



46 U.C. DAVIS L. REV. 1041 (2013)
Legal Studies Paper No. 2012-22

DEMOCRACY ON THE HIGH WIRE:
CITIZEN COMMISSION IMPLEMENTATION
OF THE VOTING RIGHTS ACT

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Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act

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The Voting Rights Act, often praised as the most successful civil rights statute, is among the most fact-intensive of election regulations. California, the country's most populous and most diverse state, is among the most challenging terrain for applying the Act. California is also the largest jurisdiction at the vanguard of a burgeoning experiment in indirect direct democracy: allowing lay citizens, not incumbent officials, to regulate the infrastructure of representation.

In 2011, fourteen California citizens strode into the briar patch where citizen institutions intersect the Voting Rights Act. These fourteen comprised the state's brand-new Citizens Redistricting Commission: an official body of laypersons responsible for applying, in the face of substantial public skepticism, the most nuanced of regulations to the most complex political landscape in the country.

This Article, building on prior theoretical work regarding citizen control of public institutions, assesses the new Citizens Commission's approach to complying with the Voting Rights Act. It offers the first comprehensive review of an actual citizen commission's engagement with a legal structure that is poorly understood by most citizens. This Article opens a rare window not only on the procedures involved in implementing the Voting Rights Act — including new amendments applied to redistricting for the first time in 2011 — but on the process by which a citizens commission may undertake public responsibilities more generally.

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And in so doing, it highlights decision paths likely to inform not only future citizen bodies, but a range of officials confronting the Voting Rights Act across the country.

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INTRODUCTION

The California Citizens Redistricting Commission assembled for the first time in December 2010. Fourteen citizens, culled from 30,725 applicants,¹ prepared to overhaul the infrastructure of the democracy enjoyed by 37.3 million of their neighbors.² They would redraw political district lines and thereby determine the degree to which different interests would be represented in legislative delegations.³ By redrawing the district lines, they had the capacity to redraw the political landscape. Most remarkable was the fact that they were holding the pen at all.

As in most states, the California legislature controlled redistricting throughout the twentieth century.⁴ Incumbent control of electoral rules represents a hoary democratic difficulty, much studied and much lamented for the potential conflict of interest inherent in that control.⁵ Scholars have examined various means by which greater citizen involvement might (or might not) mitigate the potential conflict.⁶ Less often have they recommended substituting lay citizens for professional politicians as the principal relevant decision-makers.⁷ Less often still have these ideas been put into practice.⁸

¹ *Statistics*, CITIZENS REDISTRICTING COMM'N, <http://web.archive.org/web/20101117092854/https://application.wedrawthelines.ca.gov/statistics> (last visited Dec. 24, 2012).

² *State and County Quickfacts: California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last revised Dec. 6, 2012).

³ See Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 *LOY. L.A. L. REV.* 513, 516-18 (2011).

⁴ CAL. CONST. art. XXI, § 1 (2007) (amended 2008).

⁵ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103, 117, 120 (1980) (discussing the capacity for incumbents controlling the political process to create electoral regulations artificially sustaining their own power); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998) (same).

⁶ See, e.g., CRAIG B. HOLMAN, *AN ASSESSMENT OF NEW JERSEY'S PROPOSED LIMITED INITIATIVE PROCESS 21-22* (2000), available at http://www.brennancenter.org/page/-/Democracy/nj_an_assessment.pdf (discussing a limited citizen initiative for electoral regulations); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 *WASH. U. L. REV.* 667, 700-04 (2006) (suggesting a referendum as a check on incumbent redistricting).

⁷ See, e.g., Levitt, *supra* note 3, at 534-43 (noting the potential for citizen redistricting commissions); cf. ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004) (proposing a more general system of citizen jury lawmaking); David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81 (2005) (proposing greater deference for administrative rulemaking involving citizen juries).

⁸ See, e.g., Mark E. Warren & Hilary Pearse, *Introduction: democratic renewal and*

California's new Commission marks a profound, and profoundly unusual, real-world expression of the theory. It was put in place by the practice of what we may call "indirect direct democracy": direct democracy focused purely on the ground rules for governing. Our usual process of democracy — our standard "republican form of government"⁹ — is indirect, premised on legislation by a representative political class. Direct democracy, in contrast, features legislation by plebiscite.¹⁰ Indirect direct democracy is an amalgam of the two: plebiscite measures intended to substitute lay citizens for the political class, but only in controlling the electoral rules that govern negotiation of future legislation.¹¹ It leaves professional politicians responsible for substantive lawmaking, but reclaims popular control over the electoral infrastructure of the political process. And in so doing, it provides a public check on the ability of the political class to insulate itself from electoral feedback.

California's new Commission is a remarkable product of this exercise of citizen power. A popular initiative in 2008 stripped authority over state legislative redistricting from the state legislature, and vested that authority in a new independent commission of citizens. A second initiative in 2010 extended the independent body's authority to congressional districts.¹² California was only the sixth state to have ceded control of its redistricting process to individuals unconnected to elected officials, and it was by far the country's largest and most diverse jurisdiction to have done so.¹³ Indeed, it appears to

deliberative democracy, in *DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS' ASSEMBLY 6-7* (Mark E. Warren & Hilary Pearse eds., 2008) (describing the citizens' assembly empowered by British Columbia to set a constitutional agenda).

⁹ U.S. CONST. art. IV, § 4.

¹⁰ See Glen Staszewki, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 396-98 (2003).

¹¹ Cf. Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997 (2005) (investigating the frequency and potential efficacy of such measures).

¹² CAL. SEC'Y OF STATE, *Proposition 11*, in CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE, 70-73, 137-40 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf>; CAL. SEC'Y OF STATE, *Proposition 20*, in CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 2, 2010: OFFICIAL VOTER INFORMATION GUIDE, 18-23, 95-97 (2010), available at <http://vig.cdn.sos.ca.gov/2010/general/pdf/english/complete-vig.pdf>.

¹³ See ALASKA CONST. art. VI, §§ 3-4, 8; ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI, § 1; CAL. GOV'T CODE § 8252 (West 2012); IDAHO CONST. art. III, § 2; IDAHO CODE ANN. § 72-1502 (2012); MONT. CONST. art. V, § 14(2); MONT. CODE ANN. §§ 5-1-101, -102, -105 (2012); WASH. CONST. art. II, § 43; WASH. REV. CODE ANN. § 44.05.030-.100 (West 2012). Several local jurisdictions also rely on citizen

be the largest jurisdiction in the world to have given individuals neither appointed by nor connected to elected officials the responsibility to make public law.¹⁴ The design of the commission, and the way in which it carried out its charter, will be closely studied for years.

The California Commission comprised fourteen individuals without established relationships to legislative incumbents.¹⁵ It also comprised fourteen individuals without established relationships to each other or, for the most part, to the practice of statewide redistricting. These fourteen individuals formed a brand-new state entity, with minimal infrastructure and eight months to draw four sets of statewide districts for the largest, most diverse state in the nation. They had to perform this task in the most complex legal environment in the country, with an equally new set of prioritized but occasionally competing criteria, some of which were laden with meaning derived from past legal battles, and some of which had never before been interpreted.¹⁶

Of particular note were two legal requirements from different sections of the Voting Rights Act (“VRA”)¹⁷: the most nuanced, demanding, and fact-intensive of election-related regulations. Early opposition to the Commission from civil rights groups centered on fears that a body of independent laypersons would be insufficiently attentive to minority concerns, including adequate compliance with the Act.¹⁸ The Commission’s work is now complete for the current redistricting cycle. So how did it do?

redistricting bodies not beholden to particular legislative officials. *See, e.g.*, N.Y.C., CITY CHARTER §§ 50-51 (2012) (describing New York City’s independent redistricting commission).

¹⁴ *See* Warren & Pearse, *supra* note 8, at 6-7.

¹⁵ *See* CAL. CONST. art. XXI, § 2(c)(1), (2), (6); CAL. GOV’T CODE § 8252(a)(2) (West 2012).

¹⁶ *See* CAL. CONST. art. XXI, § 2(d), (e).

¹⁷ 42 U.S.C. §§ 1973a, 1973c (2006).

¹⁸ *See* Steven Harmon, *Civil Rights Groups Worried About Effect of Remap Proposal*, CONTRA COSTA TIMES, July 8, 2008; *cf.* Arturo Vargas, *Opinion, Redistricting Effort Already a Flop*, ARIZ. REPUBLIC, Feb. 20, 2001, at B7 (articulating similar concerns in Arizona). It may be that civil rights concerns about independent bodies to date stem from particular design or implementation choices in the commissions that have been established, rather than the inherent nature of an independent decisionmaking body. *See* NAACP LEGAL DEF. & EDUC. FUND, INC., POLITICAL PARTICIPATION GRP., INDEPENDENT REDISTRICTING COMMISSIONS: REFORMING REDISTRICTING WITHOUT REVERSING PROGRESS TOWARD RACIAL EQUALITY 3-5 (2010), *available at* http://naacpldf.org/files/publications/IRC_Report.pdf.

This Article, building on prior theoretical work regarding citizen redistricting bodies,¹⁹ assesses the new California Commission's approach to complying with the Voting Rights Act. It thereby adds an important experiential reflection to the scholarly debate about citizen redistricting bodies, and about the use of citizen bodies in public law more generally.²⁰ Indeed, the Article offers the first comprehensive review of an actual citizen commission's engagement with a legal structure that is poorly understood by most public citizens. In so doing, this piece joins a distinguished line of scholarship tracing in detail the procedures by which various institutions tackle the thorny issues of the Voting Rights Act, though none thus far have turned their attention to independent citizen bodies.²¹ Moreover, this Article attempts to highlight the steps and missteps of California's citizen commission with an eye to lessons that may inform not only future citizen bodies, but decision-makers across the country contending with application of the Voting Rights Act.

The Article proceeds as follows. Part I reviews the substantive requirements of the Act that are applicable to redistricting, emphasizing the nuance that has escaped public understanding and that might be expected to surprise lay commissioners. This review includes an analysis of portions of the Voting Rights Act that were amended in 2006 and applied for the first time to redistricting in 2011, but which have not yet been construed by the courts. Part II then summarizes the procedural means by which a public body might optimally seek to ensure compliance with the Act without simultaneously running afoul of other legal constraints. Part III turns from theory to practice, examining for the first time in detail the process by which the California Citizens Redistricting Commission attempted to comply with the Voting Rights Act, with particular focus on the Commission's notable decision points. Finally, Part IV concludes with an assessment of the ways in which the Commission's approach may have enhanced or hindered its ability to ensure compliance, identifying notable lessons and lingering questions for future citizen institutions.

¹⁹ See generally Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012); Scott M. Lesowitz, *Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535 (2006); Levitt, *supra* note 3.

²⁰ See *supra* notes 6-8 and sources cited therein.

²¹ See generally Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007) (reviewing the 2006 Amendments to the Voting Rights Act, and discussing their interpretation in light of past practice).

It is worth emphasizing that this Article does not set out to determine whether the Commission's work product actually complied with the Voting Rights Act. Instead, it is intended to assess whether the Commission appears to have gone about its task in a way that made compliance more or less likely.²² Beyond its more manageable scope, such a review has the benefit of informing the design and preparation of future efforts to comply with the Voting Rights Act, even under very different demographic and political conditions.

I. SUBSTANTIVE REQUIREMENTS OF THE VOTING RIGHTS ACT

The Voting Rights Act is widely hailed as one of the most successful pieces of civil rights legislation in the country's history. It is, at present, our most significant shared national commitment to at least a modicum of political diversity within a prevailing system of majority rule, based in part on history that allows us to recognize that we all suffer when such a commitment is absent. The Act provides opportunities for racial and language minorities to achieve equitable political power where conditions would otherwise threaten that ability. A tool this powerful is necessarily nuanced. And in a world where news is credibly presented and digested in 140-character snippets, it is perhaps unsurprising that the Act's protections are sometimes poorly understood.

To begin, it is worth addressing a few common misconceptions. The Voting Rights Act does not always require that districts always be drawn, wherever possible, to yield minority control. It does not always require preservation of districts controlled by minorities in the past. It does not establish a hierarchy of "more preferred" and "less preferred" minorities. It does not require districts drawn in order to benefit particular incumbents at the expense of minority populations within the district (though the interests of communities and their representatives may coincide). It does not require districts drawn in order to benefit particular political parties, and does not always have the effect of consistently benefiting particular political parties (though every adjustment of district lines necessarily produces a partisan

²² Though this Article draws from a comprehensive review of the public record, including all of the Commission's public transcripts, it is also important to acknowledge the limitations of the methodology. Relevant portions of the Commission's process — including discussions between small teams of Commissioners and their line-drawing technical consultants — are not captured in the public record and are difficult to infer or otherwise glean from public sources. Other relevant conversations were privileged, in anticipation of litigation, or otherwise held confidential.

impact). And compliance with the Act cannot be assessed merely by looking for pockets of minority voters or for minority incumbents.

The following sections summarize what the Voting Rights Act *does* do, striving for sufficient detail to assess the Commission's efforts to put itself in position to comply with the law's mandate.²³ Two sections of the Voting Rights Act are relevant for these purposes: section 2 and section 5.

A. Section 2

Section 2 of the Voting Rights Act prohibits any law or practice that results in a "denial or abridgement of the right . . . to vote on account of race or color," or because of membership in a language minority group.²⁴ A redistricting plan will violate Section 2 if, in the totality of circumstances, the plan interacting with social and historical conditions provides the members of a protected class of racial or language minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."²⁵

Because there are several plausible conceptions of what it might mean to "abridge" a group's electoral opportunity, particularly with respect to redistricting decisions, the Supreme Court articulated a test refining the statutory standard in a seminal case entitled *Thornburg v. Gingles*.²⁶ With some modifications, that test remains the governing standard today. Broadly, where groups facing historical discrimination are sufficiently large and sufficiently politically cohesive that they would be able to elect their chosen candidates in districts designed for that purpose — but where voting is sufficiently polarized that they would otherwise be more likely to lose if districts were not so designed, to the detriment of their equitable representation in the jurisdiction — the Voting Rights Act steps in to require well-crafted districts.

In that sentence lies a wealth of detail.

²³ Because the focus of this analysis is the Commission's implementation of the Act, where there are distinctions in the application of the VRA among the circuits, this Article follows the state of the law in California.

²⁴ 42 U.S.C. §§ 1973, 1973b(f)(2) (2006).

²⁵ *Id.* § 1973(b).

²⁶ *Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also* *Grove v. Emison*, 507 U.S. 25, 40-41 (1993).

1. *Gingles* Threshold Condition One

Gingles established three threshold preconditions for determining when a jurisdiction must draw districts designed to give a minority group the effective opportunity to elect representatives of its choice. First, the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district.”²⁷

A minority group is “sufficiently large” if it constitutes at least 50% of the voting-age citizens in a district-sized population.²⁸ The precise size of a district depends on the nature of the district. Under the U.S. Constitution, congressional seats must generally be equally populated, with minor variances permissible when those variances are necessary to achieve legitimate, consistently applied, state criteria.²⁹ State and local districts have more constitutional latitude to be smaller or larger than the mean, if there is a sufficiently good reason for the deviation,³⁰ although California law leaves substantial ambiguity about the extent of the permissible spread.³¹

²⁷ *Gingles*, 478 U.S. at 50.

²⁸ *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009); *League of United Latin Am. Citizens (“LULAC”) v. Perry*, 548 U.S. 399, 428-29 (2006); *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989), *overruled on other grounds by* *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990) (en banc); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233-34 (C.D. Cal. 2002), *aff’d*, 537 U.S. 1100 (2003).

²⁹ *Tennant v. Jefferson Cnty. Comm’n*, 113 S. Ct. 3, 5 (2012); *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).

³⁰ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964); *see also* *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1337-53 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (2004).

³¹ State legislative plans may generally leave a 10% deviation between the largest and smallest district without running afoul of the constitution, if (and only if) a permissible (and consistently applied) reason supports the deviation. *See Brown*, 462 U.S. at 842-43; *Larios*, 300 F. Supp. 2d at 1337-53.

In California, however, the standard may be different. In 1973, in the absence of valid legislatively enacted plans, the California Supreme Court drew state legislative lines. *Legislature v. Reinecke*, 10 Cal. 3d 396, 399-401 (1973). The Special Masters conducting the redistricting opined that “[t]he population of senate and assembly districts should be within 1 percent of the ideal except in unusual circumstances, and in no event should a deviation greater than 2 percent be permitted.” The California Supreme Court approved that conclusion. *Id.* at 401, 411. The basis for this ruling, however, is unclear.

It is possible that the court was articulating a standard for *itself*, as a court drawing lines: under the federal constitution, court-drawn plans must strive for lower population deviations than plans drawn by other state actors. *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975) (“A court-ordered plan, however, must be held to higher

This first *Gingles* condition requires not only that the minority group be numerous, but that it be sufficiently “geographically compact” to exercise power in a reasonable single-member district. The Supreme Court has not offered a “precise rule” defining compactness,³² but the concept essentially measures whether a group’s members live relatively close together, or whether they are relatively dispersed and far-flung. This determination of compactness is not an assessment based on Platonic geometry. The California Supreme Court has interpreted geographical compactness under the Voting Rights Act to have a strong “functional” component for electoral purposes: a minority population is more likely to be geographically compact when

standards than a State’s own plan.”); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1140 (2005). This general principle was established by the Supreme Court with respect to federal district courts, based on their comparative inability to balance difficult political choices in selecting an appropriate level of deviation. Many of the same concerns about comparative institutional ability extend to state judicial bodies as well. However, this rationale would not support strict deviation constraints for a Citizens Redistricting Commission acting as a stand-in for the legislature.

It is possible that the *Reinecke* court was construing the federal constitution generally: based on the extreme size of California’s districts, the court found that minimal percentage deviations might involve impermissibly large population deviations. If so, the extent to which the state court’s interpretation of federal law is binding on a Commission is unclear. State courts may interpret state law as they please, but they may not interpret federal law to impose greater restrictions than interpretations issued by the federal courts. *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001). Federal law itself contains some ambiguity: recent federal decisions grant latitude to states with substantial deviations for legitimate purposes, but none directly addresses the appropriate standard for California’s unusually large districts. It is possible that federal courts would construe the federal constitution along the narrow lines of *Reinecke* — and it is possible that they would not.

It is also possible that the *Reinecke* court was construing the state constitution, though the relevant portion of the discussion is quite short and appears to rely exclusively on federal law. At the time, the state constitution required assembly districts “as nearly equal in population as may be.” CAL. CONST. art. IV, § 6 (1973); *Silver v. Brown*, 63 Cal. 2d 270, 273 n.1 (1965). The California Constitution has since been amended in a manner that suggests more population flexibility for compliance with the Voting Rights Act. The governing standard states that “Senate [and] Assembly . . . districts shall have reasonably equal population with other districts for the same office [— the same ‘reasonably equal’ standard articulated in *Reinecke* —], except where deviation is required to comply with the federal Voting Rights Act or allowable by law.” CAL. CONST. art. XXI, §§ 2(d), 2(d)(1). To the extent that *Reinecke*’s adoption of a 2% maximum deviation represented state law but not binding federal law, California’s Constitution may now reflect an instruction to maintain the 2% “reasonably equal” standard except where a greater deviation would prevent dilution under the Voting Rights Act.

³² *LULAC*, 548 U.S. at 433.

there is a potential sense of community.³³ It is perhaps easier to recognize the absence than the presence of compactness: “a district would not be sufficiently compact if it was so spread out that there was no sense of community . . . or if it was so convoluted that there was no sense of community”³⁴ The U.S. Supreme Court has echoed this interpretation: “a district that combines two far-flung segments of a racial group with disparate interests” or one that “reaches out to grab small and apparently isolated minority communities” with little shared “political identity” is not reasonably compact for section 2 purposes.³⁵

Moreover, though the assessment of compactness involves an assessment of shared political community, the appropriate analysis under the Voting Rights Act is not a search for the most powerful communities of interest in the abstract, or an inquiry into whether the members of the minority community share *all* of the same interests. Under the Voting Rights Act, decision-makers are not permitted to follow the most strongly perceived communities of the area at the expense of a legitimate, reasonably proximate minority community with some shared interests.³⁶ Rather, *Gingles* compactness is designed to test whether minority groups amounting to half of a district-sized population are so disparate, dispersed, and far-flung that they share little other than race or ethnicity. If not, the first *Gingles* threshold condition has been satisfied.

2. *Gingles* Threshold Conditions Two and Three

The second *Gingles* threshold condition is that the minority group be politically cohesive;³⁷ the third is that the majority votes sufficiently

³³ *Wilson v. Eu*, 1 Cal. 4th 707, 715, 749 (1992).

³⁴ *Id.* at 749 (quoting *Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988)).

³⁵ *LULAC*, 548 U.S. at 424, 433, 435.

³⁶ *Id.* at 435 (“[I]n some cases members of a racial group in different areas — for example, rural and urban communities — could share similar interests and therefore form a compact district if the areas are in reasonably close proximity.”).

³⁷ In California, if two different minority populations in the same region vote as a politically cohesive bloc, they may together constitute a community protected by section 2. See *Badillo v. City of Stockton*, 956 F.2d 884, 890-91 (9th Cir. 1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1390 (S.D. Cal. 1989) (“The Court does recognize that the minority group for a § 2 case may consist of members of two or more different minority groups.”); cf. *LULAC v. Clements*, 999 F.2d 831, 863-64 (5th Cir. 1993) (en banc) (acknowledging that two different minority groups may together form a cognizable group if sufficiently sizable and politically cohesive); *Romero v. City of Pomona*, 883 F.2d 1418, 1423-24 (9th Cir. 1989) (assuming that

as a bloc to enable it to defeat the minority's preferred candidate in most instances.³⁸ Together, these conditions are generally known as "racially polarized voting" — the minority group generally prefers to vote as a bloc for one type of candidate, and the majority group generally prefers to vote as a bloc for a different type of candidate and would generally defeat the minority's preference. In such circumstances, the minority group would have little opportunity to elect representatives of its choice if the districts did not specifically protect minority political power.

Assessing the degree to which voting is racially polarized within a jurisdiction, and particularly in the area surrounding a sizable, reasonably compact minority population, is not a simple assessment of the partisan preferences of the majority and minority communities, nor is it based on majority and minority support in a few particularly prominent individual campaigns. Rather, courts have emphasized that the determination of polarization demands a "searching practical evaluation of the past and present reality and . . . a functional view of the political process" with respect to the real preferences of the minority community.³⁹ Because of the secret ballot, it is not possible to determine racial or ethnic voting patterns by examining ballots themselves. And it is improper to assess the degree of polarized voting based on the ethnicity of a candidate alone or based on overall election returns by city or county, because such assessments require broad-based and legally unsupported assumptions about individuals' voting choices. Exit polling, if conducted reliably, may provide one indication of voting patterns based on voters' race or ethnicity.⁴⁰ But more frequently, the courts have endorsed a finely-grained analytical

Hispanic and African-American populations could together form a cognizable group for section 2 purposes if sufficiently sizable and cohesive, but finding lack of size and cohesion), *overruled on other grounds by* *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990) (en banc).

By the same token, if two different racial or ethnic populations in the same region vote as a politically cohesive bloc, they may together constitute a majority serving to dilute the votes of a minority community protected by section 2. *See* *Gomez v. City of Watsonville*, 863 F.2d 1407, 1409, 1416-17 (9th Cir. 1988) (finding bloc voting among the non-Hispanic majority, including Anglo, Asian, and Black citizens).

³⁸ *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

³⁹ *Wilson v. Eu*, 1 Cal. 4th 707, 749 (1992) (quoting *Gingles*, 478 U.S. at 45 (quoting the Senate Report accompanying the Voting Rights Act)) (internal quotation marks omitted).

⁴⁰ *See* Kareem U. Crayton, *Sword, Shield, and Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement*, 64 RUTGERS L. REV. 973, 979 (2012).

method based on actual election results.⁴¹ Essentially, analysts catalog the demographic makeup of a precinct and the sorts of candidates preferred by the precinct's voters; aggregating many different precincts, over many different elections at various jurisdictional levels, begins to produce a portrait of the electorate's preferences. This portrait indicates whether minorities tend to band together behind certain types of candidates, and whether others tend to band together against those candidates. Sophisticated statistical techniques are used to assess whether the aggregate data reveal a legally significant pattern based on race or ethnicity.⁴²

This assessment of polarization depends primarily on the preferences of majority and minority voters, rather than the racial or language minority background of particular candidates. Sometimes, the minority voting community may coalesce around a minority candidate, but sometimes it will coalesce around a candidate who is not a minority. The most important lodestar for purposes of the Voting Rights Act is the degree to which the minority community regularly coalesces around a candidate (and the degree to which the majority community regularly coalesces around someone different), and not the racial or ethnic background of the candidates in question.⁴³

That said, a candidate's race is not irrelevant to a polarization analysis.⁴⁴ In determining minority cohesiveness — and particularly majority cohesiveness against the candidate preferred by the minority — all elections are not created equal. If the minority population prefers minority candidates, and the majority population prefers non-minority candidates, then elections pitting a minority candidate against a non-minority candidate will offer more probative evidence of the degree of polarization.⁴⁵ In contrast, elections pitting non-minority candidates against each other, or elections evaluating ballot measures without substantial and widely understood racial connotation, may

⁴¹ *Gingles*, 478 U.S. at 52-53.

⁴² See Crayton, *supra* note 40, at 981-82; Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, in *THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY* 44-67 (Nathaniel Persily ed., 2000).

⁴³ *Gingles*, 478 U.S. at 67-68 (plurality opinion); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 551 (9th Cir. 1998); see also *LULAC v. Perry*, 548 U.S. 399, 423-24, 427, 439 (2006) (noting polarized Latino voting *against* a Latino candidate).

⁴⁴ See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 665-66 (2006).

⁴⁵ *Ruiz*, 160 F.3d at 552-53; *Cano v. Davis*, 211 F. Supp. 2d 1208, 1236 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003); Katz et al., *supra* note 44, at 668.

offer the voters fewer opportunities to express their true preferences — and thus their impact on determining overall levels of polarization within the electorate are likely to be less significant.⁴⁶ “The [Voting Rights] Act’s guarantee of equal opportunity is not met when . . . [c]andidates favored by [minorities] can win, but only if the candidates are white.”⁴⁷

Other factors may also render particular elections more or less probative when considering whether the relevant electorate is polarized in a manner usually leading to the minority-preferred candidate’s defeat. For example, courts will generally discount strong support for non-minority incumbents, which often persists despite otherwise pervasive polarization.⁴⁸ In jurisdictions with a strongly uniform partisan preference, where the opportunity to elect candidates of choice is driven by success in a primary election, primary election results will be more probative than general election results, particularly when a candidate strongly preferred by the minority loses the primary election and a less-preferred candidate succeeds.⁴⁹ And more recent elections will usually be more probative than more distant ones.⁵⁰

The degree of racial polarization that is sufficient to clear the *Gingles* threshold is not marked by a bright line and will “vary from district to district.”⁵¹ Minorities must vote mostly as a bloc, the majority must vote mostly as a bloc, and the minority community must, as a result, generally be unable to elect its candidate of choice outside of a district specifically tailored to grant that opportunity. The standard permits some crossover support in most elections and substantial crossover support in isolated, anomalous elections; the focus, instead, is the overall pattern in the jurisdiction. “[I]n a district where elections are

⁴⁶ *Cano*, 211 F. Supp. 2d at 1236.

⁴⁷ *Ruiz*, 160 F.3d at 553 (quoting *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) (quoting *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988))) (internal quotations and punctuation omitted).

⁴⁸ *Gingles*, 478 U.S. at 57, 60; *Ruiz*, 160 F.3d at 556. In contrast, strong minority support for a challenger against a non-minority incumbent, or strong non-minority voting against a minority incumbent, are more meaningful departures from the norm.

⁴⁹ *Ruiz*, 160 F.3d at 552; *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016-19 (2d Cir. 1995); *Katz et al.*, *supra* note 44, at 668-69.

⁵⁰ *Ruiz*, 160 F.3d at 555; *Cano*, 211 F. Supp. 2d at 1239-40. That said, any specific election year that represents an anomalous departure from more consistent long-term trends will likely be discounted despite its recency. *Cf. Texas v. United States*, 887 F. Supp. 2d 133, 144 (D.D.C. 2012) (three-judge court) (refusing to grant more weight to a recent anomalous election in the context of section 5 of the Voting Rights Act).

⁵¹ *Gingles*, 478 U.S. at 55-56.

shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election.”⁵² Similarly, if districts are not specifically drawn to afford an effective opportunity to elect candidates of choice, and minority-preferred candidates are usually defeated by polarized voting, the election of a few minority-preferred candidates will not undermine the broader finding of disenfranchisement.⁵³

As seen above, this inquiry into the voting patterns of the second and third *Gingles* conditions must be thorough, nuanced, and broad-ranging, to assess whether a minority group usually supports candidates who are rarely supported by the majority, and whether the minority community would therefore usually lose absent concerted efforts to protect its political voice. It is no trivial task to determine the presence and degree of polarization.

3. “Totality of the Circumstances”

If the three *Gingles* threshold conditions above have been established, the Voting Rights Act next requires an evaluation of the “totality of circumstances” to determine whether a redistricting plan, interacting with social and historical conditions, provides racial or language minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁵⁴

Courts have consistently examined the “totality of circumstances” through the lens of factors listed in the Senate Judiciary Committee Report on the 1982 amendments to the Voting Rights Act that clarified the Act’s application to procedures with the effect of diluting minority voting power. These “Senate factors” are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

⁵² *Id.* at 57, 75-76; *Ruiz*, 160 F.3d at 549-50.

⁵³ *Cano*, 211 F. Supp. 2d at 1237-38; *see also* *LULAC v. Perry*, 548 U.S. 399, 427 (2006).

⁵⁴ 42 U.S.C. § 1973(b) (2012); *LULAC*, 548 U.S. at 425-26; *Johnson v. De Grandy*, 512 U.S. 997, 1010-13 (1994).

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals; [and]
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.⁵⁵

The Senate Report also specifically noted the probative value of evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group, and of an assessment that the policy underlying the jurisdiction's use of the contested practice or structure is tenuous.⁵⁶

The Senate factors above are helpful aids to determine whether, in the totality of circumstances, a minority group's right to vote is abridged. They are neither comprehensive nor exclusive.⁵⁷ They are also not to be applied mechanically: vote dilution may still be established without the presence of one or more enumerated factors, or even without a majority of enumerated factors, or with factors present to differing degrees.⁵⁸ They are meant merely as relevant considerations in conducting a searching practical and functional evaluation of equal access to the political process.⁵⁹

⁵⁵ S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06; *accord Gingles*, 478 U.S. at 44-45; *see also De Grandy*, 512 U.S. at 1010-11.

⁵⁶ S. REP. NO. 97-417, at 28-29.

⁵⁷ *Gingles*, 478 U.S. at 45.

⁵⁸ *Id.*

⁵⁹ *Id.*

In addition to the factors above, the Supreme Court requires an inquiry into whether the percentage of districts in which the minority population has the effective opportunity to elect candidates of choice is substantially proportional to the minority population's share of the jurisdiction's voting-age population as a whole.⁶⁰ While, like the Senate factors above, the proportionality inquiry is never itself dispositive, it is relevant in determining whether the minority group has less opportunity to elect representatives of choice. A minority group that controls a substantially disproportionate share of the jurisdiction's districts is unlikely to have less opportunity than others to elect representatives of choice under the Voting Rights Act.⁶¹ In contrast, the fact that a minority group controls substantially fewer districts than its share of the jurisdiction's eligible population would tend to bolster a finding of vote dilution.

4. Effective Opportunity District

If, under the analysis described above, a jurisdiction has the obligation to draw one or more districts responsive to a minority community, any such district will comply with the Voting Rights Act only if it ensures that the minority group has an effective opportunity to elect candidates of choice.⁶² This effective opportunity is measured not by a single election, but by the ability of the minority group to control elections in the district in the usual course.

The proportion of minority voters within a district necessary to yield a consistent effective opportunity to elect candidates of choice is not a number to be assessed in the abstract. In some cases, based on turnout or other considerations, a district may have to comprise more than 50% minority voters to yield an effective opportunity district.⁶³ In other cases, a district may be an effective opportunity district for the minority community with less than a majority of voters. Without a majority-minority district, however, the jurisdiction will have the responsibility to demonstrate that the district nevertheless provides the minority community with an effective pragmatic opportunity to elect candidates of choice. The courts have rejected reliance on rough generalizations about minority-voter percentages at which districts

⁶⁰ *LULAC v. Perry*, 548 U.S. 399, 426, 437 (2006); *De Grandy*, 512 U.S. at 1014.

⁶¹ *LULAC*, 548 U.S. at 426, 437.

⁶² *See id.* at 428-29 (tying the existence of a violation to efforts that "prevented the immediate success of the emergent Latino majority").

⁶³ *See id.* at 428 (acknowledging that "it may be possible for a citizen voting-age majority to lack real electoral opportunity," but finding real opportunity in the challenged district at issue).

that are not majority-minority offer minority voters an effective opportunity to win elections.⁶⁴ Instead, the same searching precinct-based statistical analysis described above, analyzing a series of elections to deduce the overall patterns within the particular district in question, will be necessary to demonstrate that a district without a majority of minority voters nevertheless reliably offers that minority an effective opportunity to elect candidates of choice.

B. Section 5

Section 5 of the Voting Rights Act is distinct from section 2 in both its objective and its manner of operation. If section 2 is designed to prevent dilution of minority voting power from what it might otherwise be (given demographic and electoral realities on the ground), section 5 is designed to prevent dilution of minority voting power from what it has already been. That is, it is focused on preventing backsliding for gains that minority voters have already made.

1. Coverage for Particular Jurisdictions

While section 2 of the Voting Rights Act applies across the whole country, section 5 only applies to certain jurisdictions, where voting practices were of particular concern. A jurisdiction is covered if: (1) it maintained a “test or device” as a prerequisite for voting on November 1, 1964, November 1, 1968, or November 1, 1972; and (2) the test was operating to depress voter participation, such that less than half of the voting-age population was registered to vote or voted in the presidential elections of 1964, 1968, or 1972.⁶⁵ That is, the section applies to jurisdictions where a majority of the eligible electorate was not even participating in the democratic process.

Under this standard, nine states are wholly “covered” for purposes of section 5; portions — certain counties or towns — of six other states are covered. Most of these states are in the deep South or Southeast, but portions of Michigan, New York, and South Dakota are also covered. During the last redistricting, so were four California counties: Monterey and Yuba counties became covered based on 1968 participation rates, and Kings and Merced counties became covered based on 1972 participation rates.⁶⁶

⁶⁴ *Cano v. Davis*, 211 F. Supp. 2d 1208, 1239-40 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003).

⁶⁵ 42 U.S.C. § 1974b(b) (2012).

⁶⁶ 28 C.F.R. pt. 51 app. (2012). On August 29, 2012, Merced County “bailed out” of coverage under section 5 of the Voting Rights Act. Consent Judgment and Decree,

Coverage is not permanent: the Act itself requires Congress to “reconsider” the coverage formula in 2021, and in 2031, the coverage formula expires unless reauthorized before that date.⁶⁷ Moreover, covered jurisdictions are eligible to petition for “bailout”: a judgment issued by the U.S. District Court for the District of Columbia to jurisdictions that, within the prior ten years, have demonstrated improved behavior — including no liability under the Voting Rights Act, successful preclearance of all changes in voting practices without objection, and other “constructive efforts” to promote access to the political process.⁶⁸ Such a judgment removes a jurisdiction from coverage for section 5 purposes. None of the four covered California counties had bailed out of coverage for the 2010 redistricting cycle.⁶⁹

2. Preclearance

Section 5 of the Voting Rights Act operates by means of a special procedure, reversing the normal presumption of legal validity for election-related changes in covered jurisdictions. Such jurisdictions may not implement any new prerequisite to voting, or standard, practice, or procedure with respect to voting, that has not been “precleared” by one of two specific reviewing bodies: either the U.S. Department of Justice or a three-judge court of the U.S. District Court for the District of Columbia.⁷⁰

Redistricting plans are included among the voting-related changes that must be precleared.⁷¹ Any jurisdiction covered under section 5, either in whole or in part, must therefore submit redistricting plans for preclearance.⁷² Because Kings, Merced, Monterey, and Yuba are covered for purposes of section 5, California must submit its statewide redistricting maps for preclearance, to ensure that the maps do not discriminate against minority voters in those counties. California’s Citizens Redistricting Commission submitted its plans for

Merced County v. Holder, No. 1:12-cv-00354 (D.D.C. Aug. 31, 2012) (Doc. 11).

⁶⁷ 42 U.S.C. § 1973b(a)(7), (8).

⁶⁸ *Id.* § 1973b(a)(1).

⁶⁹ *See supra* note 66.

⁷⁰ Specifically, a jurisdiction may petition the court for a declaratory judgment of preclearance (“judicial preclearance”) or may secure preclearance if, after submitting a voting-related change to the Department of Justice, the Department fails to object to preclearance within sixty days (“administrative preclearance”). 42 U.S.C. § 1973c(a) (2006).

⁷¹ 28 C.F.R. § 51.13(e) (2011); *see also* Georgia v. United States, 411 U.S. 526, 531-34 (1973); Allen v. State Bd. of Elections, 393 U.S. 544, 565-66, 569 (1969).

⁷² Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999).

preclearance to the Department of Justice on November 16, 2011. The plans were precleared on January 17, 2012.⁷³

A redistricting plan submitted under section 5 of the Voting Rights Act will be precleared if the jurisdiction can demonstrate that the plan “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a defined language minority group, in the area covered by section 5.⁷⁴

3. Discriminatory Effect

There are two prongs to this inquiry: “purpose” and “effect.” The “effect” portion of section 5 is different from the “effect” portion of section 2, in part because section 5 focuses on the impact of a *change* in the election-related rules. In particular, the Supreme Court has ruled that the touchstone of section 5 is “retrogression”: whether a change diminishes the effective exercise of the electoral franchise for covered minorities within the jurisdiction, as compared to the ability that such minorities possessed before the implementation of the proposed change.⁷⁵

In 2006, Congress amended section 5 of the Voting Rights Act, partially clarifying the conduct that constitutes retrogression.⁷⁶ A procedure (including a redistricting plan) is impermissibly retrogressive, Congress explained, if it “will have the effect of diminishing the ability of citizens of the United States on account of race or color, or [membership in a language minority group,] to elect their preferred candidates of choice.”⁷⁷ This clarification means that in any redistricting change subject to section 5, decision-makers must at least prevent a decrease in minority citizens’ *ability to elect* preferred candidates in covered jurisdictions — or, put differently, that they

⁷³ Letter from Thomas E. Perez, Asst. Att’y Gen., Civil Rts. Div., U.S. Dep’t of Justice, to Kamala D. Harris, Cal. Att’y Gen. (Jan. 17, 2012), *available at* <http://redistricting.lls.edu/files/CA%20preclearance%2020120117.pdf>.

⁷⁴ 42 U.S.C. §§ 1973c(a), 1973b(f)(2) (2006); *see also* § 19731(c)(3) (2006).

⁷⁵ *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁷⁶ Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA), Pub. L. No. 109-246, 120 Stat. 577 (2006).

⁷⁷ 42 U.S.C. § 1973c(b); *see also* § 1973c(d) (explaining that the purpose of the amendment “is to protect the ability of such citizens to elect their preferred candidates of choice”). Professor Nate Persily examines at length the degree to which a “preferred” candidate of choice may be different from a candidate supported only reluctantly. Persily, *supra* note 21, at 225-27.

must at least protect the tangible gains realized by minority voters in acquiring the ability to elect candidates within covered areas.⁷⁸

The amendment's language is written in one direction: it explains that a procedure diminishing the ability to elect will "abridge the right to vote" in violation of section 5.⁷⁹ In context, this makes sense: before the amendments, in *Georgia v. Ashcroft*,⁸⁰ the Supreme Court had allowed covered jurisdictions to trade minority citizens' ability to elect candidates for their ability to *influence* elections (without the ability to drive results). Congress wanted to overturn *Ashcroft*, ensuring that jurisdictions could no longer diminish the ability to elect in order to achieve different objectives.⁸¹

But what the amendment does not say may also be important. The statute does not state that the *only* conduct deemed retrogressive is conduct that diminishes the ability to elect candidates of choice.⁸² For example, in a covered area where minority voters have the ability to

⁷⁸ *Texas v. United States*, 831 F. Supp. 2d. 244, 261 (D.D.C. 2011) (three-judge court).

⁷⁹ 42 U.S.C. § 1973c(b).

⁸⁰ 539 U.S. 461 (2003).

⁸¹ See VRARA § 2(b)(6); H.R. REP. NO. 109-478, at 65, 68-72 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 665-66, 668-72. The House Judiciary Committee Report is considered to be a more authoritative source of legislative history for the 2006 amendments than the Senate Judiciary Committee's Report. The Senate report was not released until six days after the full Senate had passed the bill reauthorizing and amending the Voting Rights Act, with sharp partisan disagreement over the meaning of a provision that passed with unanimous support. As a result, its reliability as decisive legislative history has been questioned. *See, e.g., Texas*, 831 F. Supp. 2d. at 267 n.30 ("[T]he Senate Report [to the 2006 Amendments] carries little weight as a piece of legislative history or evidence of legislative intent."); Persily, *supra* note 21, at 185-92 (discussing the procedural history and substantive disagreement of the Senate report).

⁸² Similarly, § 1973c(d) explains that the amendment "protect[s] the ability of . . . citizens to elect their preferred candidates of choice," but does not say that it *only* protects an ability to elect.

The relevant legislative history does little to resolve the ambiguity. Most relevant discussion was focused on correcting the construction advanced by *Georgia v. Ashcroft*, for districts where minorities *do* have the ability to elect, leaving some question about other areas of covered jurisdictions. And there are statements in the record that might each be seen to advance a different conclusion with respect to this question. *Compare, e.g., H.R. REP. NO. 109-478*, at 65 (2006) (explaining the need to amend the "effect" prong to "clarify the types of conduct that Section 5 was intended to prevent, *including* those techniques that diminish the ability of the minority group to elect their preferred candidates of choice") (emphasis added), *with id.* at 70-71 ("[I]n making preclearance determinations under Section 5, the comparative 'ability [of the minority community] to elect preferred candidates of choice' is *the* relevant factor to be evaluated when determining whether a voting change has a retrogressive effect.") (emphasis added).

elect candidates of choice, it is clear that that ability may not be diminished under section 5.⁸³ But in a covered area where minority voters do *not* have the ability to elect candidates of choice, it may also constitute impermissible retrogression under section 5 for a redistricting plan to dilute the influence of the minority group, thereby abridging their effective exercise of the electoral franchise.⁸⁴

In the context of a restriction on early voting opportunities, a three-judge District of Columbia court recently adopted the construction advanced above.⁸⁵ This court found, after substantial review of the text and legislative history, that Congress intended a retrogressive abridgment of the right to vote to include — but not be limited to — a diminishment of the ability to elect candidates of choice.⁸⁶ Twelve days later, and with minimal discussion, a different three-judge District of Columbia court assessing redistricting adopted the contrary interpretation, finding that Congress “stat[ed] that minority voters’ ‘ability to elect’ their candidates of choice is the appropriate measure of whether a proposed change will be retrogressive,” with no cognizable retrogression beyond the ability to elect candidates.⁸⁷

⁸³ There is still further ambiguity in the statute, which does not specify whether a diminishment in minorities’ ability to elect candidates of choice is to be measured within any given district as well as jurisdiction-wide. Retrogression is relatively clear if a jurisdiction with the same relative concentration of minority population moves from a redistricting plan in which minorities control five districts to one in which those same minorities control four: in such a plan, the relevant minority groups would have a diminished opportunity to elect candidates of choice. But in the same jurisdiction, if the minority group continues to control five districts but sees its effective level of control drop in one district from 70% to 55%, it is not clear whether the reduction in strength is the sort of diminished opportunity to elect contemplated by the statute. Largely for administrative reasons, a trial court recently concluded that the ability to elect within a particular district is properly assessed only as a binary matter for purposes of retrogression (either minorities have the ability to elect in a particular district or they do not), and that diminishment is therefore properly assessed only jurisdiction-wide. *Texas v. United States*, 887 F. Supp. 2d 133, 145-46 (D.D.C. 2012) (three-judge court).

⁸⁴ Similarly, in a covered area where minority voters *do* have the ability to elect candidates of choice, it may constitute impermissible retrogression under section 5 for a redistricting plan to abridge the effective exercise of the electoral franchise, even without jeopardizing the ability to elect candidates of choice. Substantial overpacking of minority voters into a single district, for example, may abridge their effective exercise of the franchise, even without a change in the ability to elect candidates of choice.

⁸⁵ *Florida v. United States*, 885 F.Supp.2d 299, 313-15 (D.D.C. 2012) (three-judge court).

⁸⁶ *Id.* at 313-15, 340.

⁸⁷ *Texas*, 887 F. Supp. 2d at 140; *see also id.* at 145, 153. This latter decision has been appealed. *See Appellant’s Jurisdictional Statement*, *Texas v. United States*, 2012

The above uncertainty is caused in part by the fact that the substantive demands of section 5 are rarely construed, particularly in the redistricting context.⁸⁸ Redistricting plans arrive largely on a decennial cycle, and the vast majority proceed through the Department of Justice's administrative preclearance process. Ninety-six percent of those submissions are precleared without objection, and such approvals are not judicially reviewable.⁸⁹ Only those preclearance submissions that proceed through the courts — either after an objection from the Department of Justice or as an initial matter — offer an opportunity for judicial construction of the statute. The 2006 amendments have not yet seen a full redistricting cycle; appeals from the first wave of judicial preclearance submissions are still underway, with few detailed explorations of the revised retrogression standard in the redistricting context. That said, as noted above, a few lower courts have had occasion to construe section 5 as amended.⁹⁰ And the

WL 5267659 (S. Ct. Oct. 19, 2012) (No. 12-496).

There is no question that a construction of section 5 to apply to redistricting decisions even where minority voters do *not* have the ability to elect candidates of choice will restrict jurisdictions' redistricting flexibility more than the alternative construction, simply because the former protects minority communities with greater range of size and cohesion. Such a construction would also require courts to assess whether relative degradations of influence — reducing a minority group's presence within a district's electorate from, say, 35% to 25% — amount to a cognizable diminishment in the effective exercise of the franchise, which is necessarily a more nuanced inquiry than the assessment of a minority group's ability to elect candidates of choice.

In the past, in interpreting a different section of the statute, a plurality of the Supreme Court considered the extent of the Voting Rights Act's impact and the asserted need for "clear lines" and "workable standards" in choosing among plausible alternative constructions. See *Bartlett v. Strickland*, 556 U.S. 1, 17-23 (2009) (plurality opinion). It drew heavy critique in so doing, particularly given the possibility that the preference for clarity revealed judicial distaste for complex empirical analysis more than it revealed congressional intent. See, e.g., Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 996-98 (2011). It is not clear whether the Court will act similarly in construing the retrogression standard of section 5. And it is beyond the scope of this Article to examine whether it would be appropriate for the Court to do so.

⁸⁸ *Redistricting and the 2010 Census: Enforcing Section 5 of the VRA: Hearing Before the U.S. Comm'n on Civil Rights* 9-10 (Feb. 3, 2012) (statement of Prof. Justin Levitt), available at <http://redistricting.ils.edu/files/USCCR%20testimony.pdf>.

⁸⁹ *Id.* at 9 & nn.49-50.

⁹⁰ See *Texas*, 887 F. Supp. 2d 133; *Florida*, 885 F. Supp. 2d 299; see also *South Carolina v. United States*, --- F. Supp. 2d ----, 2012 WL 4814094 (D.D.C. Oct. 10, 2012) (three-judge court); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court); *Laroque v. Holder*, 831 F. Supp. 2d 183 (D.D.C. 2011), vacated by 679 F.3d 905 (D.C. Cir. 2012).

Department of Justice has recently incorporated the 2006 amendments into formally promulgated regulations,⁹¹ which are traditionally afforded “substantial deference” by the courts.⁹²

From these sources, it is possible to glean a few more details about the substantive section 5 standard. As with other portions of the Voting Rights Act,⁹³ assessing the relevant impact of a change is a nuanced inquiry, dependent on a broad range of pragmatic factors that impact electoral success.⁹⁴ The demographic composition of a district is unquestionably important in determining whether minority citizens have the ability to elect candidates of choice. But that ability — and determining whether that ability is preserved, enhanced, or diminished in a subsequent plan, or whether minority rights are otherwise abridged by a change — is not merely a product of a district’s percentage of minority voting-age citizens.⁹⁵ Instead, a minority group’s practical electoral power, including its ability to elect candidates of choice, ultimately depends on a more robust contextual analysis of electoral behavior in the area in question,⁹⁶ including comparative levels of voter registration and turnout and levels of polarization.⁹⁷ For example, drawing districts that preserve similar

⁹¹ 28 C.F.R. pt. 51 (2011).

⁹² *Lopez v. Monterey Cnty.*, 525 U.S. 266, 281-82 (1999); *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 508-09 (1992); *NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 178-79 (1985); *Dougherty Cnty. Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978).

⁹³ See *supra* text accompanying notes 39-53.

⁹⁴ *Texas*, 887 F. Supp. 2d at 141.

⁹⁵ *Id.* at 140 n.5, 204 (specifically criticizing “reliance solely on demographic data” to measure compliance with the Voting Rights Act), 232 (same); cf. *LULAC v. Perry*, 548 U.S. 399, 428 (2006) (acknowledging that in the section 2 context, “it may be possible for a citizen voting-age majority to lack real electoral opportunity”).

⁹⁶ Indeed, the pragmatic understanding of electoral power may be seen clearly in the recent trial court’s evaluation of Texas’s redistricting plan under section 5 of the Voting Rights Act. In Texas, substantial minority population growth generated additional congressional seats, but none of the incremental seats were drawn with a minority ability to elect candidates of choice. In that context, the court held that an increase in the “representation gap” for minorities — maintaining static the number of minority-controlled districts while dramatically expanding the pool of seats — unlawfully diminished the minority group’s overall assertion of electoral power within the legislative delegation as a whole. *Texas*, 887 F. Supp. 2d at 158-59. A different trial court adopted a similar approach to *relative* electoral power in assessing new restrictions on early voting in Florida under section 5. *Florida v. United States*, 885 F.Supp.2d 299, 324-25 (D.D.C. 2012) (three-judge court).

⁹⁷ *Texas*, 887 F. Supp. 2d at 140 n.5, 155; *Texas v. United States*, 831 F. Supp. 2d 244, 262-64 (D.D.C. 2011) (three-judge court); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 656-57 (Fla. 2012); Persily, *supra* note 21, at 242-43.

proportions of eligible minority voters, but that dramatically change the character of that electorate, may well decrease the minority group's ability to elect candidates of choice.⁹⁸

In this context, it is important to note that neither a minority group's ability to elect candidates of choice, nor protections the group is otherwise granted against an abridgment of power to influence elections, depend — as section 2 does — on showing that a particular minority group or groups comprises more than 50% of a district-sized population, either in the old districts or the proposed new ones. For example, section 5 protects a minority group's ability to elect candidates where it is able to do so entirely on its own or where different minority groups are able to do so together (known as "coalition" districts). But section 5 *also* protects a minority group's ability to elect candidates where "one group of minority voters joins together with voters of a different racial or language background to elect the minority voters' candidate of choice" — including members of the majority.⁹⁹ The latter areas are generally known as "crossover" districts (where minorities combine with some majority voters to elect the candidates of their choice). In such combination districts, if the minority group has the ability to elect the candidates of its choice, section 5 prevents a jurisdiction from decreasing that ability in a new proposed plan.

Many of the factors considered in evaluating pragmatic electoral power under section 5 are similar to those considered under section 2. *See supra* text accompanying notes 39-53. However, there is at least one notable distinction reflecting the different purposes of the different sections. In assessing the degree to which the electorate is polarized, courts will often discount support for incumbents, which may persist despite underlying polarization. *See supra* text accompanying note 48. This discounting suits analysis under section 2, which focuses on a community's equitable opportunity for political power in the future. In contrast, section 5 revolves around the retention of political power that has already been established. As a result, courts will not discount the degree to which minority groups have successfully elected preferred incumbents in assessing whether those groups have demonstrated the ability to elect candidates of choice. *See Texas*, 887 F. Supp. 2d at 145. The best evidence of an ability to elect candidates of choice is likely to be the demonstration that such candidates have in fact been elected.

⁹⁸ *See Texas*, 887 F. Supp. 2d at 171 (describing such an approach in the 2011 Texas redistricting); Persily, *supra* note 21, at 243.

⁹⁹ *Texas*, 887 F. Supp. 2d at 147-52; *see also* H.R. REP. NO. 109-478, at 71 (2006) ("Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5.") (emphasis added).

4. Discriminatory Purpose

Section 5 also prohibits election changes undertaken with the purpose of discriminating against a racial or language minority. This “purpose” prong was also amended in 2006, and to understand the amendment, it is useful to understand the case to which it reacted.

In *Reno v. Bossier Parish School Board (Bossier Parish II)*,¹⁰⁰ the Supreme Court held that section 5 “does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.”¹⁰¹ That is, the Court found that section 5 prohibited preclearance based on the purpose of a redistricting plan, but only for plans intended to *reduce* minorities’ ability to elect candidates of choice. In the Court’s construction, section 5 did not prohibit plans intentionally designed to limit the effective political power of minorities who had not previously had the ability to elect candidates of choice.¹⁰²

Bossier Parish II drew ample critique from commentators, and then from Congress.¹⁰³ The 2006 amendments clarified that the term “purpose” in section 5 “shall include any discriminatory purpose,” retrogressive or not.¹⁰⁴ And Congress made clear that discriminatory purpose is susceptible to proof via a broad range of evidence, circumstantial and direct.¹⁰⁵

What it means to act with a discriminatory purpose is often misunderstood. One need not hold animus toward a particular racial or language minority group in order to intentionally discriminate against them. As then-Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit explained,

¹⁰⁰ 528 U.S. 320 (2000).

¹⁰¹ *Id.* at 341.

¹⁰² Consider, in this context, Georgia’s 1981 congressional redistricting plan, which retained nine of ten majority-white districts. In the remaining district, to avoid retrogressive effect, the plan architects mildly increased the percentage of African-American voting-age population to 52%, while retaining a substantial Anglo majority of registered voters. *Busbee v. Smith*, 549 F. Supp. 495, 498-99 (D.D.C. 1982). The chair of Georgia’s House redistricting committee (and reputed architect of the plan) was quoted as explaining, “I don’t want to draw nigger districts.” *Id.* at 501.

¹⁰³ Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA) § 2(b)(6), Pub. L. No. 109-246, 120 Stat. 577 (2006). *See also* H.R. REP. NO. 109-478, at 65, 66-68 (2006).

¹⁰⁴ 42 U.S.C. § 1973c(c) (2012).

¹⁰⁵ H.R. REP. NO. 109-478, at 68 (citing “the factors set out in *Village of Arlington Heights et al. v. Metropolitan Housing Development Corporation et al.*,” 429 U.S. 252 (1977), as probative in determining the existence of discriminatory intent); *see also* 28 C.F.R. §§ 51.54(a), 51.57 (2011); *Texas v. United States*, 887 F. Supp. 2d 133, 152 (D.D.C. 2012) (three-judge court).

The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.¹⁰⁶

Thus, any drawing of districts intended to limit minorities' effective exercise of the franchise, whether borne of animus or not, will violate the "purpose" prong of section 5.

C. Constitutional Limits

The above detail is important to the work of a citizens' commission, because a redistricting plan that does not meet the statutory standard is unlawful — and for section 5 purposes, if it is *uncertain* whether the standard is met, the plan may not be implemented.¹⁰⁷ The detail is also important because there may be constitutional limits on *overcorrecting*.

In a line of cases beginning in the 1990s, the Supreme Court established that when race or ethnicity is the "predominant factor"

¹⁰⁶ *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

¹⁰⁷ *See Georgia v. United States*, 411 U.S. 526, 537-39 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); 28 C.F.R. § 51.52 (2012); *see also Perry v. Perez*, 132 S. Ct. 934, 941-42 (2012) (permitting courts to incorporate the policy choices of a covered jurisdiction's unprecleared redistricting plan only if there is no "reasonable probability" that the plan will be denied preclearance or if a section 5 challenge is "insubstantial"); *cf. Goosby v. Osser*, 409 U.S. 512, 518 (1973) ("['I]nsubstantiality' has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit[.]' . . . A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" (internal quotations omitted)).

motivating the decision to draw a district, that decision is subject to enhanced constitutional scrutiny.¹⁰⁸ That is, when other considerations have been entirely subordinated to racial considerations that are “dominant and controlling” — when a district is “unexplainable on grounds other than race” — the constitution demands a particularly good reason for the predominance of race.¹⁰⁹

This constitutional limitation is also frequently misunderstood. Even if race or ethnicity is the “predominant factor” motivating the decision to draw a district, that does not render the districting decision unconstitutional. Instead, such decisions must be evaluated under “strict scrutiny”: the decision must be “narrowly tailored to achieve a compelling interest.”¹¹⁰ Though the Supreme Court has never ruled directly on the question, it has strongly suggested (and several Justices have outright stated) that drawing districts in order to comply with the Voting Rights Act is a constitutionally permissible — and therefore legally required — reason to draw districts based predominantly on race or ethnicity.¹¹¹ So if the district is required by the Voting Rights Act, it ought to be constitutional as well, even if the jurisdiction’s efforts to comply with the Act mean that the predominant reason for the district is race or ethnicity.

If, however, districts are unexplainable on grounds other than race where they are *not* required by the Voting Rights Act, those districts are likely to be constitutionally problematic. This does not mean that all consideration of race is forbidden except where required by the Voting Rights Act: accounting for race or ethnicity as factors among

¹⁰⁸ *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 241 (2001); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

¹⁰⁹ *Cromartie II*, 532 U.S. at 241-42, 257; *Cano v. Davis*, 211 F. Supp. 2d 1208, 1215-16 (C.D. Cal. 2002) (recognizing the exceptional nature of such cases), *aff'd*, 537 U.S. 1100 (2003).

¹¹⁰ *Miller*, 515 U.S. at 920.

¹¹¹ *LULAC v. Perry*, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., concurring in part and dissenting in part, joined by Breyer, J.); *id.* at 518-519 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Thomas, J., Alito, J., and Roberts, C.J.); *Bush v. Vera*, 517 U.S. 952, 990, 994 (1996) (O’Connor, J., concurring); *Shaw v. Reno*, 509 U.S. 630, 653-54 (1993); *Cano*, 211 F. Supp. 2d at 1215-16; *King v. Ill. Bd. of Elections*, 979 F. Supp. 619, 621-22 (N.D. Ill. 1997), *aff’d*, 522 U.S. 1087 (1998). Moreover, federal courts have themselves repeatedly undertaken the drawing of districts based predominantly on race when necessary to comply with the Voting Rights Act. *See, e.g., Garza*, 918 F.2d at 776 (“The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court or by a political entity in the first instance, does not violate the constitution.”).

many others is permissible.¹¹² Drawing districts while cognizant of the racial impact — indeed, even drawing districts *because of* the racial impact — does not provoke special constitutional scrutiny if the lines are also drawn as they are for other legitimate reasons, equally weighted. And so, overcorrecting — drawing districts with the intent to satisfy the Voting Rights Act, even when such districts are not actually required by the Act — is not constitutionally troublesome when other factors are equally in the mix. Many line-drawers adopt such an approach as standard practice. Still, because there may be circumstances when the Voting Rights Act demands that race or ethnicity take first priority, it is essential to understand the bounds of those requirements, because overstepping those bounds can in the wrong circumstances also lead to legal trouble.

II. CREATING THE CONDITIONS FOR COMPLIANCE

The above summary of the substance of the Voting Rights Act implies that there exist best practices for the process of attempting to comply with its mandates. Compliance cannot be guaranteed based on off-the-cuff guesses about the size and location of racial or ethnic minority groups, or anecdotal assessments about what has in the past or might in the future best serve the electoral interests of such groups. For both section 2 and section 5, the best practice involves the thorough collection and nuanced analysis of data.

A. Section 2

For purposes of section 2, demographics provide the most efficient starting point. In order to determine whether there are minority groups that satisfy the first *Gingles* condition, it will be necessary to look for sizable minority populations in reasonably compact areas. Line-drawers then have to further examine whether, carving out a district-sized territory, minorities constitute at least half of the voting-age citizens. There are many techniques to conduct this analysis, and several software packages to assist the process; most involve visual geographic display of underlying population data and an iterative approach to testing the minority proportion of the electorate within different mock-district configurations. Those configurations can involve as much art as science, especially in the assessment of whether a minority group is sufficiently compact to satisfy the first *Gingles*

¹¹² *Miller*, 515 U.S. at 916; *id.* at 928-29 (O'Connor, J., concurring); *Cano*, 211 F. Supp. 2d at 1220.

condition, since the inquiry is not intended to approach a compact ideal, but rather to screen out egregiously non-compact agglomerations of isolated minority groups with little else in common.

Most of the data required for this step is derived from the Census Bureau.¹¹³ Specifically, the decennial census — the attempt, every ten years, to tally each individual in the United States¹¹⁴ — provides a population count by age, race, and ethnicity, for one point in time.

This census does not, however, provide citizenship information. That information is collected by the Census Bureau via a rolling survey known as the American Community Survey (“ACS”), which provides periodic estimates of citizen voting-age population (“CVAP”).¹¹⁵ This survey is conducted over several years, using different geographic units — different blocks of territory, at different scale — from those used in the decennial census. Though ACS data may be used “as is” to arrive at initial guesstimates about the areas most likely to meet the first *Gingles* condition, the data must eventually be translated to ensure (greater) precision — and even when translated, it contains some substantial known errors likely to affect the redistricting process.¹¹⁶ Still, it is the best available

¹¹³ For a good overview of the forms of data used in the redistricting process, see KENNETH F. MCCUE, *CREATING CALIFORNIA’S OFFICIAL REDISTRICTING DATABASE* (2011), available at <http://statewidedatabase.org/d10/Creating%20CA%20Official%20Redistricting%20Database.pdf>.

¹¹⁴ See U.S. CONST. art. I, § 2.

¹¹⁵ The American Community Survey also collects a variety of other demographic and socioeconomic data, including estimates of population by age, race, and ethnicity less precise (and over a different time period) than the counts produced by the decennial census. See *AMERICAN COMMUNITY SURVEY*, <http://www.census.gov/acs/www/> (last visited Dec. 28, 2012).

¹¹⁶ There are several limitations of the ACS data which translation only partially ameliorates:

- Because the ACS is a survey, it provides only estimates, subject to a margin of error that may be quite substantial in small geographies. See U.S. CENSUS BUREAU, *THE 2005-2009 ACS 5-YEAR SUMMARY FILE TECHNICAL DOCUMENTATION* 1, 15 (Feb. 8, 2011), available at http://www2.census.gov/acs2009_5yr/summaryfile/ACS_2005-2009_SF_Tech_Doc.pdf.
- Though the Census Bureau provides CVAP breakdowns by racial and ethnic background, it does so for larger geographies (“census tracts” and “block groups”) than are commonly used in the redistricting process (“census blocks”). See *Geography and the American Community Survey*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/guidance_for_data_users/geography/ (last visited Feb. 7, 2013). By analogy, though redistricting uses individual atoms to build districts, the CVAP data by

race and ethnicity is available only for substantial molecules, and allocating the data to individual atoms contains its own error.

- The ACS is conducted using geographic “atoms” based on the 2000 Census. The 2010 Census uses slightly different atoms, describing different physical areas. See *Geography*, U.S. CENSUS BUREAU, http://www.census.gov/acs/www/data_documentation/geography/ (last visited Feb. 7, 2013).
- The ACS is collected over several years (most recently, from 2005–2009, for redistricting purposes). As a gauge of the 2010 population, it therefore undercounts individuals at the threshold of voting age and overcounts those who may have died by the time the Census is taken. This idiosyncrasy is particularly important for minority populations that are younger than the national average.
- The Census Bureau releases two relevant public summaries of ACS data: “regular data” and a “CVAP Special Tabulation.” Neither captures data in the precise form that the Department of Justice has said that it will use. The first problem with these summaries is the issue of the level of geography: redistricting depends on aggregations of census blocks, but the special CVAP tabulation is available only at the “block group” level, and the regular ACS data is available only at the (larger) “census tract” level. The larger the aggregate level at which data is provided, the more potential error involved in allocating the information to smaller sub-units; the smaller the aggregate level at which data is provided, the more error inherent in the survey estimate.

The second problem is that neither product aggregates racial categories as the Department of Justice does. The ACS allows individuals to check multiple categories for race (and, as a distinct item, Latino ethnicity). The Department of Justice will aggregate data to include single-minority individuals and individuals checking both “White” and a minority race, as well as minority individuals of Latino ethnicity. For example, DOJ’s tally of the black population, for Voting Rights Act purposes, includes respondents checking “Black/African American” and those checking both “White” and “Black/African American,” whether such respondents have also checked “Latino” or not. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7472-73 (Dep’t of Justice Feb. 9, 2011).

Neither public census product does this. For the black population, for example, the regular ACS summary includes individuals who have checked “Black/African American,” whether Latino or not, but does not separately provide individuals who have checked both “White” and “Black/African American.” See U.S. CENSUS BUREAU, *supra*, at 41. The special CVAP tabulation includes individuals who have checked “Black/African American” and those who have checked “Black/African American” and “White,” but only if they are not Latino. See U.S. CENSUS BUREAU, *CITIZEN VOTING AGE POPULATION (CVAP) SPECIAL TABULATION FROM THE 2005-2009 5-YEAR AMERICAN COMMUNITY SURVEY 2* (Feb. 11, 2011), available at http://www.census.gov/rdo/pdf/CVAP_Documentation_Version2.pdf.

underlying data concerning CVAP. In California, the nonpartisan California Statewide Database, housed at Berkeley Law and operated on behalf of the state, attempts to undertake what translation it can.¹¹⁷

Guaranteeing compliance with section 2 also requires the collection and evaluation of political data, to assess polarization under the second and third *Gingles* conditions.¹¹⁸ As explained above, this data gets quite granular quite quickly: in order to know whether different racial or ethnic groups within a given area (alone or in combination) tend to prefer different types of candidates, and to what degree, it is necessary to statistically analyze precinct-by-precinct returns for different elections over time at multiple levels of government serving the area, prioritizing certain races and giving less weight to others. The sheer volume of this data means that line-drawers usually first look for minority populations that satisfy the first *Gingles* condition, in order to narrow the pool of electoral data to process.

At present, this data is not available from a single source. In California, the Statewide Database collects (and attempts to translate to consistent geographic units) precinct-based election reports for certain races: general and primary elections for statewide offices and ballot measures, and general elections for state legislative and congressional seats.¹¹⁹ It has not, however, processed the data to determine patterns of racial or ethnic polarization. (Given that the relevant analysis will differ based on the scale of each potential district, it is not possible to conduct such analysis in the abstract, without first identifying the geography to be analyzed.) Nor has the Statewide Database collected state legislative or congressional primary results, or results from local elections, all of which may — depending on the area — be more relevant to determining the degree of polarization in a proposed district than votes on statewide measures.¹²⁰

For far more on the difficulties and limitations with ACS data as used to calculate CVAP, see generally Jorge Chapa et al., *Redistricting: Estimating Citizen Voting Age Population* (Sept. 2011), available at http://redistrictinggroup.org/wp-content/uploads/2011/04/Redistricting_Estimating_CVAP.pdf.

¹¹⁷ See generally MCCUE, *supra* note 113, at 16-17 (describing some of the translation process and potential difficulties with the translation); *Information About the Statewide Database*, STATEWIDE DATABASE, <http://swdb.berkeley.edu/about.html> (last visited Dec. 28, 2012) (providing information on the Statewide Database's services and history).

¹¹⁸ Cf. Crayton, *supra* note 40, at 990-91, 1012-13 (recommending that local jurisdictions gather data concerning racial polarization early in the process, to assess options and potential liability under the Voting Rights Act).

¹¹⁹ See MCCUE, *supra* note 113, at 2, 7, 29-32.

¹²⁰ *Frequently Ask [sic] Questions*, STATEWIDE DATABASE, <http://swdb.berkeley.edu/faq.html> (last visited Dec. 28, 2012). In the past, local results may have been

These election results, at present, must normally be collected individually from the local election registrars.

Moreover, in order to weight the various elections in an area according to their relevance in assessing polarization, analysts must determine the race, ethnicity, and incumbency status of the various candidates in each race. In California, no single source appears to collect this information statewide.

Finally, ensuring section 2 compliance requires an assessment of the totality of the circumstances facing racial, ethnic, and language minorities. Here too, the available data will depend greatly on the jurisdiction. Minority voters have faced historical discrimination within California to different degrees and in different forms, and different minority groups show different lingering effects of that discrimination. Comparative turnout and registration statistics, and the comparative presence of minority elected officials in the area outside of districts drawn specifically to ensure an opportunity for minority control, may reveal or dispel concerns about the political legacy of past (or present) discrimination. The Statewide Database collects and attempts to translate turnout and registration figures; nonpartisan civil rights groups affiliated with the largest minority communities in California collect lists of elected officials who consider themselves members of each minority group.

B. Section 5

Much of the data listed above will also be useful for ensuring compliance with section 5. Assessing minority voters' exercise of the franchise in California's covered jurisdictions first requires a pragmatic examination of the "benchmark": the degree to which minority voters were able to exercise political power in each of the old districts containing all or part of Kings, Merced, Monterey, and Yuba counties. As described above, this is a nuanced and pragmatic assessment, including not merely demographic data, but also registration, turnout, and polarization calculations, along with an evaluation of minority voters' past success in electing candidates of choice in the area.¹²¹ This data can be gleaned from all of the same sources mentioned above.

particularly important in compensating for the large rate of absentee ballots, which were tallied in precincts unrelated to geography in some of the most heavily minority counties of the state, with a potential to skew polarization analyses for areas smaller than a county. See MCCUE, *supra* note 113, at 7. In 2008, California legal requirements changed to require absentee ballots to be tallied in connection with the voters' appropriate geographic precincts. *Id.*

¹²¹ See 28 C.F.R. § 51.28(a), (d) (2011); *Texas v. United States*, 887 F. Supp. 2d

The best practice is to then gather the same data for areas of proposed change. Even if, for example, a proposed district moves 20,000 Latino voters out of the district at the same time that it includes 20,000 Latino voters who are new to the district, if there are dramatic differences in the turnout of those two groups, the proposed change may very well impact the practical ability of the minority group as a whole to elect candidates of choice. In a pragmatic evaluation of minority groups' ability to effectively exercise the franchise, these distinctions matter.

Relative to ensuring the absence of discriminatory effect, ensuring the absence of discriminatory purpose is more straightforward. The best way for decision-makers to ensure that a plan is not designed to discriminate against minority groups is for line-drawers to not intend to discriminate against minority groups.

Still, because those who intentionally discriminate rarely announce their intentions, the Department of Justice looks at a wide array of circumstantial evidence in order to ensure the absence of such an intent. As a result, the best practice for line-drawers involves not only engaging in redistricting with proper motives, but also designing the process to demonstrate this purity. Since the Department of Justice examines whether changes are supported by reasonable and legitimate justifications, best practice is to explain the justifications for districts drawn within covered areas. Since the Department examines whether racial and language minority groups had an opportunity to participate in the redistricting process and whether their expressed concerns were taken into account, best practice is to ensure that such groups have such an opportunity to participate, and to carefully consider their concerns.¹²²

Setting out to collect the appropriate data and procedural inputs does not guarantee compliance at the end of the day; conversely, a map may end up legally compliant even if it is not informed by the right inputs. But a well-designed process will best promote the *chances* of compliance, by ensuring that those drawing the lines understand the available options and constraints.

III. THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION

As with the Voting Rights Act, the California Citizens Redistricting Commission was designed with great attention to detail. There are inevitable benefits and detriments to imbuing a citizens' body with

133, 141-44 (D.D.C. 2012) (three-judge court).

¹²² See 28 C.F.R. §§ 51.54(a), 51.57 (2011).

control of the redistricting process;¹²³ the California Commission seemed to capture some of these effects and avoid others (both good and bad).¹²⁴ The remainder of this Part focuses specifically on the efficacy of this layperson entity's efforts to comply with the remarkable nuance and complexity of the Voting Rights Act.

A. *Qualifications*

Assessing whether the California Commission's process was well designed to comply with the Voting Rights Act must begin with the Commissioners themselves — and therefore a step earlier still, to the process for choosing the Commission.

California's approach to selecting a Commission is similar in many ways to the process of selecting a jury, albeit with important modifications.¹²⁵ The most important difference may be right at the beginning of the enterprise: the initial pool of potential commissioners is not random. Instead, interested citizens submit extensive applications, including demographic information and relevant experience. A panel of independent state auditors reviews these applicants in a process much like *voir dire*, screening for conflicts of interest and threshold technical qualifications.¹²⁶ The auditor panel *then* attempts to ensure that its "venire"¹²⁷ is more reflective of the general population, seeking partisan balance and "appreciation for California's diverse demographics and geography."¹²⁸ This "venire" is then subject to several peremptory strikes by the majority and minority state Senate and House leadership. From the remaining pool, eight commissioners are selected at random from subpools divided by partisanship, to ensure partisan balance even as the individuals are randomly selected. Those eight then select six additional commissioners, again from partisan subpools to preserve partisan balance. And as with the *venire*, the law expressly states that this choice is to be exercised such that the final commission reflects the racial, ethnic, geographic, and gender diversity of the state.¹²⁹

¹²³ Justin Levitt, *Novel (and Not-so-Novel) Alternatives to Legislative Redistricting*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* 75, 85-91 (Benjamin E. Griffith ed., 2d ed. 2012).

¹²⁴ *Id.* at 91-93.

¹²⁵ *Id.* at 87.

¹²⁶ CAL. GOV'T CODE § 8252(a)(2), (d) (2012).

¹²⁷ A *venire* is the broad panel of potential jurors summoned for jury service, from which a jury is ultimately selected. BLACK'S LAW DICTIONARY (9th ed. 2009).

¹²⁸ CAL. GOV'T CODE § 8252(d).

¹²⁹ *Id.* § 8252(g). Like most other states with a citizen redistricting body,

Elsewhere, I have examined the comparative theoretical merits and detriments of a process like California's.¹³⁰ Whatever the theory, in 2011, this process seems to have produced a Commission well suited to the redistricting task. All Commissioners were both accomplished and skilled, including several with specific training in legal interpretation and/or data analysis.

Moreover, several Commissioners had experience particularly relevant to the proper application of the Voting Rights Act. Commissioner Angelo Ancheta was a constitutional law and voting rights scholar at Santa Clara University School of Law, including coursework on the Voting Rights Act; in the 1990 redistricting process, he represented the Coalition for Asian Pacific Americans for Fair Reapportionment, including representation at statewide legal hearings.¹³¹ Commissioner Vincent Barabba was the former director of the U.S. Census Bureau; he was responsible for conducting the 1980 Census, and he was intimately familiar with the data provided.¹³² Commissioner Maria Blanco was the National Counsel at the Mexican American Legal Defense and Educational Fund (MALDEF) for the 2000 redistricting cycle and had also served as the Executive Director of the Warren Institute at Berkeley and the Executive Director of the Lawyers' Committee for Civil Rights of the Bay Area; all three organizations are deeply immersed in the redistricting process.¹³³ And in 1981, Commissioner Gil Ontai volunteered for a broad citizens' organization advocating with respect to the municipal redistricting for San Diego, and participated, *inter alia*, in drafting proposed districts designed to comply with the Voting Rights Act.¹³⁴

California's commission aims for partisan balance (equal numbers of Republicans and Democrats, with additional members not from either party) rather than a partisan composition that mirrors the partisan makeup of the state. By contrast, in evaluating other demographic criteria, California asks that its commission reflect the diversity of the state, rather than numerical balance. *See* Levitt, *supra* note 123, at 87 n.49.

¹³⁰ *Id.*

¹³¹ ANGELO N. ANCHETA, SUPPLEMENTAL APPLICATION FOR CITIZENS REDISTRICTING COMMISSION 1, 3-4 (Apr. 19, 2010), *available at* <http://wedrawthelines.ca.gov/applicant/34353/2-supplemental-application.pdf>.

¹³² VINCENT P. BARABBA, SUPPLEMENTAL APPLICATION FOR CITIZENS REDISTRICTING COMMISSION (Apr. 13, 2010), *available at* <http://wedrawthelines.ca.gov/applicant-supplemental-3353.html>.

¹³³ MARIA BLANCO, SUPPLEMENTAL APPLICATION FOR CITIZENS REDISTRICTING COMMISSION (May 11, 2010), *available at* <http://wedrawthelines.ca.gov/applicant-supplemental-8543.html>.

¹³⁴ LILBERT "GIL" R. ONTAI, SUPPLEMENTAL APPLICATION FOR CITIZENS REDISTRICTING COMMISSION (Apr. 18, 2010), *available at* <http://wedrawthelines.ca.gov/applicant-supplemental-342.html>.

This expertise — and the analytical capacity and intellectual engagement of the other Commissioners — was apparent through the redistricting process of the 2010 cycle. For example, the Commissioners evaluated, selected, and retained redistricting consultants — including Q2 Data and Research, to assist with data collection and line drawing; Dr. Matt Barreto, to assist with racially polarized voting analysis; and Gibson, Dunn & Crutcher, to fill the specific state legal requirement of at least one attorney to the commission who “has demonstrated extensive experience and expertise in implementation and enforcement of the federal Voting Rights Act of 1965.”¹³⁵ Yet the Commissioners did not defer blindly to their consultants, including legal counsel. When the Commissioners were formulating their general approach to working with VRA counsel, they discussed the relevant issues at a probing and nuanced level of detail;¹³⁶ the same is true of their approach to working with the technical line-drawing consultants.¹³⁷ And with respect to particular pieces of advice relating to the Voting Rights Act, many of the Commissioners offered exceedingly sophisticated pushback, testing with precision not only the definitions of various terms and the reliability of various data, but also the degree of ambiguity inherent in the law and the extent to which their consultants’ advice revealed preferences but not requirements.¹³⁸ They also showed a thorough

¹³⁵ CAL. GOV’T CODE § 8253(a)(5) (2010).

¹³⁶ See CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF LEGAL ADVISORY COMMITTEE MEETING *passim* (Mar. 17, 2011); CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF LEGAL ADVISORY COMMITTEE MEETING 141-43, 206-12 (Mar. 15, 2011). Transcripts of the Citizens Redistricting Commission are located at *Meeting Transcripts*, CAL. CITIZENS REDISTRICTING COMM’N, <http://wedrawthelines.ca.gov/transcripts.html> (last visited Feb. 15, 2013).

¹³⁷ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 66-76 (Mar. 24, 2011) [hereinafter Mar. 24, 2011, TRANSCRIPT].

¹³⁸ For examples of pushback to legal counsel, see CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF STOCKTON BUSINESS MEETING 210-11 (June 24, 2011) [hereinafter June 24, 2011, STOCKTON TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF CULVER CITY BUSINESS MEETING 26-29, 84-85 (June 16, 2011) [hereinafter June 16, 2011, CULVER CITY TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1 26-27 (June 1, 2011) [hereinafter June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF NORTHRIDGE BUSINESS MEETING 34-36, 44-45, 72, 79-80, 255 (May 27, 2011) [hereinafter May 27, 2011, NORTHRIDGE TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF LANCASTER BUSINESS MEETING 7-11 (May 1, 2011) [hereinafter May 1, 2011, LANCASTER TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF LOS ANGELES BUSINESS MEETING 41-44, 63-65, 92-93 (Apr. 28, 2011) [hereinafter Apr. 28, 2011, LOS ANGELES TRANSCRIPT]. For an example of pushback to the line-drawers, see CAL. CITIZENS REDISTRICTING COMM’N,

understanding of the inherently nondeterminative nature of legal advice and its relationship to litigation and other risks; those Commissioners who were not themselves attorneys proved to be quite sophisticated consumers of legal advice.¹³⁹ Such pushback is evidence that the Commissioners retained control of the process throughout, rather than deferring overly to staff.

B. Training

That said, even Commissioners well-versed in other applications of the Voting Rights Act would have benefited from earlier training in the nuances of the Act as applied to the task ahead. The scale and scope of a statewide redistricting, the limitations and gaps of the readily available data, and the interaction of the Voting Rights Act with other criteria required by state law all presented novel challenges to this first Commission. Specific training to assist Commissioners in understanding not only the law but its ramifications for the process ahead would have been invaluable. This training was, unfortunately, long deferred.¹⁴⁰

Early in their tenure, Commissioners and staff recognized the need for such training, and quickly. On January 20, 2011, Counsel for the Secretary of State mentioned that “maybe one of the things we could do, sometime *fairly soon*, is have the AG come and talk to us about pre-clearance.”¹⁴¹ The next day, in the context of a review of the Voting Rights Act, the Commissioners acknowledged the importance of early training and mentioned that several organizations with expertise had offered to conduct the sort of training that they would need.¹⁴² On February 10 and 11, there was further discussion of the

TRANSCRIPT OF SACRAMENTO BUSINESS MEETING 197-202 (July 3, 2011) [hereinafter July 3, 2011, SACRAMENTO TRANSCRIPT].

¹³⁹ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1 47-50 (July 14, 2011); June 24, 2011, STOCKTON TRANSCRIPT, *supra* note 138, at 210-11; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING 115-16 (June 9, 2011) [hereinafter June 9, 2011, SACRAMENTO TRANSCRIPT].

¹⁴⁰ Part of the delay may have been due to the fact that neither the Commission’s internal counsel nor any of the Commission’s permanent staff had any redistricting experience. Karin Mac Donald, *Adventures in Redistricting: A Look at the California Redistricting Commission*, 11 ELECTION L.J. 472, 481 (2012).

¹⁴¹ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 170 (Jan. 20, 2011) (emphasis added) [hereinafter Jan. 20, 2011, TRANSCRIPT].

¹⁴² CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 19, 21 (Jan. 21, 2011) [hereinafter Jan. 21, 2011, TRANSCRIPT].

need for “more [Voting Rights Act] training rather than less, and start[ing] earlier, rather than later.”¹⁴³ But the apparent consensus on the urgency of training was not immediately implemented.

The first formal training finally occurred on March 24, with a presentation by Ana Henderson, of the Warren Institute at Berkeley.¹⁴⁴ The brief overview was designed to review the Act’s legal requirements, which is entirely appropriate. But it did not suggest *how* the Commission should structure its work so as to ensure compliance — neither the data the Commission should seek, nor the process it should pursue. The first hints of such advice had to wait for the Commission’s VRA counsel, in a training more than a month later, on April 28.¹⁴⁵ That is, the Commission got its first formal sense of how it should go about ensuring compliance with the Voting Rights Act only on the eve of May 2011, with final districts due just over three months later.¹⁴⁶

C. Data

The delayed training may have contributed to a delay in acquiring data — including, most prominently, data regarding racially polarized voting. It is not that the necessary data did not yet exist. The basic building blocks of the Commission’s primary Voting Rights Act dataset were being compiled and translated as the Commission was being formed. The Census Bureau’s American Community Survey

¹⁴³ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 130 (Feb. 24, 2011) [hereinafter Feb. 24, 2011, TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMMISSION MEETING 396-98, 407-08 (Feb. 11, 2011) [hereinafter Feb. 11, 2011, TRANSCRIPT]; CAL. CITIZENS REDISTRICTING COMMISSION, TRANSCRIPT OF LEGAL COMMITTEE MEETING 41, 53 (Feb. 10, 2011) [hereinafter Feb. 10, 2011, LEGAL COMMITTEE TRANSCRIPT].

¹⁴⁴ Mar. 24, 2011, TRANSCRIPT, *supra* note 137, at 83-105, 124-38, 144.

¹⁴⁵ Apr. 28, 2011, LOS ANGELES TRANSCRIPT, *supra* note 138, *passim*; GIBSON, DUNN & CRUTCHER, LLP, PRESENTATION TO THE CITIZENS REDISTRICTING COMMISSION (Apr. 28, 2011) [hereinafter GIBSON DUNN PRESENTATION], *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_apr2011/handouts_20110428_gibsondunn.pdf.

¹⁴⁶ CAL. CONST. art. XXI, § 2(g). There appear to be several reasons for the delay. Some were logistical: the Commission almost had an initial training on February 25, but the preferred presenter was unavailable. Feb. 24, 2011, TRANSCRIPT, *supra* note 143, at 276. Some were based on triage: the discussion about hiring VRA counsel appeared to take up all of the available VRA oxygen, with the hope that counsel would facilitate training, but unfortunately, the time required to hire counsel meant that training was also delayed. And some may have been based on a concern that choosing a VRA trainer risked the perception of a politicized choice among various interest groups, which made deferral of the decision a more palatable alternative. Jan. 21, 2011, TRANSCRIPT, *supra* note 142, at 26.

covering 2005–2009 — the last population survey before the decennial census — was released on December 14, 2010.¹⁴⁷ A special compilation of ACS data covering citizen voting-age population was released on February 11, 2011.¹⁴⁸ Despite the recognized imprecision of these figures,¹⁴⁹ they provided the best available means to identify substantial minority populations until decennial census data were delivered on March 8, 2011.¹⁵⁰ And even after the 2010 Census data arrived, ACS data would remain the most accurate approximation of citizenship, crucial to application of the Voting Rights Act.

Yet despite Commissioner inquiries into the opportunity to get “preliminary and approximate data” from the Statewide Database as early as January 26,¹⁵¹ it is not clear that these initial datasets were available to the Commission — or used by consultants to preliminarily identify target populations — until the “full” dataset was made available in April.¹⁵²

1. Racially Polarized Voting Data

Racial polarization data was even further behind than ACS and 2010 Census figures. Recall that election data is required to assess whether voting in a particular area is polarized, such that populations of racial and language minorities might not have an equal opportunity to elect candidates of choice without districts drawn in race- or ethnicity-conscious fashion. Local election data, and analysis of that data to assess the prevalence of racial polarization, is therefore crucial to evaluating both an obligation under section 2 of the Voting Rights Act

¹⁴⁷ Press Release, U.S. Census Bureau, U.S. Census Bureau Releases First Set of 5-Year American Community Survey Estimates (Dec. 14, 2010), *available at* http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb10-cn90.html.

¹⁴⁸ *Voting Age Population by Citizenship and Race (CVAP)*, U.S. CENSUS BUREAU, http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Jan. 27, 2013).

¹⁴⁹ See *supra* note 116 and accompanying text.

¹⁵⁰ Press Release, U.S. Census Bureau, U.S. Census Bureau Delivers California’s 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting (Mar. 8, 2011), *available at* http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn68.html.

¹⁵¹ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 125 (Jan. 26, 2011).

¹⁵² Mar. 24, 2011, TRANSCRIPT, *supra* note 137, at 26; cf. Feb. 11, 2011, TRANSCRIPT, *supra* note 143, at 572 (asserting that without “complete” data, “[y]ou can start drawing; you just cannot start drawing any districts with Voting Rights Act concerns. So basically Section 5 counties and then anything Section 2, you would have to wait until you have the entire data set together.”).

(in the second and third *Gingles* factors)¹⁵³ and an obligation under section 5 of the Voting Rights Act (in assessing an “ability to elect”).¹⁵⁴

The Commissioners understood that they would have to acquire this information from sources outside of the census submission.¹⁵⁵ And though the Statewide Database was collecting *some* statewide voting data for use in polarization studies, it was not providing the most probative information: data from legislative primaries for the districts in question (which is exceedingly probative in a state with polarized partisan pockets, like California) or from local elections.¹⁵⁶ The Database would also not be providing the polarization analysis itself.¹⁵⁷

The Commissioners also seemed to understand that they should begin gathering and analyzing this data quickly — “day one.”¹⁵⁸ Commissioner Ancheta recognized and expressed the need as early as February 10, and he repeated his concerns through the next three months.¹⁵⁹

The Commission finally began assembling a formal request for a racially polarized voting consultant on April 27. After an extended back-and-forth with procurement personnel, staff were still adjusting the invitation for bid on June 2.¹⁶⁰ The Commission approved the hiring of Dr. Matt Barreto on June 9; he was at work by June 16, even before the contract was completely finalized.¹⁶¹ But the exceptionally late start meant that the Commission was able to incorporate input from the research only exceptionally late in the process, after many preliminary decisions had already been made. It was June 24 before the Commission was able to start getting hints of the results of the

¹⁵³ See *supra* text accompanying notes 38-53, 119-120.

¹⁵⁴ See *supra* text accompanying notes 77-78, 97-99, 121.

¹⁵⁵ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 55-56 (Feb. 25, 2011) [hereinafter Feb. 25, 2011, TRANSCRIPT].

¹⁵⁶ Mar. 24, 2011, TRANSCRIPT, *supra* note 137, at 20-21, 24-25.

¹⁵⁷ *Id.*

¹⁵⁸ Feb. 25, 2011, TRANSCRIPT, *supra* note 155, at 131.

¹⁵⁹ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF REDISTRICTING COMMISSION MEETING 11-12 (Apr. 8, 2011) [hereinafter Apr. 8, 2011, TRANSCRIPT]; Mar. 24, 2011, TRANSCRIPT, *supra* note 137, at 206-07; CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF TECHNICAL ADVISORY COMMITTEE MEETING 12-13, 30-31 (Feb. 23, 2011) [hereinafter Feb. 23, 2011, TECHNICAL ADVISORY COMMITTEE TRANSCRIPT]; Feb. 11, 2011, TRANSCRIPT, *supra* note 143, at 399-400; Feb. 10, 2011, LEGAL COMMITTEE TRANSCRIPT, *supra* note 143, at 51-52.

¹⁶⁰ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1 52-53 (June 2, 2011); CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF LONG BEACH BUSINESS MEETING 150-55 (Apr. 27, 2011).

¹⁶¹ June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 130; June 9, 2011, SACRAMENTO TRANSCRIPT, *supra* note 139, at 69-71.

analysis, and June 29 before counsel was able to advise definitively that certain areas of the state required drawing districts specifically to meet the demands of the Voting Rights Act. It was July 13 before the results in Los Angeles, for example, were formalized — and even those results were partial.¹⁶² Just sixteen days remained in the map-drawing process.

It could have been worse. The Commission averted disaster by rejecting the suggestion that their technical consultant specifically *avoid* collecting local voting data, which would have seriously hampered any effort at compliance.¹⁶³ The Commission also solicited and received some rough proxies for full racially polarized voting studies, in the form of input from the community. In May and June, for example, several organizations testified about the lack of polarized voting against African-Americans in Los Angeles.¹⁶⁴ Still, this community testimony was only a proxy for more comprehensive analysis, and only for limited portions of the state.

2. Difficulties Caused by Late and Limited Election Data

The delayed acquisition of racially polarized voting analysis may have led to unnecessary difficulties. For example, the absence of election data likely contributed to VRA counsel's overall approach to drawing compliant districts. Recall that the predominant use of race or ethnicity invites heightened constitutional scrutiny. If a district is drawn based on race or ethnicity in order to comply with the Voting Rights Act, it likely meets constitutional muster; if, however, a district is drawn predominantly based on race or ethnicity where the Voting Rights Act does not require the district in question, it is constitutionally vulnerable.¹⁶⁵ It may be possible to avoid the conflict by identifying large minority populations that might be protected under the Voting Rights Act and determining whether (remaining cognizant of race but not allowing race to predominate) the use of

¹⁶² Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition, app. vol. 3, at 405, 420, *Vandermost v. Bowen*, Nos. S196493, 196852 (Cal. Oct. 11, 2011); CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1 18-19 (June 29, 2011) [hereinafter June 29, 2011, SACRAMENTO TRANSCRIPT].

¹⁶³ See Feb. 23, 2011, TECHNICAL ADVISORY COMMITTEE TRANSCRIPT, *supra* note 159, at 30-43.

¹⁶⁴ Consolidated Preliminary Opposition, *supra* note 162, app. vol. 1, at 121, *Vandermost*, Nos. S196493, 196852; *id.* vol. 2, at 138 & n.6; *id.* vol. 2, at 186-88 (NAACP); *id.* vol. 2, at 235 n.11 (several organizations).

¹⁶⁵ See *supra* text accompanying notes 111-112.

nonracial criteria affords the population in question the effective opportunity to elect candidates of choice. In the happy coincidence where other criteria preserve the effective voting rights of minority populations, districts will satisfy the Voting Rights Act without exposure to constitutional challenge.

However, nonracial redistricting criteria will not always clearly preserve a minority population's ability to effectively exercise the franchise. Preserving a particular community or city boundary, for example, may operate to reduce or overpack minority population voting strength. In such circumstances, there is no legally "conservative" course of action. Drawing primarily based on race or ethnicity risks a legal challenge if there is no obligation under the Voting Rights Act; drawing primarily based on other criteria risks a legal challenge if there is an obligation under the Voting Rights Act. And given the circumstances of historical discrimination, the only way to know whether there is an obligation under the Voting Rights Act in much of California is to assess the extent of racially polarized voting.

The absence of this information made the Commission's task considerably more difficult. For example, on May 28, the Commission realized that there might be a conflict between their other redistricting criteria and the potential obligation to draw districts under the Voting Rights Act for the African-American community of Los Angeles.¹⁶⁶ It understood that it would need racially polarized voting analysis in order to determine whether the conflict actually existed — but an analyst was still weeks away from starting work. Ultimately, based largely on community testimony and past electoral success rather than statistical analysis, the Commission determined that the Voting Rights Act created no obligation with respect to the African-American electorate of Los Angeles County.¹⁶⁷ In the meantime, however, the uncertainty created controversy and likely limited the Commission's ability to assess alternative options.

More generally, the Commission turned relatively frequently to legal counsel to assess compliance with the Voting Rights Act. When districts drawn pursuant to other criteria looked like they might not fully effectuate the voting power of minority communities, however,

¹⁶⁶ CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF NORTHRIDGE BUSINESS MEETING 38-39, 43 (May 28, 2011) [hereinafter May 28, 2011, NORTHRIDGE TRANSCRIPT].

¹⁶⁷ See STATE OF CAL., CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING 19-20 (2011) [hereinafter FINAL REPORT], available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

in the absence of local electoral information, counsel had no way of knowing whether the districts were legally suspect or not.¹⁶⁸

In the absence of electoral data, counsel chose to advise that districts with large minority populations be drawn based on criteria other than the Voting Rights Act whenever possible, while still paying close attention to the relative percentage of the minority population. These districts would then be tweaked, if necessary, only after the data established a Voting Rights Act obligation.¹⁶⁹ This recommendation is similar to the procedure recently mandated by the Alaska Supreme Court for its state redistricting, which is also conducted by an independent citizens' body.¹⁷⁰

¹⁶⁸ See May 28, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 166, at 45-49, 61-64; CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF SANTA ROSA BUSINESS MEETING 115-16 (May 20, 2011) [hereinafter May 20, 2011, SANTA ROSA TRANSCRIPT].

¹⁶⁹ See GIBSON DUNN PRESENTATION, *supra* note 145, tab A, at 4-5; May 28, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 166, at 82-85; Apr. 28, 2011, LOS ANGELES TRANSCRIPT, *supra* note 138, at 54, 67-69.

Though the strategy presented in the text reflects the thrust of counsel's advice overall, on several occasions, counsel's advice was ambiguous about whether they would ever recommend districts drawn for Voting Rights Act purposes that deviated from lower-ranked state constitutional criteria. FINAL REPORT, *supra* note 167, at 13 (stating that "the Commission's map-drawing process relied on race-neutral, traditional redistricting criteria as its primary focus in crafting district lines, *even in areas where the Voting Rights Act required the creation of a majority-minority district*") (emphasis added); compare Apr. 28, 2011, LOS ANGELES TRANSCRIPT, *supra* note 138, at 67-69, 110 (suggesting that all districts would have to meet lower criteria, without exception), with *id.* at 108 (suggesting that districts following lower criteria could be adjusted, deviating from those lower criteria, if necessary to satisfy the Voting Rights Act); Video: Citizens Redistricting Comm'n April 28, 2011—Los Angeles, *Feed Three*, CAL. CITIZENS REDISTRICTING COMM'N (April 28, 2011), <http://wedrawthelines.ca.gov/video-archive-april-28-2011-los-angeles.html> (video at 8:20-8:55). The Commission's technical consultant seems to share the same confusion, based on a misunderstanding of the Supreme Court's jurisprudence on race-conscious decisionmaking. Compare Mac Donald, *supra* note 140, at 486 n.95 (incorrectly asserting that *Shaw v. Reno*, 509 U.S. 630 (1993), held that "race could not be a predominant criterion in drawing districts," without exception), with *supra*, text accompanying notes 108-112 (explaining the more nuanced operation of heightened scrutiny).

¹⁷⁰ Under the Alaska Supreme Court's required procedure, "[t]he [redistricting] Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize [Alaska constitutional] requirements when minimization is the only means available to satisfy Voting Rights Act requirements." *Hickel v. Se. Conference*, 846 P.2d 38, 51 n.22 (Alaska 1992). In 2012, when the Alaska redistricting body did not construct a complete plan under the criteria in the Alaska Constitution — which, unlike California's Constitution, does not expressly mention the Voting Rights Act — before adjusting for VRA compliance, the Alaska Supreme Court vacated the resulting redistricting plan and remanded for an

In theory, a redistricting body starting with other criteria and adjusting later for Voting Rights Act compliance should arrive at the same place as one starting with districts driven by Voting Rights Act compliance and building the remainder of the jurisdiction using other criteria. However, these two approaches yield equivalent results only if the drafters are highly attuned to Voting Rights Act obligations (and armed with the data necessary to recognize when those obligations are triggered) quite early in the process, before other district lines become legally or psychologically “set.” Otherwise, drafters may become overly attached to initial drafts that are drawn around other criteria and without sufficient regard for the Act, and consequently fail to adjust fully for compliance with the Voting Rights Act once obligations become clear. Similarly, because relatively small population shifts may cause relatively large and unanticipated repercussions elsewhere, there may be resistance to fully accommodating Voting Rights Act concerns late in the process, where doing so would cause significant changes to other districts around the state.

In Los Angeles, for example, even as late as June 24, the Commission questioned whether there was or was not racially polarized voting in Los Angeles and whether it should therefore be changing its strategy based on the presence or absence of a Voting Rights Act mandate.¹⁷¹ And when it finally appeared clear that voting in Los Angeles was polarized against the sizable Latino population, “adding” districts turned out to have “significant ripple effects.”¹⁷² Had the Commission earlier received definitive data about the voting dynamics in Los Angeles, there would have been no need to “add” districts for Voting Rights Act purposes — they would already have been built into the Commission’s mindset.

Similarly, without racially polarized voting information, the Commission attempted to draw districts primarily pursuant to criteria other than the Voting Rights Act, leaving some districts with extremely highly concentrated minority populations. The Commissioners attempted to prevent potential overpacking by spreading some of the minority population to other, adjacent districts.¹⁷³ Such a strategy might miss opportunities to draw districts

application of the required procedure. *In re 2012 Redistricting Cases*, 274 P.3d 466, 467-68 (Alaska 2012).

¹⁷¹ June 24, 2011, STOCKTON TRANSCRIPT, *supra* note 138, at 48-50.

¹⁷² CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF FRESNO BUSINESS MEETING 46-47 (June 23, 2011) [hereinafter June 23, 2011, FRESNO TRANSCRIPT]; *see also* June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 104-05.

¹⁷³ May 28, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 166, at 84-86.

ultimately required under the Act. For example, given a district with an electorate that is 80% minority and an adjacent district with a 75% minority electorate, it is possible to “bring each district down” individually, on the margins, without realizing that the districts might in combination yield a third, potentially required, 55% district. With electoral data in hand earlier, it would be easier to identify areas likely to fall definitively under Voting Rights Act protection, casting a brighter light on the consequences of — and solutions to — overpacking, with an appropriately greater (because legally required) emphasis on race, while the map is more in flux.

To be clear, these serious process difficulties do not amount to an assertion that the final maps were unlawful. Some Commissioners recognized that drafts might have to change substantially when data eventually arrived.¹⁷⁴ Even with approximate and tentative racial polarization analysis, the Commission was comfortable absorbing new information and changing course.¹⁷⁵ And when push came to shove late in the process — in the areas where other redistricting criteria appeared to risk infringement of clear Voting Rights Act requirements — the other criteria gave way. For example, the Commission clearly understood that districts must be modified to prevent likely violations of the Voting Rights Act even if doing so split incremental cities or counties, or deviated from the expressed preferences for particular communities of interest.¹⁷⁶

The discussion above relates to the consequences of delayed election data on the extent to which the Commission had to look beyond, and substantially adjust, settled expectations when data finally arrived. But not all of the relevant data did arrive, even by the close of the process. Even as the final maps were delivered, the Commission had received polarization analysis for only part of the population in only part of the state, with only part of the available probative election information.¹⁷⁷

¹⁷⁴ May 20, 2011, SANTA ROSA TRANSCRIPT, *supra* note 168, at 113-15.

¹⁷⁵ June 24, 2011, STOCKTON TRANSCRIPT, *supra* note 138, at 53, 61-64.

¹⁷⁶ June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 22, 33-37. By this, I mean only that Commission ultimately understood the legal imperative to modify districts to prevent violations of the Voting Rights Act, not that the Commission accurately assessed those potential violations or that it successfully achieved compliance.

¹⁷⁷ The Statewide Database, as explained above, collected only statewide election results for both primary and general elections, and legislative results for general elections. Presumably, these data were supplemented by other election data, including primary contests and other local elections, but there has been little public disclosure indicating how thoroughly the Statewide Database was supplemented or whether it was supplemented to the same degree in different areas of the state.

The Commission ultimately decided to examine polarization patterns with respect to Latino communities in Fresno, Kings, Los Angeles, Orange, San Diego, Riverside, and San Bernardino counties¹⁷⁸ and patterns with respect to Asian American and Pacific Islander communities in the San Gabriel Valley area.¹⁷⁹ Based on community testimony, the Commission decided to forego polarization studies with respect to the African-American community in Los Angeles.¹⁸⁰ Given that the analyst was engaged only in early June,¹⁸¹ these were reasonable triage decisions focusing on the largest populations of interest, though the late start meant that even this analysis was abbreviated — and in some counties, without the standard multi-level election analysis developed in even rudimentary litigation.¹⁸²

It would never be feasible, as the Commission realized, to conduct the most detailed level of analysis for “all the potential districts,” given time and monetary constraints.¹⁸³ But other information would have been helpful to the Commission had they been able to engage the racially polarized voting analyst much earlier.

For example, the Commission did not appear to investigate bloc voting among multiple minority groups to determine whether two or more sizable minority groups might together be protected by the Voting Rights Act. Consider Merced County. Last cycle’s Assembly district 17 showed a Latino citizen voting-age population (“CVAP”) of about 35%,¹⁸⁴ which is well below the threshold for Voting Rights Act protection under *Gingles* condition one. However, total minority CVAP was about 55%.¹⁸⁵ This figure indicates¹⁸⁶ that there may be a

¹⁷⁸ FINAL REPORT, *supra* note 167, at 17.

¹⁷⁹ *Id.* at 21.

¹⁸⁰ *Id.* at 19.

¹⁸¹ As one Commissioner rightly said, “[W]e’re behind the eight-ball at this point in time in terms of trying to get some of the analysis done.” June 9, 2011, SACRAMENTO TRANSCRIPT, *supra* note 139, at 47.

¹⁸² *Id.* at 55-56.

¹⁸³ *Id.* at 45-47.

¹⁸⁴ Data based on the 2005-2009 American Community Survey, tpls. B05003, B05003H, B05003I; *see also* OFFICE OF THE ATT’Y GEN., CAL. DEP’T OF JUST., & CAL. CITIZENS REDISTRICTING COMM’N, PRECLEARANCE SUBMISSION OF THE 2011 REDISTRICTING PLAN FOR THE COUNTIES OF KINGS, MERCED, MONTEREY AND YUBA BY THE STATE OF CALIFORNIA UNDER 42 U.S.C. § 1973c, app. L (Nov. 15, 2011) [hereinafter “PRECLEARANCE SUBMISSION”], *available at* http://wedrawthelines.ca.gov/downloads/meeting_handouts_112011/handouts_20111116_gdc_sec5sub.pdf (app. L on file with author).

¹⁸⁵ *See supra* note 184 and sources cited therein.

¹⁸⁶ By 2010, the old cycle’s district 17 contained 510,960 people, which is 9.7% above the average population for a new Assembly district — a significant

minority population in the area sufficiently sizable to constitute the majority of a single-member district's electorate. It does not appear that the Commission conducted a racially polarized voting analysis in the Merced area to determine whether these multiple minority groups would qualify for Voting Rights Act protection. As it stands, the Commission's new Assembly district in Merced — district 21 — has a total minority CVAP of 47%, which might or might not afford the multiple minority populations in the area an effective opportunity to elect candidates of choice.¹⁸⁷ Only a voting analysis can reveal whether there was an obligation under the Voting Rights Act, and if so, only a voting analysis can reveal whether that obligation was met. But it does not appear from the public record that such an analysis was ever conducted.

Similarly, the lack of electoral data may have limited the Commission's consideration of potential additional responsibilities farther south in California's Central Valley. A submission by MALDEF shows that it is possible to draw an Assembly district around a relatively compact Latino population crossing the Kern/Tulare border, with a Latino CVAP of about 53%.¹⁸⁸ The district is drawn by slightly reducing the Latino CVAP percentage in the neighboring Kings County Assembly district,¹⁸⁹ which is protected by section 5.¹⁹⁰ Whether the Kern/Tulare population shows a community protected by section 2, and whether the related reduction in Kings County amounts to a practical retrogression in the Latino population's ability to elect

overpopulation. 2010 Census Summary File 1, American FactFinder, tbls. P1, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>. The district's old configuration, therefore, does not definitively establish a majority-minority electorate within a district-sized area. It is likely, however, that within the old district 17, a smaller, appropriately district-sized population can be found with a compact minority CVAP above 50%.

¹⁸⁷ FINAL REPORT, *supra* note 167, app. 3 at 7, available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_5appendix_3.pdf.

¹⁸⁸ The district is MALDEF Assembly district 34. MALDEF California Statewide Redistricting Plans, app. 1 at 4 (May 26, 2011), available at http://www.maldef.org/assets/pdf/MALDEF_Final_Submission_052611_Appendix1.pdf; *id.* at app. 4 at 3, available at http://www.maldef.org/assets/pdf/MALDEF_Final_Submission_052611_Appendix4-6.pdf.

¹⁸⁹ The district is MALDEF Assembly district 30, which corresponds to last cycle's district 30 and the new 2011 district 32. See FINAL REPORT, *supra* note 167, app. 3 at 7, available at http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_5appendix_3.pdf; PRECLEARANCE SUBMISSION, *supra* note 184, app. L (on file with author); *supra* note 188.

¹⁹⁰ The benchmark district's Latino CVAP was slightly below 46.8%, and MALDEF's plan would have reduced it to 45.6%. See sources cited *supra* note 189.

candidates of choice, both depend substantially on the extent of racially polarized voting. Yet despite apparent recognition of the potential issue in early June,¹⁹¹ it is at best ambiguous whether meaningful polarization analysis was conducted in the area.¹⁹²

3. Potential Reasons for Late and Limited Election Data

Multiple factors may help to explain why there was so much delay in acquiring data with respect to racially polarized voting. First, the process of finalizing a contract bid invitation took more than a month, and it was not subject to some of the legal exceptions that allowed the comparatively speedy acquisition of legal services. California's Department of General Services was apparently responsible for signing off on the final invitation for bid. As the Commission's general legal counsel explained, "[t]he DGS process works extremely well when you're building a freeway or a new bridge. The challenge is to back it down to something much simpler."¹⁹³

It should be noted that this concern is not unique to California. On February 3, 2012, an Alaska trial court described its own independent commission's process:

[T]here was testimony that because the Board's budget was under the Governor's office, the hiring process took longer than normal because the Board had to submit an RFP for everything. There was also testimony that the Board was working on changing this process for the next round of redistricting. The court finds that this RFP process played a part in delaying the hiring of the VRA expert and was out of the Board's control.

[¶] It is also unclear whether the Board could have found a VRA expert to start sooner than Handley did. There was testimony that there are about 25 VRA experts. These experts work on elections and voting issues around the country and around the world. Handley was chosen and officially hired while she was working on a project in Afghanistan. Had the

¹⁹¹ June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 138, at 108.

¹⁹² Counsel explained on July 8 that they were unable to establish racially polarized voting "in the Kings area." CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1 185 (July 8, 2011). It is not at all clear whether the analysis included an examination of polarization in Kern and Tulare as well, or whether it included analysis of the legislative primary and local elections most probative to achieving a full answer.

¹⁹³ May 20, 2011, SANTA ROSA TRANSCRIPT, *supra* note 168, at 204.

Board chosen another candidate, it is possible that the candidate also would have been in the middle of another project in a different country or state The next Board should take note of the problems this Board experienced and consider start date and availability of an expert closely.¹⁹⁴

Future redistricting bodies well beyond Alaska would do well to heed the court's admonition.

However, the contracting process cannot shoulder all of the blame. The Commission itself identified the need to gather racially polarized voting data in early February, but it only began the initial steps toward soliciting a bid in late April. Some of the delay seems due to the simple magnitude of tasks that the Commission faced: with so much going on, it is inevitable that some pieces would be lost in the shuffle. Some of the delay may have been due to a lack of focus on gaps in the available input to the Commission. For example, the early presentation by the Statewide Database focused on the data that the Database *did* have and the utility of that data, without emphasizing the additional data that the Commission would have to gather from other sources.¹⁹⁵ Some of the delay seems due to a desire to wait for VRA counsel to confirm the need for additional data;¹⁹⁶ the wait in hiring VRA counsel thereby contributed to the delay in seeking the appropriate information.

Finally, some of the decisions with respect to election data — both when it was acquired and the scope of analysis finally completed — appear to be based directly on substantive decisions of VRA counsel. For example, if Dr. Barreto examined polarization data with respect to only single minority groups, and not to groups acting in blocs, it is likely that he did so because counsel consistently — and erroneously — assessed Voting Rights Act compliance in terms of a single minority group, without attention to functioning minority coalitions.¹⁹⁷ At

¹⁹⁴ *In re* 2011 Redistricting Cases, No. 4FA-11-02209 CI, at 102 (Alaska Super. Ct. Feb. 3, 2012).

¹⁹⁵ CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF PUBLIC INFORMATION ADVISORY COMMITTEE MEETING 44-65 (Mar. 24, 2011). The presentation was not misleading; it reasonably focused on the information that the Commissioners *would* be getting. The Commissioners, however, may have been overwhelmed by the amount of information that would be forthcoming, and may not have focused on the information they would not be receiving.

¹⁹⁶ See Apr. 8, 2011, TRANSCRIPT, *supra* note 159, at 12. The lack of redistricting-specific expertise among permanent Commission staff may have contributed to the desire to wait for approval by those with greater experience. See Mac Donald, *supra* note 140 at 481.

¹⁹⁷ FINAL REPORT, *supra* note 167, at 17; GIBSON DUNN PRESENTATION, *supra* note

various points, individual Commissioners indicated an interest in evaluating the voting patterns of coalitions of multiple minority groups, but it does not appear that these suggestions were followed.¹⁹⁸

Similarly, if districts affected by section 5 were essentially locked in before Dr. Barreto's polarization analysis was complete, that may be because counsel consistently — and erroneously — assessed minority populations' "ability to elect candidates of choice" as a standard based purely on demographics, rather than including both demographics and past voting practice.¹⁹⁹ This advice was at odds with the more robust and pragmatic look that both courts and the Department of Justice give to multiple factors on the ground, including registration rates and electoral performance.²⁰⁰ As above, some Commissioners expressed a desire to grapple with communities' pragmatic ability to elect, rather than just demographics, but it is unclear whether they timely received the data offering them that choice.²⁰¹

D. Decision-making Process

In contrast to the issues highlighted above, with respect to delays in training and acquiring and utilizing election data, there is little of noteworthy concern in the Commission's overall procedural approach to making decisions pursuant to the Voting Rights Act.

The Commission seemed to use its line-drawing consultants and legal counsel in appropriate fashion, at least as Voting Rights Act compliance is concerned. Commissioners asked counsel to review both preliminary and final decisions for compliance and for legal risk, exactly as they should.²⁰² They asked their technical consultants to explore and report back options, both in real-time and outside of Commission presence, exactly as they should. As mentioned above, they did not merely accept this feedback passively, but rather pushed back on staff and consultant advice in appropriate fashion. And the

145, tab A, at 5; June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 11.

¹⁹⁸ CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1 137-38 (July 1, 2011) [hereinafter July 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT]; MAY 1, 2011, LANCASTER TRANSCRIPT, *supra* note 138, at 35-36.

¹⁹⁹ June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 138, at 21 (June 1, 2011); May 27, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 138, at 12-13.

²⁰⁰ See *supra* text accompanying notes 97, 121. Indeed, courts have chastised jurisdictions for assessing retrogression by relying on demographic data alone. See *Texas v. United States*, 887 F. Supp. 2d 133, 140 & n.5; *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 656-57 (Fla. 2012).

²⁰¹ See June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 106-10.

²⁰² June 9, 2011, SACRAMENTO TRANSCRIPT, *supra* note 139, at 98-104.

Commission's technical consultants had conversations directly with legal counsel, about different configurations of districts, exactly as they should have.²⁰³ In and around late June, VRA counsel even met with legal counsel for other groups, in order to hear potential concerns about Voting Rights Act obligations.²⁰⁴ These meetings presented opportunities to gather extremely valuable input, albeit at that point substantially late in the schedule.

On multiple occasions, options were generated and matters discussed outside of the public record, in what appeared to be compliance with California's open meetings statutes. For example, pairs of Commissioners would apparently explore district configurations with Q2 consultants, outside of full Commission time. And the Commission as a whole would occasionally go into closed session with counsel, off the record, which is appropriate for a body receiving legal advice in contemplation of litigation.²⁰⁵ Though Commissioners' understanding was no doubt informed by these meetings and conversations, there is no indication that the Commission as a whole made relevant decisions outside of the public eye.

The Commission also started its process in the right place, substantively. As early as January 20, the Commissioners realized that it would be wise to start honing in on districts starting with counties affected by section 5 of the Voting Rights Act.²⁰⁶ Accordingly, they asked Q2 to start visualizing section 5 districts, with instructions to provide summaries of the available options where options exist.²⁰⁷ As a next step, they asked Q2 to identify geographically compact minority groups with a population over 50% of a potential district, to help focus on obligations under section 2.²⁰⁸ These are precisely the right initial directions.

As mentioned above, the lack of racially polarized voting data made it exceedingly difficult to address all Voting Rights Act issues, as

²⁰³ May 20, 2011, SANTA ROSA TRANSCRIPT, *supra* note 168, at 105.

²⁰⁴ June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 22-23.

²⁰⁵ June 9, 2011, SACRAMENTO TRANSCRIPT, *supra* note 139, at 109-10.

²⁰⁶ Jan. 20, 2011, TRANSCRIPT, *supra* note 141, at 148, 167-68; *see also* Apr. 28, 2011, LOS ANGELES TRANSCRIPT, *supra* note 138, at 109; Feb. 25, 2011, TRANSCRIPT, *supra* note 155, at 126-27; Feb. 23, 2011, TECHNICAL ADVISORY COMMITTEE TRANSCRIPT, *supra* note 159, at 8.

²⁰⁷ Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition app. vol. 1 at 58-59, *Vandermost v. Bowen*, Nos. S196493, 196852 (Cal. Oct. 11, 2011).

²⁰⁸ *Id.* app. vol. 1 at 58-59; *see also* GIBSON DUNN PRESENTATION, *supra* note 145, tab A, at 5.

planned, before the Commission issued initial draft maps in early June.²⁰⁹ And the difficulties continued as the delay continued.

Still, to the Commission's substantial credit, they appeared to listen carefully to testimony they received, changing course often, if not in every circumstance.²¹⁰ For example, the Commission modified its plans in Los Angeles County, at least in part on the basis of testimony indicating a lack of racially polarized voting with respect to the African-American community.²¹¹ As another example, testimony in June specifically addressed Voting Rights Act obligations given the compact and similarly situated Latino population of the Anaheim and Santa Ana area; by the next week, the Commission appeared to change its approach in response.²¹²

E. Substantive Decisions

Finally, the Commission made several substantive decisions affecting the likelihood that its final products would comply with the Voting Rights Act. In this context, "substantive decisions" refer not to decisions about individual districts' lines, but rather to decisions about substantive principles more generally guiding or controlling the process.

1. Race-neutral Principles

As mentioned above, given ambiguities in the law and the delayed acquisition of racially polarized voting data, the Commission adopted a strategy — as recommended by counsel — for approaching minority representation.²¹³ It first looked for substantial pockets of minority population with the possibility to incur Voting Rights Act obligations. It then sought to draw lines in the area pursuant to other state-sanctioned criteria, while keeping an eye on the impact on the minority community's voting power. If it became apparent that the Voting Rights Act required departure from the other criteria, the Commission declared that it would seek to adjust the relevant districts as necessary.

²⁰⁹ May 27, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 138, at 99; Apr. 28, 2011, LOS ANGELES TRANSCRIPT, *supra* note 138, at 103.

²¹⁰ June 24, 2011, STOCKTON TRANSCRIPT, *supra* note 138, at 61-64.

²¹¹ See *supra* note 164.

²¹² June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162 at 18-19; June 23, 2011, FRESNO TRANSCRIPT, *supra* note 172, at 58.

²¹³ See *supra* text accompanying notes 165-169.

In the abstract, this strategy represents a reasonable approach to ambiguity in the face of insufficient data and to avoiding constitutional challenges based on districts drawn primarily based on race without a corresponding Voting Rights Act obligation. However, the success of the strategy depends entirely on the strength of the final step: adjusting where necessary for compliance, even when the adjustments work to the detriment of other, lesser, criteria like the integrity of cities or communities of interest. And in turn, the later that this final step is applied, the more difficulty Commissioners will have in adjusting their own settled expectations. Moreover, the commitment to other criteria may make it more difficult for Commissioners to see options — for example, different configurations of multiple districts in heavily minority areas, drawn specifically to enhance minority representation where the Voting Rights Act requires such an approach — that would be more apparent if compliance represented an early adjustment rather than a late tweak. The Commission's strategy does not make compliance impossible, but the later the explicit action implementing superseding Voting Rights Act obligations, the larger the headwind.

2. Population Disparity

The Commission's approach to population disparity represents another example of the same phenomenon. As noted above, there is substantial legal ambiguity surrounding the maximum permissible population deviation for California state legislative districts.²¹⁴

Given the ambiguity, the Commission struggled mightily to adopt a governing standard.²¹⁵ VRA counsel first recommended that districts deviate no more than 2% (presumably, following the standard that the California Supreme Court chose for its own line-drawing: $\pm 2\%$ from the ideal, for a total deviation of 4%),²¹⁶ even when drawing for purposes of the Voting Rights Act.²¹⁷ On the same day, the

²¹⁴ See *supra* note 31.

²¹⁵ Along the way, and contributing to the ambiguity, the Commission's general legal counsel rejected a Commissioner's proposal to focus on the map's average deviation rather than its total deviation, even though there appears to be little legal basis for rejecting such a proposal (where the total deviation still falls well within federal constitutional guidelines). June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 288.

²¹⁶ See *supra* note 31.

²¹⁷ Apr. 28, 2011, LOS ANGELES TRANSCRIPT, *supra* note 138, at 40-46; see also Video: Citizens Redistricting Commission, *April 28, 2011—Los Angeles, Feed Three*, CAL. CITIZENS REDISTRICTING COMM'N, (April 28, 2011), <http://wedrawthelines.ca.gov/>

Commission actually left itself a more flexible standard for preliminary drafts: as little deviation as possible, but up to $\pm 5\%$ deviation from the ideal, with an explanation of any deviation over 2%.²¹⁸ On May 27, the Commission cut back a bit with respect to preliminary drafts: as little deviation as possible for the preliminary drafts, up to a *total* of 5% deviation.²¹⁹ However, the same day, it adopted a much more restrictive standard for the final maps: no more than 1% *total* deviation, even including districts drawn for purposes of the Voting Rights Act.²²⁰ On June 16, it asked Q2 to flag deviations over 1% that would aid compliance with the Voting Rights Act²²¹ — but two weeks later, it rejected the attempt to effectuate any deviation over 1% total.²²² Finally, on July 3, the Commission approved a standard permitting a *total* deviation of no more than 2%, with greater deviation permitted where required to comply with the Voting Rights Act.²²³

Technically, the Commission's final standard should not have impaired compliance with the Voting Rights Act, as it expressly authorized population deviations where necessary to comply.²²⁴ Presumably, this final standard included an authorization to draw districts with up to a 10% total deviation (the presumptive — albeit disputed — federal constitutional threshold for a *prima facie* case²²⁵) if necessary to comply with federal law.

However, the Commission's considerable struggles with a tighter standard — and its selection of a considerably tighter standard during the crucial drafting month of June — may have communicated a different set of priorities to the line-drawing consultants. For a substantial portion of the actual drafting period, the line-drawing consultants understood that they were aiming for an absolute deviation of 1% maximum, without exceptions. Despite the Commission's belated request to flag districts for which greater population deviations would aid compliance with the Voting Rights

video-archive-april-28-2011-los-angeles.html (video at 23:15-1:04:14).

²¹⁸ See sources cited *supra* note 217; see also May 20, 2011, SANTA ROSA TRANSCRIPT, *supra* note 168, at 212-236.

²¹⁹ May 27, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 138, at 167-73.

²²⁰ *Id.* at 161.

²²¹ June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 96.

²²² June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 305-06.

²²³ July 3, 2011, SACRAMENTO TRANSCRIPT, *supra* note 138, at 172-78.

²²⁴ It is worth noting that, even under the contested assumption that the California Supreme Court's selection of a $\pm 2\%$ deviation for itself binds the Commission in the normal circumstance, the Commission chose a 2% *total* maximum deviation, which is substantially more restrictive than the California Supreme Court's own standard.

²²⁵ See *supra* note 31.

Act, it is not clear that any such deviations were identified. (It is possible that no such configurations existed.) And in the Commission's final maps, *every single* district is within $\pm 1\%$ of the ideal — i.e., a total deviation of 2%.²²⁶

That is, the process may have suffered from the same late approach to “tweaking” for compliance described above. If line-drawers became attached to population configurations within $\pm 1\%$ of the ideal, the extent to which they may have (quite late in the process) revisited initial assumptions about minority populations just below a 50% electorate threshold is unclear. And these early expectations may have translated to foregone opportunities to see areas where different districts may have been required in order to comply with the Voting Rights Act.

The maintenance of an overly restrictive population standard through June may have impacted compliance in another fashion as well. The final maps include several districts identified as drawn for Voting Rights Act purposes that are on the cusp of or just below 50% CVAP for the minority group in question.²²⁷ Recall that the ability to draw a majority-minority district is one of the threshold considerations for an obligation under section 2 of the Voting Rights Act — but the obligation is only satisfied if the district drawn as a result offers the minority population an *effective* opportunity to elect candidates of choice.²²⁸ If, due in part to historical discrimination, polarization is particularly high and registration or turnout is particularly low, a bare 50% district may not actually satisfy the requirements of section 2. Similarly, section 5 of the Voting Rights Act is concerned with the effective exercise of the electoral franchise, including a host of pragmatic electoral factors.²²⁹

Resting on counsel's focus on demographics alone,²³⁰ the Commission does not appear to have sought data to test its conclusions. But a byproduct of the focus on demographics may be that districts at the margins of Voting Rights Act compliance based on demographics alone may not actually grant effective voting opportunities. (It is also possible that these districts *are* effective, given crossover voting or greater-than-average registration and

²²⁶ FINAL REPORT, *supra* note 167, at 11.

²²⁷ These districts include Assembly districts 31, 49, 52, 53, and 80; Senate districts 14, 32, and 33; and congressional districts 29, 32, 34, and 44. *Id.* at 17-19, 21; *id.* at app. 3, at 7-8, 12, 19-20.

²²⁸ See *supra* text accompanying notes 62-64.

²²⁹ See *supra* text accompanying notes 95-99.

²³⁰ See *supra* text accompanying notes 199-200; *infra* Part III.E.3.

turnout.) And it is therefore further possible that if districts drawn with $\pm 1\%$ deviation do not actually achieve compliance, greater deviations would allow the districts in question to do so.

3. Limited Use of Election Data

The above decisions represent forms of potential detrimental path dependence: decisions to draw districts based on certain criteria, with adjustment for Voting Rights Act compliance in the event of a conflict only late in the process. The harm, if any, would materialize only if the late course correction did not fully satisfy the substantive goals.

There were also a series of legal choices, all undertaken pursuant to counsel's advice, which had the potential to hamper compliance and which do not appear to have been corrected. It is difficult to fault the Commission for seeking, and following, advice of counsel. But future citizen bodies might well wish to understand and revisit — if not avoid — these particular choices.

The decision to approach Voting Rights Act compliance almost exclusively in terms of demographics, rather than supplementing with election data, is one example noted above.²³¹ For section 5 purposes, counsel maintained that the “ability to elect” candidates of choice — the linchpin of a central 2006 amendment to section 5 — is a term of art referring to nothing more than a majority-minority district.²³² Both Congress and the courts thus far construing the Act disagree.²³³ And on the margins, counsel's erroneous interpretation meant that the Commission did not seek to examine whether there were minority communities in covered jurisdictions with the practical ability to elect candidates of choice despite a population of less than 50% of the electorate.

Similarly, the Commission's approach to section 2 compliance, with several districts poised barely on the cusp of 50% of the electorate for the minority group in question, has been discussed above. To the Commission's credit, several of these districts resulted from a late attempt to reassess marginal districts, with minority populations just under 50% of the electorate that were adjusted to put the targeted population over a 50% threshold.²³⁴ This late modification

²³¹ See *supra* text accompanying notes 198-200.

²³² June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 138, at 21; May 27, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 138, at 12-13.

²³³ See *supra* text accompanying note 99.

²³⁴ CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING 113-18 (July 24, 2011) [hereinafter July 24, 2011, SACRAMENTO TRANSCRIPT]; July 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 198, at 101-02, 127-28.

demonstrates that the Commission was willing to prioritize what it perceived to be Voting Rights Act compliance over other potentially conflicting criteria. However, based on counsel's focus on demographics, the Commission did not seek to examine whether actual past election data indicated that the bare-50% thresholds were insufficient to provide a meaningful effective opportunity to elect candidates of choice. (By the same token, it is possible that past election practice would indicate that districts *below* the 50% threshold would offer a meaningful opportunity to elect candidates of choice. The point, as above, is not that the resulting districts did not comply, but rather that the Commission could not be sure whether they complied or not.)

4. CVAP v. VAP

Counsel also determined that, for section 5 purposes, retrogression could be avoided in covered counties by maintaining the voting age population of each district's relevant minority community, compared to the benchmark 2001 district for each covered county. That is, not only did the inquiry focus on demographic factors, but it emphasized the minority community's voting age population ("VAP") rather than its citizen voting age population ("CVAP") — or, put differently, the electorate.²³⁵

Part of the reason for stressing VAP undoubtedly involves legitimate concerns about the reliability of CVAP measures.²³⁶ But there are techniques to help adjust for the inherent error in CVAP estimates, which the Commission rightly applied.²³⁷ And given a legal test focused on minority communities' "ability to elect" and their "effective exercise of the franchise," using VAP data as a proxy for information on the electorate seems risky where there are significant numbers of noncitizens. Tellingly, for section 2 purposes, counsel advised the

²³⁵ Though CVAP figures were included with the Commission's preclearance submission data, VAP figures are instead emphasized throughout the transcript and the narrative preclearance document itself. Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition at 37, 51, 102 n.61, app. 183-185 (vol. 2), *Vandermost v. Bowen*, Nos. S196493, 196852 (Cal. Oct. 11, 2011); PRECLEARANCE SUBMISSION, *supra* note 184; *see also* June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 138, at 88-89; June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 30, 71; June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 112.

²³⁶ *See* May 27, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 138, at 118-22; *supra* note 116.

²³⁷ For example, Q2 appropriately checked marginal CVAP estimates against registration numbers, as another means to assess the reliability of the CVAP estimate for a given area. June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 30-31.

Commission — correctly — to use CVAP as the best available data to reflect potential electoral power. The decision to use a different measure for section 5 was never fully explained on the public record.

On the margins, the decision to test retrogression using VAP may have had consequences for compliance. For example, the benchmark congressional district for Kings County (which is covered by section 5 of the Voting Rights Act) was district 20, with a total Latino population of 70.36% and a Latino VAP of 65.72%.²³⁸ The Commission's new district, district 21, has a total Latino population of 70.96% and a Latino VAP of 65.85%.²³⁹ These VAP figures show no indication of retrogression. However, the benchmark district's Latino CVAP was 50.53% — and the new district's Latino CVAP is 49.26%.²⁴⁰ To the extent that 50% of the electorate represents a proxy for the “ability to elect,” that drop should have signaled a potential problem. It is worth emphasizing that crossover voting and differential registration rates may actually preserve the Latino community's ability to elect in district 20; indeed, Latino voters tend to be registered at a slightly higher rate than the district average, which indicates that the district is likely to comply. Still, the general point persists: an overwhelming focus on VAP leaves potential to overlook retrogression within the real electorate.

As a side note, the Commission's figures with respect to minority population — both VAP and CVAP — appear to address minority categories as if they were mutually exclusive. Adding the percentage figures for the defined categories of population by race or ethnicity — white, black, Latino, Asian, American Indian, etc. — sums to exactly 100% in every district. But as mentioned above, the 2010 Census allowed individuals to indicate their membership in more than one racial and ethnic category. When evaluating districts for Voting Rights Act compliance, the Department of Justice reviews each category seriatim, such that its assessment of the black population includes individuals who have checked “black”, “black” and “white”, “black” and “Latino”, and so on.²⁴¹ With the Commission's categories summing to precisely 100%, the Commission's data would only meet the Department of Justice's announced standard if no individual checked more than one racial box, and if no minority individual also indicated that she were Latina.

²³⁸ PRECLEARANCE SUBMISSION, *supra* note 184, at 21.

²³⁹ *Id.*

²⁴⁰ *Id.* app. K, L (on file with author).

²⁴¹ *See supra* note 116.

It is not clear whether these two anomalies — the emphatic focus on VAP and the mutually exclusive tally of race and ethnicity — came to the Department of Justice’s attention in the section 5 review process. California made its initial preclearance submission to the Department on November 16, 2011, the contents of which have been made available to the public.²⁴² However, the file was supplemented on nine separate dates, either by the Commission or by private entities, and neither the Commission’s accessible records nor the Department of Justice’s accessible records show the content of these additional submissions.²⁴³

5. Single Minority Groups

Counsel also recommended an initial emphasis, for purposes of complying with the Voting Rights Act, on areas of the state where a “single” minority group could form a majority of a relevant district.²⁴⁴ Much of the ensuing discussion and analysis thus emphasized districts responsive to mutually exclusive minority communities.

Such an approach ignores the possibility that two or more minority groups might form a sufficiently sizable, consistently polarized voting bloc meriting the protection of the Voting Rights Act.²⁴⁵ With the possible exception of African-American and Latino communities in Los Angeles, it is not clear that the Commission assessed such combinations for potential legal obligations. At several points, the issue was raised in the abstract, but it does not appear that the relevant data was actually gathered.²⁴⁶

²⁴² *Notice of Preclearance Activity [Under] the Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (Nov. 21, 2011), <http://www.justice.gov/crt/about/vot/notices/vnote112111.php>.

²⁴³ Supplemental submissions were logged on Dec. 8, Dec. 13, Dec. 15, Dec. 16, Dec. 19, Dec. 20, Dec. 21, Dec. 23, and Dec. 30. *Notice of Preclearance Activity [Under] the Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (Jan. 3, 2012), <http://www.justice.gov/crt/about/vot/notices/vnote010312.php>; *Notice of Preclearance Activity [Under] the Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (Dec. 27, 2011), <http://www.justice.gov/crt/about/vot/notices/vnote122711.php>; *Notice of Preclearance Activity [Under] the Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (Dec. 19, 2011), <http://www.justice.gov/crt/about/vot/notices/vnote121911.php>; *Notice of Preclearance Activity [Under] the Voting Rights Act of 1965, As Amended*, U.S. DEP’T OF JUSTICE (Dec. 12, 2011), <http://www.justice.gov/crt/about/vot/notices/vnote121211.php>; see CALIFORNIA CITIZENS REDISTRICTING COMMISSION, <http://wedrawthelines.ca.gov/> (last visited Feb. 15, 2013).

²⁴⁴ FINAL REPORT, *supra* note 167, at 17; June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 11; GIBSON DUNN PRESENTATION, *supra* note 145, tab A, at 5.

²⁴⁵ See *supra* note 37 and text accompanying note 99.

²⁴⁶ July 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 198, at 137-38; MAY 1,

As a related issue, in assessing retrogression, counsel advised the separate maintenance of each group's voting-age population within a benchmark district. For example, in a district with 47% Latino VAP, 6% African-American VAP, and 11% Asian VAP, counsel suggested that a new district with a 47-6-11 split would better comply with section 5 of the Voting Rights Act than a new district with a 55-4-5 split.²⁴⁷ It is possible that such a district might indeed further compliance. But it is also quite difficult to tell which configuration better preserves the effective exercise of the electoral franchise without both citizenship information²⁴⁸ and information assessing past voting information,²⁴⁹ including as assessment of whether the minority communities within the district tend to vote as a single bloc.

6. Section 5 Populations Without the Ability to Elect

Pertinent to the example above, counsel advised the Commission to maintain relative levels of smaller minority voting communities, including those without the ability to elect candidates of choice, under section 5 of the Voting Rights Act.²⁵⁰ In Yuba County, for example, Latinos represented 10% of the CVAP (and minorities as a whole represented 19% of the CVAP) in the benchmark 2001 congressional district.²⁵¹ The Commission maintained minority electorate rates in this district across the board, even though the communities do not have the practical ability to elect candidates of choice, singly or together. If doing so was necessary to avoid dilution of these minorities' effective exercise of the franchise, even below the threshold for district control, the Commission likely chose the correct interpretation of the Act.²⁵²

Curiously, these smaller populations are not presented in the Commission's narrative preclearance submission, which focuses almost exclusively on the larger Latino population.²⁵³ And in some

2011, LANCASTER TRANSCRIPT, *supra* note 138, at 35-36.

²⁴⁷ May 27, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 138, at 35-39; *see also* June 29, 2011, SACRAMENTO TRANSCRIPT, *supra* note 162, at 23; June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 9, 57; June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 138, at 23-24, 26-27.

²⁴⁸ *See supra* Part III.A.4.

²⁴⁹ *See supra* Part III.A.3.

²⁵⁰ June 16, 2011, CULVER CITY TRANSCRIPT, *supra* note 138, at 47-49; June 1, 2011, SACRAMENTO VOL. 1 TRANSCRIPT, *supra* note 138, at 16-18, 21-22.

²⁵¹ PRECLEARANCE SUBMISSION, *supra* note 184, app. K, L (on file with author).

²⁵² *See supra* text accompanying notes 79-82.

²⁵³ PRECLEARANCE SUBMISSION, *supra* note 184, at 3 n.4.

cases, the Commission's districts *do* reduce smaller minority populations in covered jurisdictions. For example, 2001 Assembly district 17 (Merced County) had a 9.7% Asian CVAP; its 2011 counterpart has a 5.3% Asian CVAP.²⁵⁴ Similarly, 2001 Assembly district 30 (Monterey) had a 12.5% Asian CVAP; its 2011 counterpart has a 6.7% Asian CVAP.²⁵⁵ Other covered districts' smaller minority populations drop similarly, albeit not as substantially. It may be that it was not possible to maintain these populations' relative size consistently with the obligation to preserve larger populations' larger electoral impact, and given voting patterns, it may be that the smaller size does not reflect meaningfully reduced voting power. Still, given counsel's initial advice, it is curious that there appears to have been little attention to the impact of district changes on these smaller populations in the waning days of line-drawing, and curious that these impacts are not reflected in the Commission's narrative preclearance submission.

It is also worth noting that the acontextual decision to maintain threshold levels of minority population even without the ability to elect candidates of choice leads to an interesting issue in the state Senate districts of California's central coast — perhaps the most intriguing conundrum of the redistricting effort, and one whose significance seems to have almost entirely escaped the Commission's attention.

In the 2001 district plan, citizens living in Merced and Monterey were represented in two state Senate districts: district 15 (Monterey), in which Latinos represented 16% of the CVAP, and district 12 (Merced and Monterey), in which Latinos represented 38% of the CVAP.²⁵⁶ In the Commission's 2011 plan, citizens living in Merced and Monterey are again represented in two Senate districts: district 17 (Monterey), in which Latinos represent 17% of the CVAP, and district 12 (Merced and Monterey), in which Latinos represent 43% of the CVAP.²⁵⁷

In its submission to the Commission, MALDEF drew an alternative set of Senate districts. In their submission, citizens living in Monterey are represented in two districts: district 15, in which Latinos represent 14% of the CVAP, and district 4, in which Latinos represent 50% of

²⁵⁴ *Id.* app. K, L (on file with author).

²⁵⁵ *Id.*

²⁵⁶ *Id.* app. L (on file with author).

²⁵⁷ FINAL REPORT, *supra* note 167, app. 3 at 12, http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_5appendix_3.pdf; PRECLEARANCE SUBMISSION, *supra* note 184, at 13, 15.

the CVAP; citizens living in Merced are represented by district 12, in which Latinos represent 30% of the CVAP.²⁵⁸ District 4 satisfies the first *Gingles* threshold condition, and if voting is polarized in the Monterey area, this configuration may indicate a responsibility under section 2, with an obligation to draw a district in which Latino citizens of Monterey have the effective opportunity to elect a candidate of choice. Yet the consequence of drawing this set of lines is that other Latino voters in the area see the Latino CVAP in their districts drop from 38% to 30% and 16% to 14%. The former, in particular, might indicate retrogression under section 5 in a purely district-by-district approach. That is, it is possible that the demographics of the area present a mutually exclusive choice between, on the one hand, an effective section 2 district with the potential for mild retrogression in two other communities without an ability to elect candidates of choice; and on the other hand, a clear absence of retrogression but without the ability to draw a section 2 district yielding an effective ability to elect.

With two conflicting mandates, it is not improper to choose either one, and it is unlikely that the Commission legally erred by choosing to preserve the section 5 districts as is.²⁵⁹ But note that to the extent that the Latino citizens of the central coast constitute a cohesive community, they might well prefer slightly decreased influence in two districts in exchange for the first opportunity to elect a candidate of choice in a district of the same region. And the MALDEF configuration might well satisfy *both* section 5 and section 2 of the Voting Rights Act, at the same time.

More important, the extent to which the Commission understood — and thought through — these options is unclear. It appears that the issue was briefly raised.²⁶⁰ But it is not at all clear that there was follow-up to explore the relative tradeoffs.

²⁵⁸ MALDEF, *supra* note 188, app. 5 (May 26, 2011), available at http://www.maldef.org/assets/pdf/MALDEF_Final_Submission_052611_Appendix4-6.pdf. Note that district 4 is underpopulated by 4% from the district average, which is within constitutional bounds, but beyond the Commission's self-imposed population deviation threshold.

²⁵⁹ *Cf.* LULAC v. Perry, 548 U.S. 399, 429 (2006) (indicating that it is acceptable to compensate for the loss of a section 2 district in one area by creating one in another area).

²⁶⁰ May 28, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 166, at 339-40; CAL. CITIZENS REDISTRICTING COMM'N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 2 82-96 (July 2, 2011).

7. Statewide Proportionality

It is clear that the Voting Rights Act does not require that districts be drawn in order to guarantee minority communities the opportunity to elect candidates proportional to their share of the overall statewide electorate.²⁶¹ In particular areas of the state, if minority communities are dispersed in noncompact communities or voting is not particularly polarized, there is every reason to expect that legal compliance with the Voting Rights Act will not yield proportional opportunities to elect candidates.

However, a thumbnail calculation of statewide proportion may nevertheless be valuable. Substantial underrepresentation of a population subject to polarized voting may, for example, indicate a need to try to fashion incremental opportunity districts out of multiple adjacent “overpacked” districts, to avoid overall dilution.

California’s Latino population — with substantial polarization in multiple counties studied by the Commission — represents the most striking example of disproportion among California’s minority communities. California Latinos represent 23% of the statewide CVAP. Yet only 16% of the Assembly districts (13 of 80), 13% of the Senate districts (5 of 40), and 13% of the congressional districts (7 of 53) are designated as districts drawn under the Voting Rights Act in order to preserve Latino citizens’ effective opportunity to elect officials of choice.²⁶² To be clear, the disproportion alone does not indicate a violation of the Voting Rights Act. But it does show that the Commission did not reach a threshold where incremental districts would be disfavored if local conditions otherwise indicated a requirement.²⁶³

At times, counsel appeared to issue advice to the contrary. Counsel first discouraged the Commissioners from considering statewide proportion even as a rough thumbnail guide.²⁶⁴ Later, counsel seemed to indicate that it would be acceptable to forego creating incremental opportunity districts if the commission created a “sufficient number” of effective districts²⁶⁵ — but without evaluating the statewide proportion, it is difficult to understand what number would be sufficient. Similarly, counsel seemed to believe that it would suffice to

²⁶¹ 42 U.S.C. § 1973(b) (2012).

²⁶² FINAL REPORT, *supra* note 167, at 17-19, 21; *id.* app. 3, at 7-8, 12, 19-20.

²⁶³ See *supra* text accompanying notes 60-61.

²⁶⁴ May 28, 2011, NORTHRIDGE TRANSCRIPT, *supra* note 166, at 222-23.

²⁶⁵ CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 2 212 (June 2, 2011).

create “several” opportunity districts in Los Angeles²⁶⁶ — but without a focus on the statewide proportion, it is not clear whether “several” in fact sufficed, if other district configurations revealed sufficiently sizable and sufficiently polarized communities to create incremental opportunity districts. To the extent that counsel was relying on rough regional proportion as a rough proxy, such evaluations would have contravened the clear holding of the Supreme Court to focus on dilution statewide.²⁶⁷

IV. CONCLUSIONS AND LINGERING QUESTIONS

It bears repeating that this Article is not designed to determine whether the California Commission’s final work product in 2011 either complied with or violated the Voting Rights Act. Even if the Commission was not always in the optimal position to assess compliance, the uncertainty does not itself indicate that communities with legal rights actually had those rights diluted. Conversely, the dismissal of several court challenges to the Commission’s work, including challenges based on the Voting Rights Act,²⁶⁸ speak more to the particular claims and evidence marshaled by the plaintiffs in the cases than to compliance in the abstract.

Nevertheless, the Commission’s experience is instructive. As the above review makes clear, there is much to commend in the Commission’s approach to its task and to its approach to the Voting Rights Act specifically. There were also components of the Commission’s work — some of which represented reasonable responses to the need to triage, and some of which represented errors — that could be improved by others. Future redistricting bodies can take predictable steps to increase the likelihood of their own compliance with the Voting Rights Act.

Perhaps most important, there appears to be little inherent in the nature of a citizens’ redistricting entity that would spur lack of compliance with the Voting Rights Act or other complex procedural or

²⁶⁶ July 24, 2011, SACRAMENTO TRANSCRIPT, *supra* note 234, at 88-89.

²⁶⁷ LULAC v. Perry, 548 U.S. 399, 436-38 (2006).

²⁶⁸ See In Chambers Order re: Defendant California Citizens Redistricting Commission’s Motion to Dismiss, Radanovich v. Bowen, No. 11-cv-09786 (C.D. Cal. Feb. 9, 2012), available at <http://redistricting.lls.edu/files/CA%20radanovich%2020120209%20order.pdf>; Order, Radanovich v. Bowen, No. S196852 (Cal. Sup. Ct. Oct. 26, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_102011/handouts_20111026_csc.pdf; Order, Vandermost v. Bowen, No. S196493 (Cal. Sup. Ct. Oct. 26, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_102011/handouts_20111026_csc.pdf.

substantive requirements. California's fourteen Commissioners succeeded in some ways in generating a process likely to achieve compliance and missed opportunities in others, but the lapses were not caused by the fact that they were not legislators.

True, this Commission may have been hampered in some ways by institutional history: the Commission was a new institution, and each of the Commissioners was new to the task of statewide redistricting in an official role. Legislatures, by contrast, are hoary institutions; even though many individual legislators may be new to any given decennial redistricting, some officials — and more important, staff — will usually be veterans of a previous redistricting battle. Still, the advantage of legislative experience may be overrated; there is nothing inherent in the design of a redistricting commission forcing complete turnover of staff, and any given commission will accrue institutional experience over time. Commissioners themselves, even if new to the task in any particular cycle, may similarly be able to learn from the lessons of past cycles through talking to past commissioners, or through outside evaluations of their predecessors' work or of comparable work in other states.

Moreover, to the extent that a legislature's relative institutional experience with seeking Voting Rights Act compliance is an asset, that asset must be balanced against the profound temptation to prioritize self-interest when legislators redraw their own lines or those of their political comrades-in-arms.²⁶⁹ As then-Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit described an all-too-common scenario:

When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities.

. . . Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here — the systematic splitting of the ethnic community into different districts — is the obvious, time-honored and most effective

²⁶⁹ See Levitt, *supra* note 3, at 518-23.

way of averting a potential challenge. . . . [I]ncumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act.²⁷⁰

Certainly, incumbents do not uniformly elevate their own political preservation over the requirements of federal law — but neither was Judge Kozinski’s conclusion anomalous.²⁷¹ It may be that the very independence of an independent body may promote compliance.

As for the ability of any individual redistricting body to establish a VRA-compliant process, that effort will begin with decisions made even before the official decision-makers are in place. Reliable data is essential to ensuring compliance, and the collection of that data — by another government entity, if not the line-drawing body — must begin as early as possible. Of particular importance is the underlying data needed for racially polarized voting analysis: not only statewide tallies by precinct, but also local election data for both primary and general elections in areas with substantial concentrations of racial and ethnic minorities. Such data can be collected and preliminarily analyzed well before census data arrives.

For that matter, even the collection of Census data need not wait for the results of the decennial Census. Redistricting bodies can begin experimenting with areas of concern under the Voting Rights Act by using the results of the prior year’s American Community Survey. These ACS data will be imprecise, and districts built upon them will have to be revised — but the estimated data may help line drawers experiment with rough (and decidedly non-public) configurations in order to foster familiarity with some of the trickiest issues in the trickiest areas of the state. This experimentation carries an admitted risk that those drawing the lines will become attached to configurations bound for substantial change once better data arrives.²⁷² But with constant reminders that the initial options are merely tentative, early experimentation should help reveal some of the difficulties that California’s Commission discovered only belatedly, as well as some of the tradeoffs that California’s Commission never had the chance to consider fully in the press of late July.

²⁷⁰ *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

²⁷¹ See, e.g., *LULAC*, 548 U.S. at 438-42 (describing a similar prioritization in the Texas redistricting of 2003).

²⁷² See *supra* text accompanying note 170.

Beyond reliable data, the ability of a redistricting body to ensure compliance with the Voting Rights Act depends on the composition of the body itself. In California, the Commissioners chosen for the task were adept at technical and legal analysis and were savvy consumers of legal and technical advice, with the will and ability to push back when appropriate. It was also a great boon to the Commission to have several individuals with experience and expertise in applying the Voting Rights Act to redistricting problems. This sort of capacity is not the reliable result of a random canvass of citizens; rather, it required a concerted effort to recruit individuals with the appropriate qualifications, and a selection mechanism designed to ensure at least threshold ability. The design of future citizen bodies with public lawmaking responsibility should follow suit, fashioning a selection mechanism targeting skills appropriate to the complexity of the task that the citizen lawmakers will face.

Once the membership of a redistricting body has been selected, it will need training. Training in the nuances of the Voting Rights Act was on the wish-list for California's Commission months before it was received. However, even training about the legal requirements of the Act, if delivered only in abstract form, may be insufficient. Redistricting bodies should seek step-by-step recommendations for *how* they should go about their redistricting task, including incremental data to be gathered and incremental decisions to be made — and how long each step is likely to take. Beyond institutional staff and past officials, third-party groups that have attempted to draw legally compliant districts should be well equipped to offer such a blueprint.

As the process of drawing lines got underway, California's Commission seemed to develop an admirable approach to using its VRA counsel and technical consultants. The flow of information seemed to suit the need, with constant communication between Commissioners and consultants. Moreover, VRA counsel did not merely review established plans at discrete milestones, but sat together with the technical line-drawing consultants for iterative drafts of particularly thorny portions of the state. Even with different personnel in different roles, including counsel equipped to avoid the legal missteps discussed above, future bodies may benefit by considering this California Commission's *method* of engagement with its consultants and legal advisers as a baseline.

The Commission's overall approach to applying criteria in the service of legal compliance also presents an intriguing baseline, albeit with a substantial caveat. It is not unreasonable to begin the redistricting process in areas with substantial minority populations by

testing to see whether race-neutral principles provide those populations adequate political opportunity — but only as long as there is a shared and firm commitment to overriding those race-neutral principles if it becomes clear that such action is required by the Voting Rights Act. California’s Commission purported to revisit its earlier decisions, but for some principles — like the adoption of a questionably necessary population deviation — the extent of the commitment to revisit was far from clear. Future redistricting bodies that adopt a similar approach must ensure that their tentative lines do not become unnecessarily “sticky.” Such testing must include a commitment to revisit even basic assumptions, in order to ensure that early drafts do not foreclose opportunities for compliance that are not otherwise apparent. The necessity for enforced flexibility, in turn, implies that any bounds driven by race-neutral principles must be sketched and reviewed for Voting Rights Act compliance early, *before* adjacent districts are formulated, and well before any districts are released to the public as drafts.

Finally, citizen bodies must be inoculated against seduction by surface simplicity. In part, this is a concern of the preceding paragraph as well: districts that “look elegant” because they are compact or follow county lines must bend to the command of the Act where there exist Voting Rights Act responsibilities. But even where redistricting bodies have correctly made the Act a clear priority, they must beware the allure of data built on ease rather than propriety. California’s Commission — on the erroneous advice of counsel — focused almost exclusively on the demographics of single minority communities in assessing minority political opportunity. The Voting Rights Act, however, is calibrated to the effective exercise of the franchise. Its mandate requires attention to *citizen* voting-age populations, the willingness to look for distinct minority communities that vote as cohesive blocs, and a commitment to utilize polarization studies, registration rates, and past turnout in an attempt to gauge whether particular districts actually afford a pragmatic “opportunity” or “ability” to elect candidates of choice.

California’s first Citizens Redistricting Commission embarked on an inaugural journey of profound complexity. Its approach to understanding, and ensuring compliance with the Voting Rights Act presents useful lessons to all who would follow in its path.