purpose of section 5 was to bar changes that would result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[26] Since new district lines had actually increased the likelihood of a victorious Black candidate, they could hardly be termed discriminatory ("retrogressive").

Beer is still good law, but today the *Beer* standard has largely been discarded.[27] Texas has recently asked the D.C. District Court to preclear maps for the state's house and congressional districts, and, in the wake of a surge in population (mostly Latino) the question is precisely that which Justice Stewart said was irrelevant: must a newly drawn map contain more districts giving minorities the opportunity to elect candidates of their choice than the previous map had contained?[28]

The difficulty of precisely calculating an answer that would satisfy the court was apparent, however, in a previous case involving Texas congressional districts.[29] In the oral argument, the issue occasioned a near-comic exchange between Chief Justice John Roberts and Nina Perales, an attorney from the Mexican American Legal Defense and Educational Fund. The Chief Justice tried to plumb the Goldilocks formula of racial fairness. "What number of minority voters is just right to make a district qualify as 'Hispanic-opportunity,' rather than one masquerading as such," he asked Ms. Perales seven times, in several different ways. "I'm just trying to get

25. *Id.* at 140 (quoting H.R. REP. NO. 94-196, at 60 (1965).

26. *Id.*

27. *Beer* allowed jurisdictions to maintain the status quo, even when that meant sticking with two majority-minority districts where, in fact, four could be drawn. Or zero, where at least one could be drawn. In subsequent years, both the DOJ and the D.C. District Court insisted on "fairly drawn" districting plans, ignoring the majority holding in *Beer*. *See, e.g.*, Cnty. Council v. United States, 596 F. Supp. 35, 37 (D.D.C. l984) (per curiam). The court found that a "fairly drawn" single-member district plan would be "likely to allow black citizens to elect candidates of their choice in three of seven districts (or 42.8 percent of the representation on the Council)"—providing roughly proportional office-holding. *Id.* at 37. By 1984, "fairly drawn" was the standard used in judging districting plans. This point is spelled out—with multiple examples—in THERNSTROM, *supra* note 4, as well as in THERNSTROM, VOTING RIGHTS—AND WRONGS (2009) [hereinafter THERNSTROM, VOTING RIGHTS]. *Whose Votes Count?* contains examples of the commitment to racial proportionality as "fair" drawn directly from Justice Department records. It became clear that the New Orleans plan that the Justice Department precleared in *Beer*, had it been submitted a few years later, would not have survived federal scrutiny.

28. Texas v. United States, No. 11-1303, 2011 U.S. Dist. LEXIS 147586 (D.D.C. Dec. 22, 2011) (noting that in its district-by-district analysis of House and state districts, the court's central question was what kind of district could be drawn given the demographic numbers).

29. League of United Latin Am. Citizens v. Perry (LULAC v. Perry), 548 U.S. 399 (2006).

the number," he said in evident frustration.[30] "That number would be the number that shows Latinos have the opportunity to elect their candidate of choice," was the best answer she could give.[31] Minority voters are entitled to a maximum number of "opportunity-to-elect" districts, which have, in fact, nothing to do with "opportunity" and everything to do with the proper racial, ethnic—and partisan—results.

There was actually no good answer to the Chief Justice's seemingly basic question. The 1965 statute was not designed for the purpose to which it would come to be put—resolving through administrative (or judicial) channels basic matters of electoral equality. "Over time, the Voting Rights Act has evolved into one of the most ambitious legislative efforts in the world to define the appropriate balance between the political representation of majorities and minorities in the design of democratic institutions," wrote Richard H. Pildes, professor of law at New York University.[32]

The quest for that definition has largely failed. Minority voting rights is perhaps the most important and the most difficult to resolve of all race-related issues. It is what Justice Felix Frankfurter once famously called a "political thicket," although he wrote in the context of the equal population cases. What had actually been asked of the Court, he said, was nothing less than "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy."[33] That was certainly the case in the minority voting rights litigation.

In the pages that follow, this Article expands on this introduction, explaining in greater detail the preclearance provision and its history, amended by judicial decisions, the Justice Department in its enforcement capacity, and by Congress in 1970, 1975, and 2006—amendments that, in effect, rewrote the statute. In the four decades after the initial Act was passed, America experienced a remarkable revolution in racial attitudes and the status of Blacks. That progress was not recognized by those who shaped and reshaped the Act, extending preclearance. "Substantial progress has been made over the last 40 years," the House Judiciary Committee report admitted in 2006. But, "[d]espite these successes, the Committee finds that the temporary provisions of the VRA [the most important of which is section 5] are still needed. Discrimination today is more subtle than the visible methods used in 1965. However, the effects and results *are the same*."[34]

30. Transcript of Oral Argument at 15, *LULAC*, 548 U.S. 399 (No. 05-204).

31. *Id.*

32. David L. Epstein, Richard H. Pildes, Rodolfo O. de Garza & Sharyn O'Halloran, THE FUTURE OF THE VOTING RIGHTS ACT, at xiv (2006).

33. Baker v. Carr, 269 U.S. 186, 390 (1962).

34. HOUSE COMM. ON THE JUDICIARY, FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING, VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006, H.R. REP. NO. 109-478, at 6 (2006) [hereinafter 2006 HOUSE REPORT] (emphasis added). No meaningful evidence supported such an extraordinary claim. It was a

As Pildes himself suggested, the Voting Rights Act has become a blueprint for an earlier time. In 1965, it was pure antidiscrimination legislation aimed at ending the egregious violation of Fifteenth Amendment rights in one region in the country. It protected the southern election process from racist contamination. But, as Pildes wrote, "[t]he Congresses that enacted and amended the VRA over the last forty years [made sure] . . . that Section five and its unique elements . . . [were] responsive to ever-changing circumstances."[35] By every measure, circumstances have changed. Blacks are no longer excluded from political participation, and the most important voting rights dispute in 2004 was in Ohio, not Mississippi. Today, most southern states have higher Black registration rates than those outside the region, and over 900 Blacks hold public office in Mississippi alone.[36] Massive disfranchisement is ancient history—as unlikely to return as segregated water fountains.

The last third of this Article elaborates on the Pildes point above. The Judiciary Committee's ludicrous statement betrayed an assumption central to much voting rights enforcement—namely, that the racial landscape in America has remained static. It is not in the case in any corner of the nation. Perhaps demographic change is most striking. The Supreme Court may find section 5 to be an unconstitutional intrusion on state legislative prerogatives, but, the impact of demographic change will be much more important in deciding the fate of section 5. By 2030, when section 5 will be nearing the end of its current extension, Blacks are expected to make up only about a third of the total number of voters for whom ability to elect districts can be drawn. Majority-Black districts are likely to become an endangered species.

Majority-minority constituency ("racially fair") maps will become increasingly harder to create for other reasons. African Americans have moved to the suburbs in very large numbers, and most have settled in racially mixed neighborhoods (with a substantial number of recent immigrants) even in much of the South. Piecing together the ability to elect districts in which one group is a decisive majority will be a mapmaking challenge.

---

disservice to the nation to refuse to recognize the remarkable revolution in race relations that occurred in the second half of the twentieth century.

35. Richard Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 747 (2006). Rather than the 2006 renewal and amendment of section 5, Pildes would have preferred a shift from process to substance with legislation modeled on the 1993 National Voter Registration Act or the 2002 Help America Vote Act. I do not mean to suggest, however, that there were not section 2 suits in the North as well as South, but the Voting Rights Act was irrelevant to the voting problems that have made national news—as in Ohio in 2004.

36. Charles S. Bullock III & Ronald Keith Gaddie, *Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 GEO. J.L. & PUB. POL'Y 1, 6, 8 (2007).

Those who enforce the Voting Rights Act have long assumed that both Blacks and Latinos are "communities," whose members share a racial and political agenda. Yet Latinos come to America from a diversity of settings, and even the notion of a Black "community" as the foundation of a Black legislative district is rapidly becoming an anachronism. Black immigrants have little in common with the descendants of American slaves.

The enforcement of the Voting Rights Act too often ignores contemporary reality. In addition, the drive to maximize minority office holding may act as a brake on Black political aspirations. Given America's ugly racial history, the notion that Blacks are fungible members of a subjugated group that stands apart in American life, requiring methods of election that recognize their racial distinctiveness, should be especially troubling. Districts in which only Blacks are political players generally reward minority politicians who consolidate the minority vote by making the sort of overt racial appeals that are the staple of invidious identity politics. They're on a road going nowhere politically, as a result.

Thus, race-based districts seem to have worked to keep most Black legislators clustered together and on the sidelines of American political life—precisely the opposite of what the statute intended, and precisely the opposite of what is needed. Blacks running in majority-minority districts, not acquiring the skills to venture into the world of competitive politics in majority-White settings—that is not the picture of political integration, equality, and the vibrant political culture that the Voting Rights Act promised. When a group that has been historically marginalized as a consequence of deliberate exclusion subsequently chooses the political periphery, it risks perpetuating its outsider status, reinforcing the sense of racial difference and compromising the goal of the Voting Rights Act.

As the Voting Rights Act has been enforced, the right to vote has come to mean an entitlement to Black and Hispanic office holding roughly in proportion to their population numbers. In 1965 no such entitlement was contemplated. Mississippi and other states were devising new electoral rules to make sure White votes smothered Black political preferences. In the South, only in majority-Black districts could Blacks have any hope of winning elections.

Ordinarily, there are no group rights to representation in the American constitutional order. True political equality demands not group rights to representation, but a political system that recognizes citizens as individuals with fluid identities, free to emphasize their racial and ethnic heritage as they wish and to coalesce in any manner they might choose.

Nevertheless, a less radical approach could not have solved the deep-seeded problem of massive Black disfranchisement in one region of the country. Draconian federal legislation was needed. The passage of the 1965 statute—the crown jewel of civil rights legislation—marked the

death knell of the Jim Crow South. It was one of the great moments in the history of American democracy.

I. SECTION 5: PUTTING SOUTHERN STATES UNDER RECEIVERSHIP

In the congressional hearings prior to the enactment of the 1965 statute, section 5 was barely mentioned. The entire focus of the debate was on ensuring basic Black enfranchisement.[37] Preclearance was included to make sure that the statute's core enfranchising provisions could not be evaded; the provision was a prophylactic measure—a means of guarding against new efforts to stop Blacks from registering and voting.[38] The framers of the legislation understood that enforcing Fifteenth Amendment rights in the Jim Crow South would require overwhelming federal power, radical legislation that involved an unprecedented intrusion of federal authority into state and local election affairs. And thus section 5 put southern states under the equivalent of federal receivership in the conduct of their elections.

The provision allows the Justice Department to stop racially suspect jurisdictions from even provisionally implementing districting and other decisions that are the products of democratic politics. A statistical trigger that had been reverse-engineered identified the "covered" jurisdictions; the framers of the Act knew which states had engaged in egregious violations of Fifteenth Amendment rights, and arrived at the proper formula.[39] State

37. As Attorney General Nicholas Katzenbach made clear on the opening day of congressional hearings held prior to the passage of the Act, the concern was "to enlarge representative government" and "to increase the number of citizens who can vote." *H.R. 6400 & Other Proposals to Enforce the Fifteenth Amendment to the Constitution of the U.S.: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 17, 21 (1965) [hereinafter *1965 House Hearings*]. The point was reiterated throughout his testimony. "The whole bill is really aimed at getting people registered," he explained. *Id.* at 21. References to section 5 were sparse in these 1965 hearings; preclearance was just one of several measures intended to reinforce the ban on literacy tests contained in section 4 of the Act. The Senate Committee report failed even to mention section 5 in its summary of the bill's key provisions, and the House Report gave it only a cursory and unilluminating glance. H.R. REP. NO. 89-439, at 26 (1965); S. REP. NO. 89-162, at 3-16 (1965).

38. Attorney General Nicholas Katzenbach briefly explained the need for such a harsh provision at the U.S. House of Representatives hearings prior to the passage of the Act. "Our experience in the areas that would be covered by this bill," he said, "has been such as to indicate frequently on the part of state legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States." *1965 House Hearings*, *supra* note 37, at 60. Southern segregationists weren't expected to surrender without a fight.

39. It was section 4, not section 5, that contained the statistical trigger that was designed to identify the states and counties targeted for the extraordinary federal intervention. No southern state was singled out by name; instead, jurisdictions were "covered" by the Act if they met two criteria: the use of a literacy test to determine eligibil-

and local laws are usually presumed valid until found otherwise by a court. But when a jurisdiction "covered" by section 5 alters a rule or practice affecting enfranchisement, discrimination is presumed.[40] The submitting jurisdiction carries the burden of proving its innocence, which meant proving a negative—the absence of racial animus. In 1965 those who drafted section 5 believed (justifiably) that only this punitive, burden-shifting measure could stop the South from passing new measures to circumvent the basic enfranchisement promised by other provisions in the statute.[41]

It is a constitutionally extraordinary provision, and while much of the statute was permanent, for that reason, section 5 was originally intended to last only five years.[42] Over time, a quite different aim replaced the original prophylactic one. Preclearance ceased to be simply a tool to stop southern racist mischief, but became a means to insist on majority-minority districts drawn to insulate minority voters' "candidates of choice" from electoral

ity to register, and total voter turnout (Black and White) below 50% in the 1964 presidential election. The architects of the statute knew literacy tests—generally fraudulent—were the chief means of Black disfranchisement and used registration and turnout figures to identify the discriminatory use of those tests. Thus, a state or county that had employed a literacy test in November 1964, and in which less than half of the voting age population (Black and White) had cast ballots, was assumed to have engaged in electoral discrimination, with the burden on the jurisdiction to prove otherwise. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1973b, 1973c (2006)).

40. It is frequently said in the media that covered jurisdictions are those with a history of disfranchisement on the basis of race. It's a partial truth, which makes the enforcement of the Voting Rights Act morally straightforward and, in doing so, distorts it. Yes, in 1965, the covered states were those (identified by a statistical trigger) that had an egregious history of depriving Black Americans of their basic Fifteenth Amendment rights. But in subsequent years, statutory amendments extended federal power to approve or object to changes in electoral procedure on grounds of alleged discriminatory intent or effect was extended to Arizona, Texas, Alaska, and scattered counties across the nation, including (arbitrarily) three boroughs in New York City but not the other two. *See infra* note 57.

41. This was the essence of the argument made by the Supreme Court, as well, in upholding the constitutionality of the statute a year after its passage. As Chief Justice Warren wrote for a unanimous Court in *South Carolina v. Katzenbach*:

> Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

383 U.S. 301, 309 (1966).

42. The 1965 statute provides an expiration date of 1970 for section 5. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1971 (2006)).

defeat.[43] Minority voters thus acquired a sheltered status enjoyed by members of no other groups.

Section 5 protects minority voters from methods of election that are discriminatory in intent or effect. Effect means "retrogression," the Supreme Court ruled in 1976 in a decision that is still controlling.[44] "Retrogression" means backsliding from the electoral power Blacks had previously enjoyed.[45] Thus, in the process of political negotiation and territorial swapping that drives mapmaking, no players are entitled to a map they favor—with one notable exception. The majority-minority districts from which most Black and Hispanic legislators have been elected in states and counties "covered" by section 5 are safe from meddling. Their lines can be altered, but not in ways that would reduce the ability of minority voters to elect a representative of their choice.[46]

In practice, that means Black and Hispanic incumbents are generally protected from the usual politically charged maneuvering that accompanies districting fights, the outcome of which are make-or-break for many legis-

43. Racist mischief in the 1965 statute meant efforts to rob Blacks of the right to cast ballots once again. Thus at the 1965 congressional hearings Attorney General Katzenbach made clear that for changes in the method of voting to be rejected under section 5, they would have to have the effect of denying the rights guaranteed by the Fifteenth Amendment. *1965 House Hearings*, *supra* note 37, at 60. And numerous witnesses at the hearings reassured their audience that those rights were expected to be narrowly defined. Thus, Roy Wilkins, executive director of the NAACP, referred to the need to protect the citizen only "from the beginning of the registration process until his vote has been cast and counted. *Id.* at 379.

The first decision in which a reference was made to a Black entitlement to elect a candidate of choice was *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969) ("Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change [from district to at-large voting] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.").

44. Beer v. United States, 425 U.S. 130 (1976). The purpose of section 5, the Supreme Court held, had been to bar changes that would result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. In other words, it protected against backsliding. It allowed jurisdictions to maintain the status quo, even when that meant sticking with two majority-minority districts where, in fact, four could be drawn. Or zero, where at least one could be drawn.

45. *Id.*

46. *Id.* That was the meaning of the term "retrogression"—the test for discriminatory effect—as spelled out in *Beer*. For that reason, the voting rights community has always disliked the decision and its views were represented by a minority of four on the Supreme Court. See the dissents of Justices Stevens, Breyer, Souter, and Ginsburg in *Reno v. Bossier Parish School Board* (*Bossier II*), 528 U.S. 320, 342 (2000), in which all four concurred that "the Court was mistaken in *Beer* when it restricted the effect prong of § 5 to retrogression." The retrogression test, however, was reaffirmed in *City of Lockhart v. United States*, 460 U.S. 125 (l983), *rev'g* 559 F. Supp. 581 (D.D.C. 1981). *Lockhart* overturned a district court ruling that made clear the lower court's persistent commitment to subverting the High Court's test.

lators at all levels of government. And once they enjoy incumbent status, they can usually remain safely in their legislative seat until they choose to move on.[47]

The original vision of the statute was firmly grounded in the Fifteenth Amendment: racial equality in the American polity. This constitutional clarity was partly responsible for the relatively weak southern resistance to basic Black enfranchisement, in sharp contrast to the fierce (often violent) opposition to school desegregation well into the 1960s.[48]

II. AMENDING SECTION 5 TO ENSURE ELECTORAL EQUALITY

Political equality was the goal of the statute, but it soon became apparent that equality could not be achieved—as originally hoped—simply by giving Blacks the vote. Merely providing access to the ballot was insufficient after centuries of slavery, another century of segregation, ongoing White racism, and persistent resistance to Black political power. Ensuring Black electoral equality was more difficult than originally understood. Southern Black registration quickly skyrocketed, but in Mississippi and elsewhere, counties and other political subdivisions began to structure elections to minimize the number of Blacks likely to win public office.[49] More aggressive measures were needed.

In much of the South, Black enfranchisement would not, by itself, bring Black electoral power. And yet, holding public office came to be viewed as critical to the larger aim: ending, once and for all, White hegemony.[50] In response, Congress, courts, and the Justice Department in

47. A new map that made Black and Hispanic incumbents vulnerable to competition from a White candidate would be labeled "retrogressive" under the *Beer* standard, and it is seldom that Blacks challenge Black incumbents—incumbency being a powerful deterrent that discourages challengers in every electoral setting.

48. On the contrast between the South's resistance to school desegregation and its relative acceptance of Black enfranchisement, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 456 (2004).

49. The effort to circumvent the enfranchising provisions of the statute are described in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), which even includes an appendix to the opinion running through the changes in the proposed methods of voting that would dilute the impact of the Black vote. The impact of the statute was almost immediately felt. In Alabama, an estimated 19.3% of voting-age Blacks were registered as of March l965; the figure rose to 51.6% by September l967. Mississippi took off from a low point of 6.7%; two years later it had the highest percentage of Black registered voters (59.8%) anywhere in the South. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 22 (1975) [hereinafter USCCR, VRA]. *See also* THERNSTROM, *supra* note 4, at 17-18 (recounting the arresting story of rapid Black enfranchisement in Selma, AL).

50. Even before the passage of the statute, civil rights activists were skeptical that votes alone could shake the pillars of the southern status quo. Those who went to Mississippi in the summer of 1964 to participate in a dangerous voter registration drive

effect amended the law to ensure the equality that the statute clearly promised.

In the face of racist maneuvers to maintain White supremacy, in 1969, in *Allen v. State Board of Election*, the Supreme Court expanded the definition of discriminatory voting practices to include devices that "diluted" the impact of the Black vote.[51] At-large voting, districting lines, and other election procedures whose impact could deprive Blacks of expected gains in office holding became subject to preclearance.[52] The decision was a turning point; it was, in effect, the first amendment to the Act, and its profound importance would soon become apparent.

Before 1969, attorneys in the Civil Rights Division were expected to ask a straightforward question: would the proposed change in voting procedure keep Blacks from the polls? *Allen*, however, opened the door to a much broader inquiry: had the method of election been restructured to weaken the potential for Black electoral power?

The decision led in time to denials of preclearance on the ground that "better" districting plans or other methods of voting could have been adopted to ensure racial representation that was more nearly proportional to the Black population.[53] A law initially designed simply to open the

saw themselves as working toward a much larger goal: true racial equality. *See* CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S (1981). These warriors in the racial backwaters of the South wanted to revolutionize the social order, and voter registration seemed unequal to the task.

51. 393 U.S. at 567.

52. *Id.* at 570.

53. *See* Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) *aff'd and remanded*, 515 U.S. 900 (1995) (demonstrating the Justice Department's commitment to "better" districting plans—i.e., ones that were more likely to result in minority office holding in proportion to the minority population—in litigation over the 1991 Georgia congressional map); *see also* THERNSTROM, VOTING RIGHTS, *supra* note 27, at 11-114 (discussing the Justice Department's commitment to "better" districting plans).

In brief, however, the (Republican) Justice Department forced Georgia to accept a plan drawn by the American Civil Liberties Union in its capacity as advocate for the Black caucus of the state's general assembly. The Georgia House and Senate redistricting committees, when they began the map-drawing process following the 1990 census, had no idea of the roadblocks that lay ahead. They drew one map and then another, both of them raising the number of majority Black districts in Georgia from one to two, although under *Beer* the state had no obligation to improve on the status quo—no obligation to draw districting lines that gave minorities the greater electoral power they might have had under what voting rights advocates considered a "better" plan. The point of preclearance, it should be clear, had been to prevent racially suspect states from depriving Blacks of the political gains that basic enfranchisement promised—not to ensure a "fair" number of legislative seats. Georgia had clearly met the demands of the law.

Nevertheless, the Justice Department found both of the maps drawn by the state in violation of section 5. John Dunne, the Assistant Attorney General for Civil Rights from 1990 to 1993, informed the state that it had not adequately explained its failure to create a *third* majority-minority district. "No legitimate reason has been suggested to

doors of electoral opportunity was transformed into an effort to protect minorities from any measure that might weaken their electoral strength—and then into one requiring proactive efforts to maximize their political power. At the time *Allen* was decided, however, the issue was simply southern racist efforts to reduce the power of newly enfranchised Black voters.

The Court had put the enforcement of the Act on a proverbial slippery slope. Ensuring that Black ballots carried sufficient weight to elect Black candidates became the expanded goal of the Act.[54] From there it was but a short slide to a constitutionally problematic system of reserved seats for minority group members, even in settings with no history of racist exclusion.

And from there, with another short slide, proportional racial and ethnic representation became the only logical standard by which to measure true electoral opportunity. Anything less than proportional office holding suggested a "diluted" minority vote—one that was less effective than it could be.[55]

---

explain the exclusion of the second largest concentration of blacks in the state from a majority black Congressional District," a March 20, 1992, letter of objection read. Johnson v. Miller, 864 F. Supp. at 1365.

Dunne wanted, among other changes, more Black voters added to the Eleventh District, while some of the district's existing residents would be moved to a newly created Congressional District 2. But the reconfiguration would create an Eleventh District that connected Black neighborhoods in metropolitan Atlanta and poor Black residents on the coast, 260 miles away and "worlds apart in culture," as the Supreme Court put it in its 1995 decision in *Miller v. Johnson*, 515 U.S. 900, 908 (1995).

Dunne's communications were entirely guided by ACLU attorney Kathleen Wilde, who had drawn up a "max-Black" plan. As the district court noted, "Throughout the preclearance process, from this first objection letter to the final submission, [the Department of Justice] relied on versions of the max-Black plan to argue that three majority-minority districts could indeed be squeezed out of the Georgia countryside. Ms. Wilde's triumph of demographic manipulation became DOJ's guiding light." 864 F. Supp. at 1363-64. In fact, the Georgia legislators and staff who met with Justice Department attorneys in Washington were 'told to subordinate their economic and political concerns to the quest for racial percentages." *Id.* at 1398.

54. In expanding the definition of discriminatory voting practices to include devices that "diluted" the impact of the Black vote, the Court in *Allen* was suggesting that Black voters were entitled to ballots that carried their full weight. Anything less compromised the electoral equality they were promised with the passage of the Act. *Allen*, 393 U.S. at 548 ("[T]he Act implemented Congress' firm intention to rid the country of racial discrimination in voting."). The one-person, one-vote Fourteenth Amendment decisions contained a similar promise. "Each and every citizen has an inalienable right to full and effective participation . . . an equally effective voice." Reynolds v. Sims, 377 U.S. 533, 565 (1964).

55. The slippery slope danger was quickly realized in decisions involving municipal annexations. *See* City of Richmond v. United States, 422 U.S. 358 (1975). The section 5 standard has been met, the Court said, if the system "fairly reflects the strength of the Negro community as it exists after the annexation." *Id.* at 371. With this decision, when a city annexed surrounding territory, its districting map would not be precleared unless it provided proportional racial representation on the city council; the

Blacks came to be treated as politically different—entitled to *in*equality in the form of a unique political privilege. Legislative districts carefully drawn to reserve seats for African Americans became a statutory mandate. Such districts would protect Black candidates from White competition; Whites would seldom even bother to run in them.[56]

III. THE AMENDMENTS OF 1970 AND 1975, DEPRIVING THE STATUTE OF ITS INITIAL ELEGANCE

The Court started the process of amendment, but Congress was also quick to revise the statute. In 1970 and 1975, new groups and new places came under preclearance coverage. An arbitrary change in the statistical trigger, for instance, made section 5 applicable to three boroughs in New York City (although not the other two), even though Black New Yorkers had been freely voting since the enactment of the Fifteenth Amendment in 1870 and had held municipal offices for decades.[57]

legal standard in section 5 cases involving redistricting differed from that in the annexation decisions. Beer v. United States, 425 U.S. 130 (1976). The standard of proportionality as the measure of racial fairness ran through decisions involving employment, contracting, and education. *See, e.g.*, Richmond v. J.A. Croson, 488 U.S. 469, 469 (1989) ("[N]o direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. [However] [t]he evidence that was introduced included: a statistical study indicating that, although the city's population was 50% Black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years . . . .").

56. Steve Cohen, a Democrat from Tennessee, is currently the only White member of the U.S. House of Representatives elected from a majority-Black district. His 60% African-American district includes Memphis, and he gained his congressional seat in 2006 after a crowded field of Black candidates splintered the vote. In November 2010, the Leadership Conference on Civil Rights gave him a "perfect" score on civil rights. *Cohen Receives Perfect Score on Civil Rights Scorecard*, POLITICALNEWS.ME, http://politicalnews.me/?id=6880&keys=Congressman-Steve-Cohen-VotingRecord (last visited Feb. 29, 2012). In July 2008, he was instrumental in passing H.R. 194, a House resolution Cohen originally introduced in 2007 apologizing for the enslavement and racial segregation of African Americans. *See* H.R. 194, 110th Cong. (2007); *House of Representatives Apologizes for Slavery*, LEADERSHIP CONF. ON CIV. & HUM. RTS., http://www.civilrights.org/lists/monitor-weekly/2008-july30.html (last visited, Feb. 29, 2012). He was reelected that November. One might think that the winner in a majority-Black district would be regarded as speaking for Black interests, but Representative Cohen's request to join the Congressional Black Caucus was rejected. *The Almanac of American Politics 2008—Rep. Steve Cohen (D)*, NATIONALJOURNAL.COM, http://www.nationaljournal.com/almanac/2008/people/tn/rep_tn09.php (last visited Feb. 29, 2012).

57. The 1970 amendments to section 5 extended the provision for another five years, banned literacy tests nationwide, and expanded coverage to include states and counties that employed such tests and had a voter turnout in 1968 of less than 50%. Thus, with literacy tests banned everywhere, the statistical trigger for section 5 coverage had been reduced to voter participation levels below 50%. Jurisdictions covered in 1965 (on the basis of 1964 voter participation and the use of a literacy test) would re-

Once the Supreme Court had blurred the distinction between electoral arrangements that stopped Blacks from voting and those that could "nullify" their ability "to elect the candidate of their choice," it was inevitable that federal authorities would, in time, insist on districting maps drawn to maximize Black office holding.[58] And once minorities in three New York boroughs qualified for protection originally intended for vulnerable Blacks in the South, there was no logical place to stop.

In 1965, the statistical trigger for section 5 coverage was crafted to catch only those states known to have *intentionally* barred Blacks from the polls. It was reasonable to assume that, deprived of the opportunity to use literacy tests for purposes of disfranchisement, they would deliberately search for other means to accomplish that same end; hence, the demand that suspect states institute no voting practice or procedure without prior federal approval required the jurisdiction to prove itself above suspicion. But there was no cause to distrust those places that were brought under coverage by the l970 amendments. All of them were outside the South and had no record of official hostility to Black political participation. In 1969, the Supreme Court had read the existing statutory language in an unanticipated way, but judicial decisions are open to further modification. Any alteration of the statute itself, however, was permanent unless further revised by Congress itself, and with the passage of the amendments of 1970, the beautiful design of 1965 had lost its elegance.

Amendments in 1975 further continued that process of statutory erosion. By that time, the right to vote had acquired new meaning. Witnesses at the congressional hearings drew a parallel between Blacks denied access to the polls in the Jim Crow South and Blacks without a majority-Black

main covered, but would now be joined by those counties in which turnout had dropped below 50% in the 1968 presidential election. Thus, because voter turnout dropped a few percentage points in three New York City boroughs (counties), they became subject to section 5—despite their long history of minority electoral participation and success. Likewise, scattered counties in such disparate states as Wyoming, Arizona, California, and Massachusetts found themselves subject to federal scrutiny when they changed any aspect of their electoral system, including a minor move in the location of a polling place.

In New York, the ban on the use of literacy tests and the extension of section 5 to three boroughs occasioned considerable outrage. For instance, New York Mayor John Lindsay's office objected strongly to having to preclear all changes in voting procedure in the Bronx, Brooklyn, and Manhattan. "The need in New York is for educative and organizational efforts to enfranchise, in fact, the hundreds of thousands of people who have the legal right to vote but do not use it," a spokesman for the Mayor said. *Lindsay Opposes Extension of Voting Rights Act Here*, N.Y. TIMES, Mar. 11, 1970, at 21. "Here in New York the problem is not one of discrimination, nor is there anything but a desire to have as many people vote as possible," he went on. *Id.* And the *New York Times* editorialized that "systematic discrimination against potential voters of the sort sometimes encountered in sections of the South does not exist in New York City." *New York Electoral Reform*, N.Y. TIMES, Mar. 12, 1970, at A40.

58. *Allen*, 393 U.S. at 569; *see also supra* note 40.

district in which to cast their ballots.[59] The new definition of disfranchisement not only argued for renewing section 5, but also invited the extension of preclearance protection to new groups in new jurisdictions. The argument that Blacks remained without a meaningful vote as long as their numbers in office were disproportionately low logically applied to Hispanic and perhaps other groups as well.

The 1975 revisions added Hispanics, Asian Americans, American Indians, and Alaskan Natives (labeled "language minorities") to the list of those eligible for extraordinary protection, although their experience with racist exclusion from the polls was not remotely comparable to that of southern Blacks, as a number of witnesses admitted.[60] In addition, the formula for coverage was changed again. Turnout in the 1972 presidential election was added to the trigger based on that of 1964 and 1968; low participation levels in any one of those three elections made the state or coun-

59. In the congressional hearings that began in February 1975 prior to the 1975 amendments to the statute, both witnesses and members of Congress spoke of persistent disfranchisement. They offered, however, few examples of hostile registrars and purged voting rolls, but referred instead to the "disfranchisement" effect of at-large voting and districting plans that fragmented minority voting strength.

"Beatings and gerrymanderings," Senator John V. Tunney of California said, both "keep people from registering and voting." *Hearing on Extension of the Voting Rights Act Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 94th Cong. 38 (1975) [hereinafter *1975 Senate Hearings*] (statement of Sen. Tunney). Clearly the right to vote had been redefined. Tunney had drawn a parallel between Blacks denied access to the polls by the use of violence and Blacks voting in districts that fragmented Black voting strength—Blacks without a majority-Black district in which to cast their ballots.

The equation was not his alone; nor was it applied solely to redistricting. Civil rights attorney Frank Parker likened the results of election-related violence in Mississippi in 1964 to those that flowed from the retention of an at-large electoral system in the state capital ten years later: "Where newly enfranchised Black voters *may* be continually outvoted by White majorities in at-large districts, the effect is the *same* as continuing to prevent Blacks from voting at all." Frank R. Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 401 (1973) (emphasis added). Arthur Flemming, Chairman of the U.S. Commission on Civil Rights agreed: "A jurisdiction may seem to conform to the letter of the law by permitting minority registration and voting but rob that participation of its meaning by structuring the system against minority political victories." *Extension of the Voting Rights Act: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 26 (1975) [hereinafter *1975 House Hearings*]. And looking back to the bloody days of Selma, Alabama, he saw disfranchisement then as only more "spectacular" than that which still occurred in 1975. *Id.* at 37 ("Denials of minority voting rights may be less spectacular than they were 10 years ago, but denials of minority voting rights continue to occur at every stage of the political process.").

60. As a representative of the Mexican American Legal Defense and Education Fund (MALDEF) later admitted, "We were able to produce those horror stories" needed to suggest obstacles to voting. But "not many of them . . . . We really did it by the skin of our teeth." Confidential Interview with a Representative, MALDEF (May 1981).

ty racially suspect and changes in its method of voting subject to federal preclearance. In addition, the literacy test acquired a new definition. The traditional test had been banned in 1970, and that ban was made permanent in 1975—but it did not apply to states such as Texas, for instance, which had never screened registrants for their ability to read. Texas did, however, provide ballots (and related literature) printed only in English, and the 1975 amendments labeled that English-only election material as a "literacy test," no different from the barriers to Black political participation erected in the Jim Crow South.[61]

States and counties that had been covered by the 1965 statistical trigger (and its updated version in 1970) remained subject to federal preclearance. The 1975 amendments expanded the list of covered jurisdictions to include those in which more than 5% of the voting-age citizenry were members of a single "language-minority" group and registrants were expected to read English in casting ballots. Only four groups qualified as "language minorities": Asian Americans, American Indians, persons of Spanish heritage, and Alaskan Natives. A California county with a 7% Hispanic population and elections in English, therefore, was thenceforth required to submit for federal review municipal annexations, redistricting, and all other changes in electoral procedure. The county would conduct its electoral affairs under a cloud of suspicion, carrying the burden of proof to demonstrate an absence of discrimination, even though it had never deliberately disfranchised minority voters.

With other changes to the statistical trigger, preclearance had been extended to Texas, Arizona, Alaska, and scattered counties in California and elsewhere across the nation. Much of the Voting Rights Act is permanent, but preclearance was always a temporary emergency measure and thus amendments set an expiration date. In 1975 the life of preclearance was

61. The redefinition of literacy tests was the imaginative solution to a particular problem: the state had never used a literacy test, which had been the chief means of disfranchising Blacks in the South. Yet MALDEF was eager to see the state covered. The Justice Department had been using the preclearance provision to insist that covered jurisdictions employ methods of election that maximized Black office-holding and MALDEF wanted the same extraordinary privilege for its constituents.

The fact that literacy tests had never been employed in Texas was only one of several difficulties MALDEF faced in bringing the state under the aegis of section 5. The Fifteenth Amendment protected citizens against denial or abridgment of the right to vote only on account of "race or color." The 1965 statute had given life to the clear constitutional command that the franchise was not to be restricted by virtue of the irrelevant, ascribed characteristic of race. But (with the single exception of 1930) the Census Bureau had historically classified Mexican Americans as White, reflecting the way in which a substantial number of Hispanics thought of themselves. To stretch Fifteenth Amendment rights to cover groups that had not been protected by the amendment was, well, a stretch—hence, the new category that avoided any reference to race: "language minorities." The four designated groups had Fourteenth Amendment equal protection rights, rather than Fifteenth Amendment voting rights.

extended for seven years (rather than the usual five) in order to make sure new districts drawn after the 1980 census would be subject to federal approval, making the new expiration date 1982, when the preclearance provision was extended for another twenty-five years. One might think that the emergency of southern Black disfranchisement to which the 1965 Act had been a response had actually become more dire; otherwise, why the additional quarter century?

IV. THE 2006 VRARA AND ITS FREEWHEELING DEFINITION OF DISCRIMINATORY INTENT

In 2006 Congress once again substantially rewrote section 5. In 1965 the provision was designed, as the statutory language stated, to protect against all proposed electoral changes that had "the purpose and . . . the effect of denying or abridging the right to vote on account of race or color . . . ." As noted above, the standard for assessing submissions for preclearance had been laid out in *Beer v. United States* (1976).[62] Discriminatory "effect" meant "retrogression" or backsliding. The Justice Department or the D.C. Court was supposed to ask: would the submitted change leave minority voters less able to elect the candidates of their choice than they had previously been?

Beer had fudged the question of whether the same standard applied to questions of discriminatory intent, however, and in the 1980s and 1990s the DOJ adopted a free wheeling definition of the term "purpose"—one that even allowed objections to new districting maps supported by Black legislators if it were possible to draw a map with more majority-minority districts.[63] The test for invidious intent became "racial fairness"—minority legislative seats roughly in proportion to the minority population in the ju-

62. 425 U.S. 130, 141 (1976) ("A legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise cannot violate 5 unless the new apportionment itself so discriminates racially as to violate the Constitution.").

63. "[T]he purpose of 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* Maurice Cunningham, in his carefully researched account of the Voting Rights Act in the 1990s was particularly struck by the increased reliance in Department of Justice letters of objection on findings of suspected discriminatory intent. "Proponents of maximization and [Civil Rights] Division attorneys came to focus upon Section Five's prohibition against purposeful discrimination," he wrote. Though the term connotes some act taken with the intention to impair minority participation, the CRD came to accept another interpretation . . . a reading whereby a failure to adopt a maximization plan if one had been presented to the state would raise a presumption of discriminatory purpose. *See* CUNNINGHAM, *supra* note 2, at 4.

risdiction, although nothing in the statute, its history, or in the Constitution suggested a right to proportional racial representation.[64]

A 2000 Supreme Court decision, *Reno v. Bossier Parish School Board* (*Bossier II*), brought a temporary end to that era, however.[65] It held that the two halves of section 5—discriminatory intent and discriminatory effect—were a whole, connected by "and." Together, they protected only against new methods of voting that left minority voters worse off than they had been. The retrogression standard governed the entire provision.[66]

Bossier II was an attempt to rein in the Justice Department, which had defined intent so broadly as to be almost devoid of meaning. Every electoral change could be declared possibly suspicious, and that possibility (real or imagined) sufficed to deny preclearance. The Court's definition in 2000 not only squared with the provision's limited prophylactic purpose; its before-and-after comparison made administrative review a manageable process—one that could be accomplished in the sixty days specified by the guidelines. The greatly expanded definition of discriminatory purpose used in the 1980s and (especially) in the 1990s could only be properly explored in the context of a full-scale trial, with depositions, evidence, and opposing arguments.

The civil rights community had strenuously objected to *Bossier II*, and persuaded Congress to pass statutory amendments in 2006, which were called the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act." The VRARA superseded the Court's decision and rewrote section 5 to separate the terms intent and effect, permitting a definition of the one independent from the other. Under the revised statute, jurisdictions have the burden of proving that voting changes would have "neither" the purpose "nor" the effect of denying or abridging voting rights. Discriminatory "intent" became a stand-alone question. As redefined, its meaning was no longer restricted to retrogression or backsliding. "Purpose" meant any discriminatory purpose.[67]

The expanded definition of discriminatory intent was spelled out in part by the House Judiciary Report accompanying the passage of the statute:

64. *See* THERNSTROM, VOTING RIGHTS, *supra* note 27 *passim*.

65. 528 U.S. 320, 335 (2000).

66. *Id.*

67. *See* Fannie Loue Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (amending 42 U.S.C. § 1973c) ("Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) is amended . . . by striking 'does not have the purpose and will not have the effect' and inserting 'neither has the purpose nor will have the effect' . . . . The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose.").

> [T]he Committee concludes that the factors set out in *Village of Arlington Heights et al. v. Metropolitan Housing Development Corporation et. al*. provide an adequate framework for determining whether voting changes submitted for preclearance were motivated by a discriminatory purpose, including determining whether a disproportionate impact exists; examining the historical background of the challenged decision; looking at the specific antecedent events; determining whether such change departs from the normal procedures; and examining contemporary statements of the decision-maker, if any.[68]

V. DOJ GUIDELINES THAT PROVIDED LITTLE GUIDANCE

The statutory language and its accompanying congressional explanations always constituted very bare bones. Regulations written to guide the DOJ in its enforcement decisions were needed almost from the outset.[69] "Procedures for the Attorney General's Administration of Section Five" had been first published in 1971, with updated versions issued in 1981 and 1987, and—after a lapse of twenty-four years—most recently on August 15, 2011.[70]

The 2011 Guidelines are an interpretation of the 2006 VRARA. Depending on their use by the D.C. District Court and the Justice Department itself, they are likely to shape the political landscape in ways few Americans understand. In general, revised regulations buried in the *Federal Register* implementing a statute attract little public notice. Yet, as historian Hugh Davis Graham once wrote, "[O]ut of such bureaucratic boilerplate . . . can come fundamental shifts in public policy."[71] That has certainly been true in the history of the 1965 Voting Rights Act. The statute itself did not identify key terms and the Supreme Court decisions interpreting the language were few and far between. Thus, political appointees, career attorneys, and other voting section staff decided questions fundamental to democratic government.

68. H.R. REP. NO. 109-478, at 12 (2006); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977).

69. They became necessary in the wake of the Supreme Court's decision in *Allen v. State Board of Elections*, which redefined the meaning of voting practices and procedures in the preclearance provision. It expanded the reach of section 5 to include devices that "diluted" the impact of the Black vote. The Justice Department acquired the power to review not just changes in registration procedure and other obvious disfranchising devices, but the institution of at-large voting, new district lines, and other changes potentially affecting minority voting strength. *See* 393 U.S. 544, 544 (1969).

70. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51 (2011).

71. HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 343 (1990).

Following in the footsteps of the House report, the 2011 Guidelines, in their most important section, state: "The Attorney General's evaluation of discriminatory purpose under section 5 is guided by the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp*."[72] The 1977 decision had nothing to do with voting rights; it was a Fourteenth Amendment ruling involving a rezoning request from a nonprofit development corporation planning to build a racially integrated housing complex. But it had the crucial and regrettable effect of blurring the difference between discriminatory intent and impact.[73]

In relying on *Arlington Heights*, the guidelines state, the DOJ would look at: 1) whether the impact of the official action bears more heavily on one race than another; 2) the historical background of the decision; 3) the specific sequence of events leading up to the decision; 4) whether there are departures from the normal procedural sequence; 5) whether there are substantive departures from the normal factors considered; and 6) the legislative or administrative history, including contemporaneous statements made by the decision makers.[74]

The guilty-until-proven-innocent section 5 test demanding that jurisdictions prove a negative was always difficult to meet. With *Arlington Heights* as the framework to use in judging discriminatory intent, states and their political subdivisions seeking preclearance had to assume the burden of demonstrating an absence of all possibly relevant circumstantial evidence, including disparate impact. The list gave the DOJ a free hand to define the various criteria as it pleased in particular contexts and to weigh one factor more heavily than another—without explanation—when it so chose.

The *Arlington Heights* checklist was preceded by a short list of other factors the Attorney General might consider in enforcing section 5: whether a "reasonable and legitimate justification for the change exists;" the extent to which the jurisdiction followed "objective guidelines and fair and

72. The Guidelines also defined discriminatory "effect," reiterating the *Beer* "retrogression" test, in keeping with the 2006 amendments that superseded *Ashcroft*. 28 C.F.R. §§ 51.2, 51.4 (2011). The 2003 Supreme Court decision had allowed districting plans that sacrificed safe minority constituencies in the interest of shoring up Democratic Party strength by spreading Black voters more thinly. "The power to influence the electoral process is not limited to winning elections," Justice Sandra Day O'Connor had explained in a concurrence. Georgia v. Ashcroft, 539 U.S. 461, 482 (2003) (*quoting* Thornburg v. Gingles, 478 U.S. 30, 99 (1986)) (O'Connor, J., concurring) (*quoting* Davis v. Bandemer, 478 U.S. 109, 132 (1986)).

73. *See Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis*, 426 U.S. 229, 242 (1976)—may provide an important starting point.").

74. 28 C.F.R. § 51.57 (2011).

conventional procedures;" whether "members of racial and language minority groups [had] an opportunity to participate in the decision to make the change;" and the degree to which their concerns were taken into account. It was a recycled list from 1987 section 5 regulations and provided little real guidance, since too many terms were open to varying interpretations.[75]

There were two additional lists, one of "background factors" and one that focused specifically on considerations related to submitted districting plans. In deciding whether a jurisdiction's electoral changes had either a discriminatory purpose or effect, the Attorney General was directed to look

75. In 1971 the Department of Justice had issued its first guidelines to help states understand the process. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. § 51 (1971) (corresponds to 36 Fed. Reg. 18186) (superseded by 28 C.F.R. § 51 (2011)). They listed the type of electoral changes covered by section 5, the address to which submissions should be sent, the required contents of those submissions, the right of private individuals to comment on proposed changes, and the speed with which the department was expected to act.

Jurisdictions were additionally informed that the burden of proving an absence of discriminatory purpose or effect was on the jurisdiction; that a submission to the attorney general did not affect the right of the jurisdiction to bring suit in the D.C. Court; that no administrative or legislative changes in electoral procedure could be implemented without prior federal approval (although those changes could not be reviewed prior to their actual enactment); and that submissions were expected to include relevant material of a demographic, geographic, or historical nature. Furthermore, they were told, any individual or group could forward relevant information to the attorney general concerning the proposed voting procedure and could request confidentiality, although the department would maintain a registry of interested individuals and groups. After an objection, a jurisdiction could request reconsideration in light of new information.

For all this seeming comprehensiveness, the guidelines were mute on the most important questions. There was no mention of the criteria used in judging submissions. Localities were told only that these standards would not differ from those employed by the D.C. Court. The district court, which frequently fashioned its own law, should not have been the decisive authority, however. "In light of the limited number of section 5 cases, the Attorney General can only 'guess' what the [D.C.] [C]ourt would do with any particular case," one scholar noted. Butler, *supra* note 7, at 28 n.123. Supreme Court decisions were few and far between and thus provided little guidance.

In May 1985, the Justice Department finally sent new guidelines out for comment. While they were not officially adopted until January 1987, for the first time the department outlined its criteria in assessing preclearance submissions. But the list of criteria was completely at odds with the retrogression standard set by the Court in *Beer*, and many of the terms in the list were undefined and open to a wide variety of interpretations. For instance, changes in voting procedures were supposed to be "reasonable and legitimate." As political scientist Timothy O'Rourke aptly remarked, the new guidelines read like a criminal statute that states, "Among the things you may be arrested for are . . . ." THERNSTROM, *supra* note 4, at 162 (quoting Telephone Interview with Timothy O'Rourke, Political Scientist (July 1, 1985)). In other words, the proposed guidelines provided no guidance. But they did make clear the means that the Department of Justice had developed to circumvent the Supreme Court's retrogression standard as articulated in *Beer*—and just how far the department had wandered from the limited before-and-after comparison that was, in theory, at the heart of section 5.

at: the extent to which minorities had been denied an equal opportunity to participate meaningfully in the political process; the level of racial polarization in voting and segregation in political activity; and, the impact of "present or past discrimination" on political participation.[76]

Finally, in judging districting maps, the DOJ was to consider the impact of malapportionment on minority voting rights; the degree to which the new lines reduced minority voting strength; the packing and cracking of residentially concentrated minority voters; the availability of alternative plans that would meet the jurisdiction's legitimate interests; departures from objective redistricting criteria, indifference to compactness and continuity, as well as disregard for natural or artificial boundaries; and inconsistency with the jurisdiction's stated redistricting standards.[77]

VI. THE D.C. DISTRICT COURT WEIGHS IN: IGNORING CONTEMPORARY REALITY

The lists cover the waterfront, it might seem. From one perspective, nothing was left out. On the other hand, nothing of much significance was included either. The specificity of that list of factors was deceptive. As suggested above, the items were inadequately defined and no indication of their relative weight was given. What was the measure of an impact that bore more heavily on one race than another? What aspect of the historical background would indicate invidious intent? Certainly few public officials in the twenty-first century would express racist sentiments for the record. But the detailed examination of the legal standards articulated in *Arlington Heights*—pulled from the housing into the voting rights context—was important. *Arlington Heights* was a 1977 Fourteenth Amendment decision; widespread housing discrimination in that era lent clarity to questions of racial animus that were gone thirty-four years later. Moreover, housing and voting rights are quite different arenas. Seeming racial animus in the housing market is more difficult to eradicate than electoral discrimination, particularly because considerations of race and class overlap in the residential choices that families make.

The other lists of relevant factors in the guidelines have the same flaw. What are "reasonable and legitimate" reasons for a change in voting procedure? When do minority groups have a sufficient "opportunity to participate" in the map drawing process? What is the measure of excessive minority-voter concentration? And so forth. Perhaps to answer critics (like myself) who have complained that the vision that ran through the enforcement of section 5 (from the early 1980s to *Bossier II* in 2000) was racial fairness as defined by proportional racial representation, the guidelines do

76. 28 C.F.R. § 51.58(b) (2011) (Background factors).

77. 28 C.F.R. §51.59 (2011) (Redistricting plans).

contain the following seemingly specific disclaimer: "A jurisdiction's failure to adopt the maximum possible number of majority minority districts may not be the *sole* basis for determining that a jurisdiction was motivated by a discriminatory purpose."[78] The disclaimer is meaningless. In denying preclearance, DOJ attorneys never suggest that one—and only one—reason drove their decision. In fact, the language in the Department's objection letters was historically and still remains exceedingly vague.[79]

Judicial decisions can never be as vague as boilerplate objection letters sent to jurisdictions by the DOJ. And towards the end of December 2011, the D.C. District Court did weigh in on the question of how section 5 should be interpreted in light of the 2006 statutory amendments and the 2011 Guidelines. The case was *Texas v. United States*, and the question was the racial fairness of the congressional and state legislative districting maps drawn by the state legislature.[80] Texas has experienced a population surge of more than four million people, two thirds of whom are Hispanic.[81] As a consequence the state gained four new congressional seats whose lines, along with those drawn for state legislative elections, had to be precleared. The constitutionality of section 5 has not been explicitly raised, but it is lurking between the lines.

In November 2011, the district court denied summary judgment to Texas on the ground that the state failed to engage in what the court called a "multi-factored" analysis in determining whether an election district provides minority voters with the "ability to elect" the candidates of their

78. *Id.* (emphasis added).

79. In the 1980s, when I was examining the internal files of the voting section of the DOJ Civil Rights Division, letters of objection contained a standard sentence: "Under these circumstances we are unable to conclude, as we must under the Voting Rights Act, that the submitted plan does not have the purpose and will not have the effect of abridging the right to vote . . . ." A jurisdiction had no way of knowing what sort of evidence contributed to what finding. The material in the internal files that I found was extensively quoted in THERNSTROM, *supra* note 4. Other scholars have made basically the same point. *See, e.g.*, Hiroshi Montomura, *Preclearance Under Section 5 of the Voting Rights Act*, 61 N.C. L. REV. 189 (1983). Such boilerplate language is still used today. A *Texas Tribune* story on September 20, 2011 noted

> [I]n legal boilerplate, the Justice Department lawyers questioned the legality of the maps for the Texas House and for the state's congressional seats, saying they 'deny that the proposed Congressional plan, as compared with the benchmark, maintains or increases the ability of minority voters to elect their candidate of choice in each district protected by Section 5.' The Justice Department used the same language with regard to the plan for the 150 Texas House districts.

Ross Ramsey, *Feds: Proposed Texas Maps Undermine Minority Vote*, TEX. TRIB., Sept. 20, 2011, http://www.texastribune.org/texas-redistricting/redistricting/justice-texas-maps-undermine-minority-vote/.

80. No. 11-1303, 2011 U.S. Dist. LEXIS 147586, at *13 (D.D.C. Dec. 22, 2011). The United States was prepared to preclear the state senate districts, but not those for the state house or Congress. Various intervenors had argued that the senate lines also adversely affected Hispanic voting rights.

81. *Id.* at *19.

choice.[82] Texas, it asserted, had relied too heavily on demographic data—the size of the Black or Hispanic population in the districts in question.[83] A simple count of voting-age population cannot accurately measure minorities' "ability to elect" a preferred candidate of choice, which is the central question in judging whether a map should be found free of discriminatory intent or effect. An examination of voting age population in a district can start the inquiry, but additional factors must then be examined as the guidelines indicated. "[T]here is no single measure that determines minorities' ability to elect" its preferred candidates.[84]

In the 2006 amendments, the court said, "Congress sought to make clear that it was not enough that a districting plan gave minority voters 'influence.'"[85] On the other hand, section 5 protections "are not limited to districts where a single minority group has the ability to elect its candidate of choice, but extend to districts where one group of minority voters has joined with voters of a different racial or language background to elect the minority voters' candidate of choice."[86] In other words, coalition districts can count for "ability to elect" purposes; [87] indeed an effective coalition can include Whites.

The court implied that a coalition of different ethnic or racial groups counted as an "ability to elect" district only where it had been repeatedly successful in electing a candidate of choice.[88] The court evidently assumed

82. *Id.* at *14. The "multifactored approach" that the court urged included such criteria as: the size of a district's minority population considering citizenship rates; voting-age population and voter registration; the extent of racially polarized voting; the presence of electoral coalitions involving minority voters; the role of incumbency in past elections; factors that affect turnout rates by race; and, recent electoral trends.

83. *Id.* at *13-14.

84. *Id.* at *13, *24.

85. *Id.* at *35.

86. *Id.* at *15. The opinion cited language in the House Report accompanying the 2006 Amendments and explained that section 5 protects minorities' ability to elect candidates of choice either "directly or when coalesced with other voters." U.S. Mem. of Points & Authorities in Support of Its Opposition to Plaintiff's Motion for Summary Judgment at 14, *Texas*, 2011 U.S. Dist. LEXIS 147586 (No. 11-1303), (quoting H.R. REP. NO. 109-478, at 46 (2006)).

87. *Texas*, 2011 U.S. Dist. LEXIS 147586, at *35. The court also stated that "coalition and crossover districts that continue unchanged into a proposed plan must be counted as well . . . . For example, evidence that a coalition had historical success in electing its candidates of choice would demonstrate that the minority voters in that district had, and would continue to have, an ability to elect their preferred candidates." *Id.* at *68. New crossover-coalition districts, however, may amount to influence districts that Congress rejected in the VRARA.

88. *Id.* at *68-69 ("Our recognition that crossover and coalition districts are ability districts in a benchmark plan is rooted in the fact that there must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power. For example, evidence that a coalition had historical success in electing its candidates

that, in jurisdictions with such a "working coalition," the various groups that joined together shared common political values and priorities.[89] Perhaps it was a legitimate assumption when grounded in specific historical contexts, but it ignored for the most part the reality that Blacks and Hispanics—to say nothing of Whites and Asians—are not one happy family.

As noted at the outset, when the Voting Rights Act was passed, America was a nation in Black and White. And in much civil rights literature, it was assumed that members of minority groups were fungible—that all non-White Americans had the same interests.[90] In today's multiethnic society, however, it is a woefully out-of-date assumption; inter-ethnic tension is well documented in many settings. In Los Angeles, for instance, Hispanics (now a near majority) have been leapfrogging over Blacks who are a mere 10% of the city's population.[91] The city once had a Black mayor, but a Hispanic now holds the office, and Blacks are not likely to take it back, given the demographics. The Los Angeles press in recent years has been filled with stories on conflicts between Blacks and Hispanics in neighborhoods, schools, prisons, and other institutions.[92]

There was a related point: Black and Hispanic coalitions are often "ephemeral political alliances having little or no necessary connection to discrimination," Fifth Circuit Judge Patrick E. Higginbotham noted in

of choice would demonstrate that the minority voters in that district had, and would continue to have, an ability to elect their preferred candidates.").

89. Successful coalition districts are those in which the Black and Hispanic voters have "combined" to elect candidates of choice—a definition of a coalition that would seem to assume the two groups shared common values. *Id.* at *22.

90. Perhaps the best examples of this misguided notion come from school desegregation cases. For instance in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Supreme Court concluded that "the District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school." *Id.* at 197. There is agreement, the Court continued, "though of different origins [that] Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category 'segregated' schools." *Id.* at 197-98.

In the case of voting rights, the 1975 amendments, equated Black disfranchisement in the Jim Crow South with Latinos deprived of bilingual ballots in justifying the extension of the protections provided by section 5 to the latter group.

91. *State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/index.html (last visited Apr. 1, 2012).

92. *See, e.g.*, Earl Ofari Hutchinson, *Defusing Black-Brown Tension*, L.A. TIMES, Aug. 14, 2008, *available at* http://www.latimes.com/news/opinion/la-oew-hicks-hutchinson14-2008aug14,0,5021143.story?track=rss. Two systematic surveys of intergroup attitudes in Los Angeles indicate that these clashes have deep roots. *See* Mara A. Cohen-Marks & Jim Faught, *Perceptions of Race Relations in Contexts of Ethnic Diversity and Change*, 53 SOC. PERS. 73, 73-98 (2010); James H. Johnson, Jr., Walter C. Farrell, Jr. & Chandra Guinn, *Immigration Reform and the Browning of America: Tensions, Conflicts and Community Instability in Metropolitan Los Angeles*, 31 INT'L MIGRATION REV. 1055, 1055-95 (1997).

1987.[93] Such ephemeral political alliances must be distinguished from "cohesive political units joined by a common disability of chronic bigotry."[94] In his view, there was no voting rights violation without a showing of that "disability."

VII. THE EMERGENCE OF GLOBAL NEIGHBORHOODS

Changes in election procedure, including districting plans, could only be precleared if found to be free of discriminatory purpose or effect. Establishing evidence of discriminatory purpose, the D.C. Court in its 2011 Texas redistricting decision held that establishing evidence of discriminatory purpose required a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[95] The court offered no definition of "sensitive inquiry," but did say that the measure of discriminatory purpose should not be confined to a diminution in the ability to elect a candidate of choice; any and all evidence of invidious intent could be used in judging electoral discrimination, as Congress and the Justice Department had made clear in its revision and interpretation of the statute, relying on *Arlington Heights* to provide the proper framework.[96] One form that circumstantial evidence might take is the failure of a jurisdiction to ensure minority office holding in proportion to the minority population by drawing, in the case of Texas, a sufficient number of safe Hispanic seats to guarantee proportional representation. In other words, the court reasoned, while the statute does not demand safe minority seats in proportion to the minority population, a districting plan in which the number of safe minority constituencies falls short of proportionality suggests intentional electoral

93. League of United Latin Am. Citizens v. Midland Indep. Sch. Dist., 812 F.2d 1494 (5th Cir. 1987).

94. *Id.* at 1504. Another case, *Thornburg v. Gingles*, 478 U.S. 30 (1986), had involved the familiar question of the submergence of the Black vote in majority-White multimember districts, but cases in Texas and other settings with significant Hispanic populations added further complexity to the Brennan preconditions, which were, to begin with, only simple on their face.

95. Texas v. United States, No. 11-1303, 2011 U.S. Dist. LEXIS 147586, at *11 (D.D.C. Dec. 22, 2011).

96. The expanded definition of discriminatory intent was spelled out in part by the House Judiciary Report accompanying the passage of the VRARA:

> [T]he Committee concludes that the factors set out in *Village of Arlington Heights et al. v. Metropolitan Housing Development Corporation et. al*. provide an adequate framework for determining whether voting changes submitted for preclearance were motivated by a discriminatory purpose, including determining whether a disproportionate impact exists; examining the historical background of the challenged decision; looking at the specific antecedent events; determining whether such change departs from the normal procedures; and examining contemporary statements of the decision-maker, if any.

H.R. REP. NO. 109-478, at 12 (2006).

exclusion.[97] The opinion reads as an attempt to silence section 5 critics while embracing the vision of racial fairness to which the civil rights community was deeply committed.[98]

If jurisdictions read the court's opinion with care, they will conclude that—as in earlier times—a failure to draw as many majority-minority districts as possible will likely defeat a districting plan on grounds of discriminatory intent. But explanations other than racial animus can explain a disproportionately low number of minorities elected to office. Is the jurisdiction one in which other evidence suggests Whites are still committed to the idea that politics should be reserved for Whites? It's not easy to find such settings any more. America has moved on; 43% of White voters went for Barack Obama in 2008, which should have been no surprise, given the change in racial attitudes reflected in numerous polls.[99]

The measure of discriminatory effect is retrogression, as noted above. It has always involved a before-and-after comparison—established minority political strength versus that which was likely to result from a new districting plan:

97. *Texas*, 2011 U.S. Dist. LEXIS 147586, at *74 (emphasis added) ("Although Texas' alleged failure to account for the significant increase of the Hispanic population in the State does not establish retrogression, it is relevant to the Court's evaluation of whether the Congressional Plan was enacted with discriminatory *purpose*.").

98. *Id.* at *4. The definition of racial fairness as proportional racial and ethnic representation ran through voting rights enforcement in the 1980s and 1990s. Take, for example, the 1996 district court decision in *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996). The issue was a new map for the South Carolina House and Senate, not congressional districts. The Black legislative caucus, along with the ACLU, the NAACP, and other allies maintained constant contact with the DOJ's Civil Rights Division. These voting rights activists argued that African Americans were entitled to proportional representation. "One-third of our state's population should have no difficulty garnering at least one-third of the seats in the general assembly. Any other alternative is unacceptable," stated Joe Brown, chairman of the South Carolina Legislative Black Caucus. *Id.* at 1184, n.5. Deval Patrick, the Assistant Attorney General for Civil Rights in 1994 (and now governor of Massachusetts), took the same position when the house map was under review. *Id.* at 1185. The proportionality standard was not confined to voting rights. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557 (2009). There, the question was whether a municipal employer could disregard the results of a firefighter's qualifying examination on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another. For an extended discussion of the standard of proportionality, see THERNSTROM, *supra* note 4, and THERNSTROM, VOTING RIGHTS, *supra* note 27.

99. *See, e.g.*, Scott Keeler & Nilanthi Samaranayake, *Can You Trust What Polls Say About Obama's Electoral Prospects?*, PEW RES. CENTER PUBLICATIONS (Feb. 7, 2007), http://pewresearch.org/pubs/408/can-you-trust-what-the-polls-say-about-obamas-electoral-prospects (showing a Pew Research Center poll conducted by Gallup but released by Pew February 7, 2007). In 2003, 92% of Americans expressed willingness to vote for a Black president; only 6% said they would not. These results squared with other polls, also reported by Pew. *See id.*

> Although the Supreme Court has never outlined all factors relevant to this inquiry, it has emphasized that retrogression analysis 'is often complex in practice to determine' . . . . [And] the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidates of choice; an assessment of voter turnout in a proposed district [and so forth].[100]

The D.C. Court's list of factors relevant to a finding of discriminatory effect contained an element I had not seen before: "population shifts between or among redrawn districts."[101] It was a welcome addition to a list that has taken many forms over the years. The enforcement of the preclearance provision (as well as section 2, which I have not discussed in this Article) depends upon information about the size and special distribution of protected minority groups. Could Texas have drawn more "ability to elect" Latino districts—relevant to the question of discriminatory intent? The answer would depend on how many Latinos live in the areas in which new districting lines have been drawn and upon the extent of Hispanic residential concentration. In the almost half century since the VRA was first signed into law, the nation's racial demography has been transformed, raising difficult questions about how we should go about guaranteeing the voting rights of minority groups. Although Congress rested its reauthorization of section 5 in 2006 on extensive research into continuing discrimination (research provided by civil rights advocacy groups), it failed to grapple with the complex implications of this demographic revolution.

Two major demographic changes are relevant to the Voting Rights Act. First, when the Act was initially passed in 1965, the population of the United States was overwhelmingly White. The 1960 Census reported that 10% of the population was Black. American Indians, Asians, and Pacific Islanders together accounted for less than 1%of the total.[102] Another 3% of

100. *Texas*, 2011 U.S. Dist. LEXIS 147586, at *58. Katharine Butler has called such lists "Chinese Menus"—any combination of items could be selected at random and used to prove discrimination. Katharine Inglis Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 888 (1982).

101. *Texas*, 2011 U.S. Dist. LEXIS 147586, at *32 ("We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice . . . .").

102. The populations of these non-Black minorities were so small that most census tables including racial information subsumed them under the umbrella category "Negro and other races." *Historical Statistics of the United States: Colonial Times to 1970*, U.S. CENSUS BUREAU, Series A 91-104, 14 (1975), *available at* http://ia600407.us.archive.org/4/items/HistoricalStatisticsOfTheUnitedStatesColonialTimesTo1970/us

the 1960 population was Hispanic. But the Census did not recognize Latinos as a group until 1970, so this is only an estimate.[103] Traditionally they had been classified by national origin—Mexican, Cuban, Colombians, etc.—and were officially categorized as White. Thus, even if we were to call all Hispanics non-White (despite the fact that at least half of the group identify themselves as White on the census race questions), six out of seven Americans in the 1960s were Whites who could trace their ancestry to Europe.[104] The United States was thus for all practical purposes a biracial society; almost everyone was regarded as either Black or White.

Since then, the nation's racial composition has changed dramatically, and will continue to change rapidly well into the future. We have become a multi-racial nation. As a result of massive new waves of immigration from Asia and Latin America since the 1960s, by 2010 the White European share of the total population had plunged to just 64%. The Black proportion rose modestly over this half-century, from 10 to nearly 13%. But the Hispanic share leaped from 3 to 16%, and the proportion of Asians jumped from 0.5 to 5%.[105] If the demographers are correct, this transformation is far from over. Before the middle of the 21st century—by 2045—the Census Bureau projects that White Americans with European roots will be a minority of the total population. Furthermore, the Hispanic and Asian numbers will grow far more rapidly than those for Blacks.[106]

In 1965, Black enfranchisement was the purpose of the Voting Rights Act; Hispanics, Asians, and Alaskan Natives became protected groups in 1975. At the hearings, however, a number of witnesses acknowledged that the analogy to the experience of southern Blacks was extremely weak.[107]

_historical_statistics_colonial_times_to_1970.pdf. An example of the use of the umbrella category "Negro and other races" is to be found in Series A 23-28 a few pages before.

103. For an excellent discussion of why the Hispanic concept was adopted in 1970, see PETER SKERRY, COUNTING ON THE CENSUS: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS (2000). Careful estimates of the size of the pre-1970 Latino population may be found in Brian Gratton & Myron P. Gutmann, *Hispanics in the United States, 1850-1990: Estimates of Population Size and National Origin*, 33 HIST. METHODS 137-53 (2000).

104. On the racial identification of Hispanics, see *Race and Hispanic Origin: 1790-1990*, at tbl.1 (U.S. Census Bureau, Working Paper Series No. 56, 2002), *available at* http://www.census.gov/population/www/documentation/twps0056/twps0056.html. In 1980, for example, 55.5% of the people identifying themselves as Latino on the census Hispanic-origins question reported their race as White on the race question.

105. *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU, C2010-BR02 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

106. *Summary Table 6, Percent of the Projected Population by Race and Hispanic Origin for the United States: 2010-2050*, U.S. CENSUS BUREAU [hereinafter *Summary Table 6*], http://www.census.gov/population/www/projections/summarytables.html (follow Excel spreadsheet link under Summary Table 6).

107. Prior to the passage of the Voting Rights Act, the overwhelming majority of Blacks in the Deep South could not register and vote. As I argued above, it is impossi-

With the projected growth of these groups in the coming decades, the case for drawing "ability to elect" districts to protect members of non-Black groups from electoral discrimination will grow ever weaker, while maps with majority-minority constituencies will become harder to draw. Majority-Black districts, specifically, are likely to become an endangered species; by 2030, when section 5 is nearing the end of its current extension, Blacks are expected to make up less than a third of the total number of voters for whom ability to elect districts must be drawn.[108]

Majority-Black constituencies will become harder to create not only because the Black share of the minority population will have sharply declined. In 1965, levels of residential segregation were at an all-time high.[109] Most Blacks lived in heavily-Black parts of cities. From the late-nineteenth century to 1960, levels of spatial separation between the two groups had risen sharply. But at the very time that the 1968 Kerner Commission report warned (mistakenly) that the nation was becoming racially polarized, with a growing gulf between "White" suburbs and "Black" inner cities, Black flight to the suburbs began.[110]

---

ble to argue that Hispanics had suffered equivalent disfranchisement. *See supra* note 60. A representative of MALDEF later admitted "we were able to produce those horror stories" needed to suggest obstacles to voting. "But," he went on, "not many of them . . . . We really did it by the skin of our teeth." *See* Confidential Interview with Representative, *supra* note 60. Those who wrote the 1965 legislation had had an abundance of evidence of widespread disfranchisement throughout the Deep South—the extensive litigation experience of the Justice Department. There was no matching record of suits against Texas registrars and other officials. Even the Assistant Attorney General for Civil Rights, J. Stanley Pottinger, was forced to acknowledge that the Justice Department had "concluded that the evidence does not require expansion [of coverage] based on the record currently before us. In other words, that record is not compelling." *See 1975 Senate Hearings*, *supra* note 59, at 543-44. Other leading civil rights spokesmen concurred with the MALDEF representative. Joseph Rauh, counsel for the Leadership Council on Civil Rights, admitted, "You do not have the same situation . . . the murders, the awful things that happened to blacks." *Id.* at 60. A U.S. Commission on Civil Rights memorandum made the same point: "Statistics on [language] minority registration and voting and the election of minorities to office do not paint the shocking picture that, for example, the 1965 statistics on [Blacks in] Mississippi did." Staff Memorandum, U.S. Commission on Civil Rights, Expansion of the Coverage of the Voting Rights Act 47 (June 5, 1975).

108. In 2030, according to the most recent Census Bureau projections, 43.8% of the U.S. population will be made up of groups with special protections under the VRA. The Black population then is expected to be 13.1% of the national total. Hispanics, Asian Americans, Native Hawaiians and Pacific Islanders, and American Indians will by then be 30.7% of the total population. *See Summary Table 6*, *supra* note 106.

109. Edward L. Glaeser & Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America's Neighborhoods, 1890-2010*, 66 MANHATTAN INST. 4 fig.1 (2012).

110. For an analysis of these trends based on data up to 1990, see THERNSTROM & THERNSTROM, *supra* note 22, at 203-31. The 2000 and 2010 census data analyzed by Glaeser and Vigdor shows that residential segregation by race continued to decline rapidly between 1990 and 2010. Glaeser & Vigdor, *supra* note 109, at 4 fig.1.

In 1960, just 15.2% of African Americans lived in suburbs, while today—very strikingly and little known—a *majority* of Blacks (51%) who live in the 100 largest metropolitan areas reside in the suburbs rather than the central cities.[111] Over the 1990s, the total number of African Americans declined in eight of the twenty-five cities with the largest Black populations, and between 2000 and 2010, Black flight occurred in sixteen of the twenty-five largest Black population centers.[112] Between 1960 and 2010, the national Black/White dissimilarity index shrank by about a third.[113] The building blocks for assembling majority-Black electoral districts have been steadily eroded by the strong trend towards residential integration.

In contemplating the future of preclearance, of course, figures for the nation as a whole could be misleading. The vast majority of "covered" jurisdictions are located in the South; they have a population of roughly sixty-five million people today.[114] It might seem logical to assume that the sharp drop in racial segregation by neighborhood since the 1960s occurred mostly in the North and West. If so, ability to elect districts would continue to be easier to draw in the region where racial and ethnic residential clustering remains high. In fact, the assumption is wrong. As one would expect, in 1960, residential segregation by race was higher in the South than elsewhere. But since then, segregation levels remarkably have dropped in the southern states far more than elsewhere. Between 1960 and 2000, the Black/White dissimilarity index fell by a stunning 32.8 points in the South, as compared with just 5.3 points in the Northeast, 13.6 points in the Midwest, and 23.4 points in the West.[115] In 2000, the segregation index for the South was an impressive sixteen points below its level for the Northeast and Midwest. No regional breakdowns of segregation indices for 2010 are available as yet, but it is clear that the trend has continued over the first decade of the new century.[116] Long a laggard in racial change, the South is now in the vanguard.

111. THERNSTROM & THERNSTROM, *supra* note 22, at 211; William H. Frey, *Melting Pot Cities and Suburbs: Racial Change in Metro America in the 2000s*, 28 ST. OF METRO. AM. 9 (2011).

112. *Id.* at 6-8.

113. Glaeser & Vigdor, *supra* note 109, at 4 fig.1.

114. *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Apr. 1, 2012); *State & County QuickFacts*, *supra* note 91.

115. Edward L. Glaeser & Jacob Vigdor, *Racial Segregation in the 2000 Census: Promising News*, BROOKINGS CENTER ON URB. & METRO. POL'Y 15 tbl.3 (2003).

116. *See* Glaeser & Vigdor, *supra* note 109, at 5-8. Although the paper analyzing the 2010 census data does not give a regional breakdown, it is apparent from the figures given on 2000-2010 changes in the ten largest metropolitan areas (Table 1), and in the cities with the largest African-American populations (Table 5), that the South continues to lead the Northeast and Midwest in the pace of its shift towards greater neighborhood integration. Atlanta, which had only the thirteenth-largest concentration of Black people of any American city, is now second only to New York City. Atlanta had a dissimi-

Not only have African Americans moved to the suburbs in very large numbers; most have settled in racially mixed neighborhoods, as is evident from the steep declines in the segregation indices that have accompanied rising Black suburbanization. Moreover, their neighbors now include large numbers of people who have entered the United States as a result of the major liberalization of immigration law in the same year as the passage of the Voting Rights Act. The shift from a biracial to a multiracial society has occurred in the South as well as elsewhere, though more so in Virginia, North Carolina, Georgia, Florida, and Texas than in Louisiana or Mississippi.[117]

One investigator has measured the growth of population in "global neighborhoods," which he defines as census tracts in which Whites, Blacks, Asians, and Hispanics are all well represented. In the 20 highly-diverse large cities he examined—six of which are in covered jurisdictions—the percentage of people residing in areas in which all four racial/ethnic groups were found in large numbers rose from 23% to an impressive 38% between 1980 and 2010. And as of 2010, another 31% resided in tracts in which three of these groups were well represented.[118] A mere 3% of Blacks in these metropolitan areas resided in tracts without a significant number of neighbors of other races, and an even smaller fraction of those from the other three groups resided in racially homogenous areas.[119] With this level of mixing at the neighborhood level, it will be extraordinarily hard to piece together ability to elect districts in which one group is a decisive majority. More Black incumbents or aspiring Black politicians will find themselves in districts in which African-American voters are only a plurality. Coalitions will form, but they will not count for section 5 purposes unless there has been a history of their effectiveness in electing minority candidates of choice, and if the standards set out in the D.C. Court are accepted by the Supreme Court as well.

larity index that was eight points higher than that of New York in 1970; its index is 11% lower than New York's today. Chicago's segregation index today is eighteen points higher than that of Atlanta and twenty-four points higher than that of Houston. Similarly, Miami and Dallas are substantially less segregated than the typical large northern city.

117. These are the southern states that have attracted the largest numbers of Hispanic immigrants and internal Black migrants in recent years. *See Table 19, Resident Population by Race, Hispanic Origin, and State: 2009*, U.S. CENSUS BUREAU, http://www.census.gov/compendia/statab/2011/tables/11s0019.pdf.

118. John R. Logan & Wenquan Zhang, *Global Neighborhoods: New Evidence from the 2010 Census*, 2011 US2010 PROJECT 4 tbl.1, *available at* http://www.scribd.com/doc/71031910/Global-Neighborhoods-New-Evidence-from-Census-2010.

119. *Id.*

VIII. THE MYTH OF MINORITY "COMMUNITIES"

As I have argued above, the huge literature on minority voting rights has paid too little attention to demographic factors that have important implications for the enforcement of the preclearance provision. For a variety of reasons, members of a minority group do not necessarily cluster residentially, and Hispanics living in neighborhoods that are some distance from one another are not necessarily a "community" that should be recognized as such by those attempting to meet the demands of the Voting Rights Act.[120] The residential dispersion of Blacks is relatively new; White racism had historically forced the creation of Black neighborhoods. But if Blacks keep scattering, as they have been doing, Black representation by Black officeholders will inevitably become harder to ensure. The creation of majority-Black legislative districts will no longer come easily. In addition, as minority families continue to move up into the middle class and from city to suburb, the legitimacy of wandering district lines chasing after these mobile residents to maintain safe Black legislative constituencies is likely to become increasingly questionable.[121] Black and Hispanic families who leave central cities don't necessarily identify with their old neighborhoods. Their sense of socioeconomic status may alter. They acquire new neighbors with interests tied to the schools and other institutions and organizations in the immediate area. And yet, these families are forcibly conscripted into the same districts and are thus linked to their old neighbors with whom they have little in common. In addition, in different parts of a far-flung district, different media markets may operate, weakening their connection to candidates.[122]

120. The issue came up in the Supreme Court's response to a new Texas congressional map drawn in 2003. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006). The state created a new majority-Hispanic district, but in a decision that rested on section 2 of the Voting Rights Act—with legal standards establishing electoral exclusion quite different from those of section 5—the Court said it didn't like its looks. Justice Kennedy, writing for the Court, concluded that the district was not compact and Hispanics that were clustered hundreds of miles apart in "different communities of interest" had been illegally grouped together for purposes of representation. *Id.* at 441. "The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals," he wrote. *Id.* at 434.

121. Beginning in 1994, the Supreme Court did set some limits on how distorted districts could become. *See* Miller v. Johnson, 515 U.S. 900 (1995). The cases in which the Court found race-driven, contorted districts a violation of the Fourteenth Amendment were all responding to lines drawn to comply with section 5.

122. On this point, see Judge Edith Jones, writing for the court in *Vera v. Richards*, 861 F. Supp. 1304, 1335 n.43 (S.D. Tex. 1994):

> Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic

There is a related point. Neither Blacks nor Latinos are necessarily a "community," whose members share a racial agenda. Latinos come to America from a diversity of settings; immigrants from Puerto Rico and those from Ecuador bring very different cultures to their new homeland. Moreover, the entire notion of a Black "community" as the foundation of a Black legislative district is rapidly becoming an anachronism. The migration of Blacks from Africa and the Caribbean has brought to the American shores "Blacks" who have little in common with the descendants of American slaves. In addition, few eyebrows were raised—or so it seemed—when novelist Toni Morrison called Bill Clinton "our first black president."[123] But if Whites can be Black, then racial identity has become a matter of ideology and politics. And districts that are drawn to provide Blacks with the ability to elect the candidates of their choice can be majority White—although not Republican, given the political views of most Blacks.[124]

> and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can no longer importune *their* Congressman and expect to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional districting principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grass-roots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries . . . . [As] the influence of truly local organizations wanes, that of special interests waxes . . . . The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles.

123. Toni Morrison, *Talk of the Town*, THE NEW YORKER (Oct. 5, 1998), *available at* http://www.newyorker.com/archive/1998/10/05/1998_10_05_031_TNY_LIBRY_000016504?currentPage=all. Referring to the sexual scandals surrounding Clinton, Morrison said:

> African American men seemed to understand it right away. Years ago, in the middle of the Whitewater investigation, one heard the first murmurs: white skin notwithstanding, this is our first black President. Blacker than any actual black person who could ever be elected in our children's lifetime. After all, Clinton displays almost every trope of blackness: single-parent household, born poor, working-class, saxophone-playing, McDonald's-and-junk-food-loving boy from Arkansas. And when virtually all the African American Clinton appointees began, one by one, to disappear, when the President's body, his privacy, his unpoliced sexuality became the focus of the persecution, when he was metaphorically seized and bodysearched, who could gainsay these black men who knew whereof they spoke? The message was clear "No matter how smart you are, how hard you work, how much coin you earn for us, we will put you in your place or put you out of the place you have somehow, albeit with our permission, achieved. You will be fired from your job, sent away in disgrace, and—who knows?—maybe sentenced and jailed to boot. In short, unless you do as we say (i.e., assimilate at once), your expletives belong to us."

Id.

124. The issue came up in *League of United Latin American Citizens v. Perry*, 548 U. S. 399, 443-46 (2006). Martin Frost, the former dean of the Texas delegation, is a White Democrat. His district (as Black Representative Eddie Bernice Johnson testified at the trial) was drawn by Whites to elect a White Democrat. Nevertheless, minority

Richard Thompson Ford has argued that "[t]oday, there are, effectively, at least two black communities: an increasingly prosperous and well-educated professional class, and an increasingly isolated, poor socialized, and demoralized underclass . . . [They are] increasingly divided by lifestyle, values, norms of behavior, and life prospects."[125] His point further underscores the immediately preceding argument: districting lines that rest on the assumption that Blacks form a cohesive community ignore contemporary reality.

IX. MAJORITY-MINORITY DISTRICTS: A BRAKE ON BLACK POLITICAL ASPIRATIONS

Legislative maps that fail to recognize the diversity that characterizes America's minority groups ignore contemporary reality. In addition, lines drawn to ensure minority office-holding have unintended consequences that should be unwelcomed. The drive to maximize minority office-holding may act as a brake on Black political aspirations, for instance.[126] Arguably, in fact, Black political progress might be greater today had race-conscious districting been viewed simply as a temporary remedy for unmistakably racist voting in the region that was only reluctantly accepting

plaintiffs argued this was a district in which Black voters could predictably elect the "candidate of their choice," which is how they described Mr. Frost. It was, they said, a Black "opportunity-to-elect" district, protected by the Voting Rights Act, even though it was only 25% Black and had elected a White congressman. The Supreme Court didn't buy it. Anglo Democrats controlled the district, the Court found, which is what the district court had found. It was not a section 5 suit, it should be noted, but one that rested on another Voting Rights Act provision, section 2. *Id.* at 445-46.

125. RICHARD THOMPSON FORD, RIGHTS GONE WRONG 197 (2011).

126. For a much fuller discussion of the high price of continuing to insist on race-based electoral arrangements, see THERNSTROM, VOTING RIGHTS, *supra* note 27, at 214-20. An article by Jason Rathod makes an almost identical argument with respect to costs, noting that the Voting Rights Act "currently encourages formation of majority-minority districts that reward racially polarizing candidates, handicap minorities from winning politically powerful statewide races, and reproduce race as an organizing principle of American society." Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 101 (2011).

Race-based districts, he continues, "typically reward race-baiters who resort to fanning the flames of racial extremism," and as a consequence, "campaigns degenerate into battles of who is the Blacker candidate." *Id.* at 151. "Because majority-minority districts reward race-baiting candidates and punish post-racial candidates," he continues, "they elect candidates who lack the cross-racial appeal to win statewide races." *Id.* at 155. These are precisely the points I made in my 2009 book and repeat (in an abbreviated version) below. But Rathod goes on (as I did not) to urge a solution that I agree with: encouraging the drawing of maps that contain many more crossover districts in which minority candidates must appeal to White voters. Such districts would reward post-racial campaigns. And he places his argument in a larger and distinctive theoretical context, depicting the country as torn between civic nationalism and racial nationalism, concepts he discusses at length. *Id.* at 136-42.

Blacks as American citizens. As I argue below, race-driven districts carried a high cost, turning Whites into "filler people" in majority-minority districts, generally pushing Black representatives to the periphery of American politics, and depriving them of any experience and training in building biracial and bipartisan coalitions.

Multiple questions can be—and have been—raised about the costs of race-driven districting. Voting rights experts T. Alexander Aleinikoff and Samuel Issacharoff suggest that racially gerrymandered districts flash the pernicious message "RACE, RACE, RACE,"[127] with the implication (disconnected from reality, I argue above) that all Blacks think alike, although, as the authors pointed out, the stereotyping of Whites should be of equal concern.[128] "Race essentialism" should be morally unacceptable, whatever the color of members of the group. But given America's ugly racial history, the notion that Blacks are fungible members of a subjugated group that stands apart in American life, requiring methods of election that recognize their racial distinctiveness, should be especially troubling. Compact districts honoring geographically natural boundaries never send that message.

Race-conscious districts drawn to ensure legislative seats safe for minority candidates were forced upon states by both Democratic and Republican Justice Departments.[129] As Daniel Lowenstein has noted, "State legislatures, acting on their own, do not carry race-based districting to excess. Racial and ethnic groups, like other groups, will be accommodated, but none will be privileged."[130] When politics, not race, drives the districting process, the nonracial electoral agendas of parties, incumbents, and candidates are not so recklessly dismissed.

Such districts have also turned White voters into what Aleinikoff and Issacharoff called "filler people."[131] Whites became irrelevant to the outcome of the elections in districts designed to elect minorities, unless they served as the swing vote in a Black-on-Black contest. They had been included in such districts only to make sure that the Black population did not become so concentrated as to make some Black ballots superfluous and, therefore, wasted. They had not been "expected to compete in any genuine sense for electoral representation . . . lest they undo the preference given to the specified minority group."[132] As a consequence, such districts generally reward minority politicians who consolidate the minority vote by mak-

127. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 592, 610-11 (1993).

128. *Id.* at 610.

129. THERNSTROM, VOTING RIGHTS, *supra* note 27 *passim* and chapter 4 (discussing Miller v. Johnson, 515 U.S. 900 (1995)).

130. Lowenstein, *supra* note 19, at 828.

131. Aleinikoff & Issacharoff, *supra* note 127, at 601.

132. *Id.* at 631.

ing the sort of overt racial appeals that are the staple of invidious identity politics. "Post-racial" has no appeal in such contexts, with the result that very few members of the Congressional Black Caucus have a voting record that would attract White support, except in reliably liberal jurisdictions.[133] And very few have any experience building biracial coalitions.

Indeed, only five members of the CBC, as I write, have been elected from majority-White constituencies, and only two are Republicans.[134] In short, race-based districts seem to have worked to keep most Black legislators clustered together and on the sidelines of American political life—precisely the opposite of what the statute intended, and precisely the opposite of what is needed. Blacks running in majority-minority districts, not acquiring the skills to venture into the world of competitive politics in majority-White settings—that is not the picture of political integration, equality, and the vibrant political culture that the Voting Rights Act promised.

Harvard law professor Cass Sunstein describes a larger phenomenon that is related: people across the political spectrum end up with more extreme views than they would otherwise hold when they talk only to those who are similarly minded.[135] Districts that meet the ability to elect standard have been drawn to give voice to the "similarly minded." As a result, elected representatives are left insufficiently tutored in the skills necessary to win competitive contests in majority-White settings. It is a self-fulfilling prophecy: very few Black candidates risk running in majority-White constituencies; majority-minority districts thus become the settings in which Blacks are most frequently elected.[136]

133. As of 2006, every member of the Congressional Black Caucus was a Democrat and had a composite liberal voting score (as assigned by the *National Journal*) above the congressional average; only Sanford Bishop of Georgia, with a score of 54.8, had a record close to the mean, while half of the members scored above 80. *2006 Vote Ratings*, NAT'L J. (Mar. 3, 2007), http://www.nationaljournal.com/member/magazine/2006-vote-ratings-20070303?mrefid=site_search. *See also* DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 36 (1997).

134. The two Republicans are Allen West, representing Florida's 22nd congressional district, and Tim Scott, representing South Carolina's 1st congressional district. Scott has refused to join the Congressional Black Caucus, with its very liberal politics. *See supra* note 133. The other three Black members elected from majority White constituencies are Keith Ellison (MN-5), Emanuel Cleaver (MO-5), and André Carson (IN-7). *See* THE ALMANAC OF AMERICAN POLITICS (Michael Barone et al. eds., 2012).

135. CASS R. SUNSTEIN, WHY GROUPS GO TO EXTREMES (2008).

136. In April 2011, all but five members of the Congressional Black Caucus had been elected in majority-minority districts; the other five had been elected in majority-White constituencies. I calculated this from a list of the CBC membership available on the CBC website. *See Members Directory*, CONG. BLACK CAUCUS, http://thecongressionalblackcaucus.com/members/directory (last visited Apr. 1, 2012); *see also* MICHAEL BARONE & CHUCK MCCUTCHEON, THE ALMANAC OF AMERICAN POLITICS (2012). This work proved invaluable.

In safe minority constituencies, aspiring politicians are under no pressure to run as centrists, and are most often pulled to the left. Their politics, along with a reluctance to risk elections in majority-White settings, perhaps explain why so few members of the Congressional Black Caucus have run for statewide office. As of 2006, the entire CBC was more liberal than the average White Democrat, limiting the appeal of its members to White voters, particularly in the South.[137] Politicians outside the mainstream can play an important role in shaping legislative debate. But when a group that has been historically marginalized as a consequence of deliberate exclusion subsequently chooses the political periphery, it risks perpetuating its outsider status, reinforcing the sense of racial difference and compromising the goal of the Voting Rights Act.

Race-based districts seem to have worked to keep most Black legislators clustered together and on the sidelines of American political life. But not all Black politicians have been elected from safe minority constituencies; the point should not be overstated. President Obama's political career actually began with his successful bid for the Illinois state senate, running from a majority-Black district. Obama, however, was a uniquely gifted political entrepreneur with the skills to reach across racial lines. Thus, he created, saw, and seized opportunity where others have not.

Other Black politicians have succeeded in majority-White settings. Journalist Gwen Ifill has described a number of such candidates in her recent book, *The Breakthrough: Politics and Race in the Age of Obama.* Mike Coleman was elected in 1999 as the first Black mayor of Columbus, Ohio. She describes his strategy: "Woo the White voters first . . . then come home to the base later."[138] Richard Thompson Ford in his recent book, *Rights Gone Wrong*, describes Obama as "part of a cohort of new black politicians who have won office not by appealing to narrow racial solidarities but by drawing broad support from all races, and in some unlikely locations."[139] On his list are Newark Mayor Cory Booker, Massachusetts Governor Deval Patrick, and Philadelphia Mayor Michael Nutter.[140]

Nevertheless, the cohort of "new black politicians" is small. The Voting Rights Act was meant to level the political playing field, so that Blacks would become a political faction with the ability to enter and exit coalitions as other citizens do—that is, if they chose to define themselves as members of a likeminded political interest group. Its ultimate goal was full

137. *2006 Vote Ratings*, *supra* note 133. The National Journal has its own scale that it uses for all members of Congress, with its data based on votes on issues that it considers ideologically revealing.

138. GWEN IFILL, THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA 227 (2009).

139. FORD, *supra* note 125, at 190.

140. *Id.* at 190-91.

political assimilation. Instead, the law—with its stress on the urgent need for maximizing the number of ability to elect districts—suggests that Black and Latino voters (the number of race-conscious districts drawn for Asians and American Indians is miniscule) are never like other citizens who may or may not put race or ethnicity at the center of their self-definitions. Indeed, these non-Asian minorities constitute a nation within our nation—entitled to distinctive treatment as belonging to outsider groups. In a racially transformed country in which the President is Black, Blacks hold important corporate and other positions of power, residential and other forms of integration are on the rise, and bigotry has become socially and politically unacceptable, old notions of race are still alive in the enforcement of our most important civil rights law.

X. LOOKING TOWARDS THE FUTURE

At its inception, the Voting Rights Act stood on very firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic Fifteenth Amendment rights. A clear principle justified its original enactment: citizens should not be judged by the color of their skin when states determine eligibility to vote. That clarity could not be sustained over time. As a result, more than four decades later, the law has become what Judge Bruce Selya has described as a "Serbonian bog."[141] The legal land looks solid but is, in fact, a quagmire, into which "plaintiffs and defendants, pundits and policymakers, judges and justices" have sunk.[142]

In part the problem is the difficulty that "plaintiffs and defendants, pundits and policymakers, judges and justices" are having in finding their footing in a racial context so very different than that in which the statute had been enforced for most of its life. In following its own recently issued guidelines, the Justice Department may not soon start down untraveled roads, recognizing the waning of American racism. But administrations come and go, new people take charge of civil rights enforcement at the DOJ, new judges are appointed, and the racial zeitgeist continues to change. Today's interpretation of the language of the guidelines is not likely to remain the definitive understanding of the demands of preclearance. Section 5 is set to expire in 2031; long before that date, the "Procedures for the Attorney General's Administration of section five," most recently issued in April 2011, will surely be altered in ways we cannot yet foresee. We know only this: the American racial landscape is fluid, and the law does respond to change.

141. Vecinos De Barrio Uno v. City of Holyoke, 72 F.3d 973, 977 (1st Cir. 1995).
142. *Id.*