

# VOTING RIGHTS IN LOUISIANA: 1982–2006

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## I. INTRODUCTION

President Lyndon Johnson framed the challenge posed by our nation's tradition of racially motivated violence and discriminatory voting practices in his speech proposing the bill that became the Voting Rights Act of 1965 (VRA):

Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.<sup>1</sup>

For nearly one hundred years following passage of the Fifteenth and Fourteenth Amendments, entrenched discrimination in voting eroded the promise of equality. Citizen protests brought urgency to the need to reconcile our nation's high constitutional principles with its low anti-democratic practices. Congress took up President Johnson's charge to ensure political equality by overwhelmingly passing the VRA, which was "designed . . . to banish the blight of racial discrimination in voting."<sup>2</sup> On four subsequent occasions, after determining that the goal of purging discrimination from voting had yet to be achieved, Congress and the sitting President have renewed the national commitment to the VRA's expiring enforcement provi-

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<sup>1</sup> President Lyndon Baines Johnson's Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281 (Mar. 15, 1965).

<sup>2</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding the constitutionality of Section 5 preclearance).

sions.<sup>3</sup> Section 5 and other enforcement provisions of the Voting Rights Act of 1965<sup>4</sup> are set to expire in 2007 unless renewed by Congress.<sup>5</sup> These provisions have been at the core of voting rights enforcement in the four decades since the passage of the VRA.

In order to determine whether reauthorization of the expiring provisions is warranted, Congress must carefully consider the effects of the provisions in the covered jurisdictions<sup>6</sup> since the time of the last renewal in 1982.<sup>7</sup> In the process, Congress must consider the reach of history, measure of progress and again determine the best method of ensuring meaningful equality in voting.

This report analyzes voting rights enforcement in Louisiana since 1982. The view from Louisiana provides important evidence about the effectiveness and ongoing necessity of VRA protections. Forty years after the passage of the VRA, Louisiana has made demonstrable progress toward the goal of equality in voting, but has fallen short of accomplishing it. Any careful study of the experience of minority voters in Louisiana reveals that much of the progress that has been achieved in the state is a direct result of the protections of the VRA generally, and the Section 5 preclearance provision in particular. As this report illustrates, the role of the VRA both as a remedy for, and as a deterrent to, voting discrimination is unmistakable. The record of enhanced African-American voter registration, participation and minority office-holding, of Section 5 objections to retrogressive voting changes, deterrence of others and of Section 2 litigation resulting in judgments or settlements, collectively paints a picture of a civil rights act that has been effective and whose protections remain vital.

The experience in Louisiana since 1982 shows that voting discrimination in the state persists, attempts to dilute African-American votes are

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<sup>3</sup> Expiring provisions of the VRA were renewed in 1970, 1975, 1982 and 1992. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992).

<sup>4</sup> The related provisions include Sections 203 (42 U.S.C. § 1973aa-1a), 4(f)4 (42 U.S.C. § 1973b(f)) and the federal examiner provisions (42 U.S.C. §§ 1973d, 1973f).

<sup>5</sup> After this report was written and submitted to Congress, the minority language and preclearance provisions of the VRA were, in fact, renewed. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

<sup>6</sup> *See* Department of Justice, Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited Jan. 20, 2008).

<sup>7</sup> Section 203, the language assistance provision of the VRA, was last renewed in 1992. *See* Voting Rights Language Assistance Act of 1992 § 2.

commonplace and many white officials remain intransigent—refusing to provide basic information required under Section 5 to the U.S. Department of Justice (DOJ). African-Americans have been excluded from local decision-making processes, and African-American officials who advocate for non-discriminatory voting changes have confronted retaliation. The record includes examples of discriminatory effects and intentionally discriminatory acts. Some unexpected and unforgettable contemporary events provide a window into the continuing importance of the VRA in Louisiana. The recent national attention on the city of New Orleans following Hurricane Katrina presents a new opportunity to weigh the necessity of minority voter protections at the same time that it brings renewed focus to a city that has consistently been the center of efforts to weaken minority voting rights. In the years since the last renewal of the VRA in 1982, but long before Hurricanes Katrina and Rita devastated New Orleans and the surrounding areas, African-American voters in that part of the state have relied upon the protections of the Act to turn back repeated efforts to dilute their voting strength.<sup>8</sup> Sections 5 and 2 of the VRA are again playing crucial, if limited, roles in shaping the legislative responses to Hurricane Katrina's voting-related problems, as well as those of courts and the DOJ. In post-Hurricane Katrina Louisiana, VRA protections have been important not only for displaced citizens and minority voting rights advocates, but also for those state officials who attempt to protect minority voters in the face of countervailing political pressures.

The immediate and potential long-term implications of Hurricane Katrina on Louisiana's African-American electorate provide a useful reminder of why the VRA<sup>9</sup> is essential if Louisiana is to continue its slow climb toward full political equality for its African-American citizens. As this report explains, the VRA experience since 1982 in New Orleans is a microcosm of the broader story of the Act's significance.

Following this Introduction, Part II provides a brief overview of the history of racial discrimination in Louisiana prior to and following the enactment of the VRA. Part III describes Louisiana's demographics and record of minority office holding in recent decades. Part IV analyzes administrative and judicial findings<sup>10</sup> made since 1982 regarding minority voting

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<sup>8</sup> See *infra* Part IV.A.

<sup>9</sup> See *infra* Part IV.A; see also Kristen Clarke-Avery & M. David Gelfand, *Voting Rights Challenges in a Post-Katrina World: With Constituents Dispersed, and Voting Rights Districts Underpopulated, How Should New Orleans Hold Elections?*, FINDLAW WRIT, Oct. 11, 2005, [http://writ.news.findlaw.com/commentary/20051011\\_gelfand.html](http://writ.news.findlaw.com/commentary/20051011_gelfand.html).

<sup>10</sup> Given the administrative regime established by Section 5, most covered jurisdictions prefer to seek preclearance of voting changes with the DOJ prior to seeking a declaratory judgment from the Dis-

rights in Louisiana in elections for federal, state and local offices. This part is further sub-divided into analyses of the roles of Sections 5, 2 and the Constitution, respectively. This report concludes that, in light of the state's history and continuing practices, Section 5 remains critical to any effort to ensure that African-Americans in Louisiana avoid unnecessary backsliding in their ability to participate equally in the political process, and to their opportunities to elect candidates of their choice on terms comparable to Louisiana's white citizens.

## II. OVERVIEW OF THE HISTORY OF RACIAL DISCRIMINATION IN LOUISIANA

The history of racial discrimination in Louisiana that helped to illustrate the need for the VRA protections has been well documented. Nevertheless, because that history helps to explain ongoing discrimination in voting and the electoral process that Louisiana continues to struggle to overcome, it is worth recounting briefly.

Until 1868, the state constitution limited the vote to white males.<sup>11</sup> Following the Civil War, from 1868 to 1896, there were fewer substantial legal impediments to African-American voting, and African-American citizens made up nearly 45% of the state's registered voters,<sup>12</sup> as compared to approximately 30% at the time of the 2000 Census.<sup>13</sup> In 1898, Louisiana pioneered the use of the infamous Grandfather Clause, which imposed complicated education and property requirements only on registrants whose fathers or grandfathers had not been registered to vote before January 1, 1867.<sup>14</sup> As a result, African-American voter registration was reduced to 4% of total registration by 1900.<sup>15</sup> The president of the state constitutional

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tribunal Court for the District of Columbia (D.D.C.). Therefore, the DOJ makes the vast majority of substantive determinations of whether any particular voting change will be retrogressive with respect to minority voting rights. As a result, the vast majority of judicial determinations related to Section 5 assess whether a covered jurisdiction has complied with its obligation to seek preclearance for voting changes, rather than whether proposed changes meet the substantive requirements of Section 5. Judicial findings in Section 2 and constitutional cases, however, do deal more directly with the jurisdictions' substantive obligations.

<sup>11</sup> See Richard L. Engstrom et al., *Louisiana, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* 103, 104 (Chandler Davidson & Bernard Grofman eds., 1994).

<sup>12</sup> See *id.* at 105.

<sup>13</sup> Louisiana Department of Elections and Registration, State Wide Report of Registered Voters as of 12/29/2000, [http://www400.sos.louisiana.gov/stats/Quarterly\\_Statistics/Statewide/2000\\_4q\\_sta\\_inact.txt](http://www400.sos.louisiana.gov/stats/Quarterly_Statistics/Statewide/2000_4q_sta_inact.txt) (last visited Apr. 12, 2008).

<sup>14</sup> Engstrom et al., *supra* note 11, at 105.

<sup>15</sup> *Id.*

convention that enacted the Grandfather Clause explained the purpose of that convention as follows: “What care I whether the test that we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn’t it meet the case? Doesn’t it let the white man vote, and doesn’t it stop the negro from voting, and isn’t that what we came here for?”<sup>16</sup> This type of bald expression of racial animus has happily become less familiar, but the modern corollaries of the purpose that was expressed are still evident in Louisiana.

The U.S. Supreme Court struck down the Grandfather Clause in 1915.<sup>17</sup> In the next few decades, Louisiana was, as the Court said of another jurisdiction, “unremitting and ingenious”<sup>18</sup> in its methods of ensuring that its African-American citizens would have no effect on the political process. Notwithstanding judicial invalidation of the Grandfather Clause, Louisiana developed an “understanding” clause requiring citizens to “ ‘give a reasonable interpretation’ of any section of the federal or state constitution in order to vote.”<sup>19</sup> The Supreme Court invalidated this provision in 1965.<sup>20</sup> Another law “prohibited elected officials from helping illiterates.”<sup>21</sup> Louisiana also levied poll taxes and purged registration rolls of the few African-Americans who were able to surmount these discriminatory hurdles.<sup>22</sup> To complement these devices, Louisiana “authorized an all-white Democratic primary which functioned to deny blacks access to the determinative elections, inasmuch as Republican opposition to the Democratic Party in the general elections was nonexistent.”<sup>23</sup> The all-white primary completely excluded African-Americans in Louisiana from the political process between its creation in 1923 and the Supreme Court’s condemnation of the practice in 1944.<sup>24</sup>

Adding to this notorious collection of “understanding” requirements, poll taxes and registration purges, in the 1950s, Louisiana developed citizenship tests, as well as bans on single-shot voting that allowed the minority community to aggregate their votes behind one candidate in a multi-

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<sup>16</sup> REBECCA J. SCOTT, *DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY* 154 (2005) (quoting Ernest B. Kruttschnitt, President, 1898 Louisiana Constitutional Convention).

<sup>17</sup> See *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>18</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

<sup>19</sup> *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 455 (D.D.C. 1995) (Kessler, J., concurring in part and dissenting in part), *vacated*, 520 U.S. 471 (1997).

<sup>20</sup> See *Louisiana v. United States*, 380 U.S. 145 (1965).

<sup>21</sup> *Bossier Parish*, 907 F. Supp. at 455.

<sup>22</sup> *Major v. Treen*, 574 F. Supp. 325, 340 (1983).

<sup>23</sup> *Id.*

<sup>24</sup> See *Smith v. Allwright*, 321 U.S. 649 (1944).

member election.<sup>25</sup> For elections to party committees, the state employed a majority-vote requirement.<sup>26</sup> Meanwhile, “[f]or a quarter of a century, from 1940 to 1964, the States Rights Party spearheaded a strong movement against black enfranchisement and judicially-directed desegregation.”<sup>27</sup> Every discriminatory, disfranchising technique developed by Louisiana remained in practice, except for the few specifically condemned by the Supreme Court, until Congress banned them expressly or made them subject to meaningful legal review through the passage of the VRA in 1965.<sup>28</sup>

These devices were very effective in achieving their discriminatory objectives.<sup>29</sup> From 1910 until 1948, less than 1% of Louisiana’s voting age African-American population was able to register to vote.<sup>30</sup> In 1948, that proportion rose to 5%, and from 1952 until 1964, even with concerted federal attention, the proportion rose only from 20% to 32%, reaching 32% only in October 1964.<sup>31</sup> The consistency of Louisiana and other states’ abilities to develop techniques and devices to maintain white supremacy in the political process, even as the Supreme Court condemned one disfranchising practice after another, led Congress to find that “case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits,” such that “[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, [it should] shift the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>32</sup> Thus, the long history of Louisiana’s and other states’ disregard of their constitutional obligations to include citizens of all races in the political process led Congress to impose the remedies and protections embodied in the VRA.<sup>33</sup>

Louisiana’s coverage under Section 5 began immediately upon enactment of the Voting Rights Act in 1965, triggered by the state’s maintenance of a literacy test for voting and its voter registration levels of less than 50% in 1964.<sup>34</sup> There was no question that Louisiana merited coverage under the formula set forth in Section 4 of the VRA.<sup>35</sup> The state’s voting test—in

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<sup>25</sup> *Major*, 574 F. Supp. at 340.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 340 n.19.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

<sup>33</sup> *See id.* at 327–28.

<sup>34</sup> *See id.* at 317–18.

<sup>35</sup> 42 U.S.C. § 1973b(b) (2006).

place from 1921 until the U.S. Supreme Court voided it in 1965—was a model of racially discriminatory vote denial.<sup>36</sup> Under the test, registrars had complete discretion to decide whether a registrant's interpretation was satisfactory, which they used to reject 64% of African-American registrants and only 2% of white registrants between 1956 and 1962.<sup>37</sup> As a result, in the twenty-one parishes involved in the lawsuit that led to the test's demise, only 8.6% of voting-age African-Americans were registered in 1962.<sup>38</sup>

The pre-VRA tests and devices, however, were not the last variations on the disfranchisement theme. In 1968, after the enactment of the VRA, Louisiana began a new phase of its campaign to minimize the African-American vote by passing state laws that enabled parish councils and school boards to switch to at-large elections that submerged newly-registered African-American voters in white majorities.<sup>39</sup> If the laws had not been immediately nullified by two DOJ objections under Section 5, in Louisiana, the VRA might have represented little more than an occasion for another change in the strategy by which white officials perpetuated barriers to political equality.<sup>40</sup> Since that time, too many in Louisiana have remained steadfast in their efforts to minimize African-American voting power. From that first Section 5 objection until the most recent renewal of Section 5 in 1982, the DOJ objected to fifty<sup>41</sup> attempts by state and local authorities to implement voting changes that would have diluted African-American voting strength. Since 1982, the DOJ has objected to ninety-six proposed changes.<sup>42</sup> The gains in political access that are described in the following section have come only with steadfast enforcement of the VRA.

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<sup>36</sup> Engstrom et al., *supra* note 11, at 106–08.

<sup>37</sup> *Id.* at 107–08.

<sup>38</sup> *Id.* at 107.

<sup>39</sup> *Id.* at 112.

<sup>40</sup> *See id.*

<sup>41</sup> *See* Department of Justice, Section 5 Objection Determinations: Louisiana, [http://www.usdoj.gov/crt/voting/sec\\_5/la\\_obj2.htm](http://www.usdoj.gov/crt/voting/sec_5/la_obj2.htm) (last visited Jan. 21, 2008). The DOJ listing of objections interposed contains summary information about administrative objections. In certain circumstances, as the listing indicates, objections are subsequently withdrawn based upon the receipt of new information or changes in the proposed voting law or practice that cured Section 5 infirmities. The numbers of objections referenced in this report are based upon objections made as indicated on the DOJ listing. This listing of objections is an important but incomplete source of data regarding the effect of Section 5 because it does not capture: requests for more information, which can result in the withdrawal of a proposed change by the submitting authority; the deterrence effects of Section 5; or any judicial denials of preclearance or Section 5 enforcement proceedings. Moreover, a single objection letter can touch a number of voting changes and, similarly, a number of retrogressive aspects of a single statewide redistricting plan, for example. *See infra* note 81. It bears mention that Louisiana has also failed to submit covered voting changes, which can have the effect of retrogressive voting laws being implemented without detection.

<sup>42</sup> *See* Department of Justice, *supra* note 41.

## III. OVERVIEW OF LOUISIANA'S DEMOGRAPHICS AND POLITICS

## A. DEMOGRAPHICS

The following brief overview of Louisiana's demographic profile is based on the results of the 2000 Census.<sup>43</sup>

The population of Louisiana is 4,468,976, making it the twenty-first-largest state in the United States.<sup>44</sup> Only nine cities in Louisiana have populations of more than 50,000.<sup>45</sup> Yet Louisiana has the fifth largest total African-American population in the United States.<sup>46</sup> It is second only to Mississippi in largest African-American population as a percentage of the state's total population.<sup>47</sup> Almost a third of Louisiana's population is African-American (32.5%), compared to a national African-American population percentage of 12.3%.<sup>48</sup> Whites account for 63.9% of Louisiana's population, but 75.1% of the national population.<sup>49</sup> Persons of Hispanic or Latin origin represent only 2.4% of Louisiana's population, while representing 12.5% of the country's overall population.<sup>50</sup>

There are also stark socioeconomic disparities along racial lines in Louisiana. About three quarters (74.8%) of Louisiana citizens twenty-five years of age and older have at least a high school diploma, and 18.7% of the state's total population aged twenty-five and older has earned a bache-

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<sup>43</sup> This section does not consider population adjustments due to Hurricane Katrina/Rita population displacements.

<sup>44</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P1, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>45</sup> See *id.* The cities are New Orleans (484,674), Baton Rouge (227,818), Shreveport (200,145), Metairie (146,136), Lafayette (110,257), Lake Charles (71,757), Kenner (70,517), Bossier City (56,461) and Monroe (53,107).

<sup>46</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>47</sup> See U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171), at tbl.PL1, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008); see also U.S. Census Bureau, 1990 Census Summary File 1, at tbl.P006, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008); U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>. Louisiana's African-American population is 32.5% of its total population, and Mississippi's is 36.3% of its total.

<sup>48</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>49</sup> See *id.*

<sup>50</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P4, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008). American Indian and Alaska Native persons account for 0.6% and 0.9% of Louisiana and United States populations, respectively, while Asians represent 1.2% of Louisiana's population and 3.6% of the national population. See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).



lor's degree or higher.<sup>51</sup> However, among African-Americans, the rates of educational attainment are 63.1% and 10.9%, respectively, whereas for whites, the rates are 80% and 21.8%, respectively.<sup>52</sup> In 2000, Louisiana's unemployment rate was 7.3%, compared to a 5.8% national unemployment rate.<sup>53</sup> The African-American unemployment rate in Louisiana was 13.6%, compared to 4.7% for whites.<sup>54</sup> The per capita income for whites in Louisiana is \$20,488, while African-American per capita income is less than half that amount, \$10,166.<sup>55</sup> Significant disparities exist in housing as well. According to the Census, the percentage of whites in owner-occupied housing is 51.27%, and the white population in renter-occupied housing is 16.75%.<sup>56</sup> In contrast, the percentage of African-Americans in owner-occupied housing is only 14.94%, and the percentage of African-Americans in renter-occupied housing is 13.90%.<sup>57</sup>

#### B. MINORITY OFFICE HOLDING

In 2001 (the most recent year for which comprehensive data is available), Louisiana elected a total of 705 African-American officials: one U.S. Representative (of seven total seats, 14.3%); nine State Senators (of thirty-nine total seats, 23.1%); twenty-two State Representatives, each elected from a district with a majority of African-American voters<sup>58</sup> (of 105 total seats, 20.2%); one member of a regional body; 131 members of county governing bodies; thirty-three mayors; 219 members of municipal governing bodies; four other municipal officials; one justice on the State Supreme Court (of seven total seats, 14.3%); forty-eight magistrates or justices of the peace; four other judicial officials; twenty-four police chiefs, sheriffs and marshals; two members of the State Board of Elementary and Secondary

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<sup>51</sup> See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P37, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>52</sup> See U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P148A, P148B, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>53</sup> See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.P43, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>54</sup> See U.S. Census Bureau, 2000 Census Summary File 3, at tbls.150B, 150I, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>55</sup> See U.S. Census Bureau, 2000 Census Summary File 3, at tbls.P157A, P157B, available at <http://factfinder.census.gov> (last visited Jan. 21, 2008).

<sup>56</sup> See U.S. Census Bureau, 2000 Census Summary File 3, at tbl.H11, available at <http://factfinder.census.gov> (last visited Feb. 11, 2008).

<sup>57</sup> *Id.*

<sup>58</sup> Charles S. Bullock III & Ronald Keith Gaddie, *An Assessment of Voting Rights Progress in Louisiana*, in AMERICAN ENTERPRISE INSTITUTE PROJECT ON FAIR REPRESENTATION 17 (2006), available at <http://www.aei.org/research/nri/subjectAreas/pageID.1140,projectID.22/default.asp> (select "VRA Louisiana Executive Summary and Study" hyperlink).

Education (of eleven members, 18.2%); and 161 local school board members.<sup>59</sup> African-Americans made up 29.7% of the voting age population in 2000.<sup>60</sup> Therefore, while the number of African-American elected officials certainly represents gains over the prior decades, it continues to lag behind the voting strength of Louisiana's African-American voting-age population at every level of government.

Not surprisingly, in the face of persistent racially polarized voting, these electoral gains have come about largely through the existence and protection of majority-minority districts.<sup>61</sup> Indeed, *every* African-American representative currently holding office in Congress from Louisiana, or in the Louisiana State Legislature, has been elected from a majority African-American district.<sup>62</sup> U.S. Representative William Jefferson, for example, won his seat through elections from the 2nd Congressional District, which covers metropolitan New Orleans and has a voting age population that is 62% African-American.<sup>63</sup> This district is the only majority-minority congressional district in Louisiana.<sup>64</sup> Jefferson's election in 1990 represented the first time that the state sent an African-American to Congress in the 113 years since Representative Charles E. Nash (1875–1877) left Congress, the last African-American to serve since the Civil War.<sup>65</sup>

The racial disparities in voting that exist in Louisiana are also evident in the election patterns for virtually every office in the state. As the sections that follow show, numerous courts and the DOJ in several of its Section 5 objections have documented the phenomenon of Louisiana's racial bloc voting. For example, in the 2000 presidential election, the state voted 53% to 45% for George W. Bush over Al Gore, with whites voting 72% to 26% for Bush and African-Americans voting 92% to 6% for Al Gore—evidencing racially polarized voting of the highest order.<sup>66</sup> Intense racial polarization places special importance on majority-minority opportunity districts. For example, Justice Bernette Joshua Johnson—the only African-

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<sup>59</sup> DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2001 14–15 (2001), *available at* <http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf>.

<sup>60</sup> *Id.* at 16.

<sup>61</sup> See David Ian Lublin, Percent of African-American Legislators Elected in Black-Majority, Black + Latino Majority, and Other Districts, <http://www.american.edu/dlublin/redistricting/tab3.html> (last visited Jan. 22, 2008).

<sup>62</sup> *See id.*

<sup>63</sup> *See* BOSITIS, *supra* note 59, at 22.

<sup>64</sup> Bullock & Gaddie, *supra* note 58, at 17.

<sup>65</sup> *See id.* at 14; John Pope, *Forerunner's Legacy: A Call for Racial Peace*, NEW ORLEANS TIMES-PICAYUNE, Nov. 4, 1990, at B1.

<sup>66</sup> *See* Voices for Working Families, *Louisiana Voting Facts and General Information* (on file with author).

American member of the Louisiana Supreme Court—won her seat through elections from the 7th Supreme Court District, which covers metropolitan New Orleans.<sup>67</sup> This district is the only majority-minority supreme court district in Louisiana. Of the thirty-three African-American mayors in Louisiana, only two presently hold office in cities with populations over 50,000, and each won his seat from cities with African-American majorities.<sup>68</sup> New Orleans, which was 67.3% African-American in 2000, elected Ray Nagin as Mayor, and the city of Monroe, which was 61.1% African-American in 2000, elected James Mayo as Mayor.<sup>69</sup>

Louisiana has never elected an African-American Governor, although Cleo Fields and William Jefferson ran for that office in 1995 and 1999, respectively.<sup>70</sup> In the Fields/Foster race, exit polls indicated that Fields received 82% of the African-American vote, while Foster received 87% of the white vote.<sup>71</sup> Moreover, the political climate in Louisiana, not only in 1965 but just last decade, was such that the nation's most infamous modern day Klansman, David Duke, ran for the state's highest elected offices.<sup>72</sup> In the 1991 governor's race, Duke—a former Grand Wizard of the Ku Klux Klan, who celebrated Adolf Hitler's birthday and led the National Association for the Advancement of White People—garnered 39% of the state's vote, winning 55%, a majority, of the white vote, though he eventually lost to Edwin Edwards.<sup>73</sup> Duke's strong gubernatorial showing was not a fluke; in the Senate race of 1990, he won 44% of the vote against a long-time incumbent, and again won the support of the majority of whites.<sup>74</sup>

Significantly, continuing racial bloc voting in Louisiana cannot be explained away as merely a reflection of modern partisan alignments. Not only are the historical underpinnings of these voting patterns readily traceable to the state's history of *de jure* discrimination, but Louisiana also is one of a very small number of states that has an open primary law that permits all candidates, regardless of party affiliation, to run in a single primary with the top vote-getters competing in a run-off if neither exceeds 50% of the votes cast.<sup>75</sup> This system permits multiple candidates from a

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<sup>67</sup> See Louisiana Supreme Court, Louisiana Supreme Court Districts, [http://www.lasc.org/about\\_the\\_court/map03.asp](http://www.lasc.org/about_the_court/map03.asp) (last visited Jan. 22, 2008).

<sup>68</sup> See BOSITIS, *supra* note 59, at 21.

<sup>69</sup> See *id.*

<sup>70</sup> Bullock & Gaddie, *supra* note 58, at 17, 21.

<sup>71</sup> *Id.*

<sup>72</sup> James Hodge, *Duke Lost, But America Hasn't Seen the Last of Him*, NAT'L CATH. REP., Dec. 6, 1991, at 2.

<sup>73</sup> *Id.*

<sup>74</sup> Bullock & Gaddie, *supra* note 58, at 21.

<sup>75</sup> See LA. REV. STAT. ANN. § 18:402(B)(1) (Westlaw through 2007 Sess.).

single party to compete at both the primary and run-off stages. Thus, under Louisiana's open primary system, there are consistent examples of electoral contests where novel partisan explanations of intense racial bloc voting patterns are unpersuasive.

Racially polarized voting patterns continue to characterize political life in Louisiana, and like Henry Ford's theory of consumer freedom, which allowed customers to choose any color car they preferred so long as it was black, in the absence of VRA-protected opportunity-to-elect districts, "[c]andidates favored by blacks can win [in Louisiana], but only if the candidates are white."<sup>76</sup>

The record of African-American office holders in Louisiana from the 1960s to the present tells a story.<sup>77</sup> First, African-Americans have made measurable progress toward political equality since the enactment of VRA, yet, forty years after enactment, the contemporary political reality is that African-Americans in Louisiana have an opportunity to elect their preferred candidates only when those candidates are white or if an African-American candidate runs in a district with a majority of African-American voters. In this context, the gains that African-Americans in Louisiana have made in the ability to elect candidates of their choice are largely attributable to the protections afforded by the VRA.

#### IV. RACIAL DISCRIMINATION IN VOTING IN LOUISIANA SINCE 1982

Although it is essential to take account of the extent of progress in Louisiana in the area of minority voting rights, it is equally important to consider what has contributed to that progress and to examine the tenuousness of the gains. As a general matter, federal courts and the DOJ have required greater compliance with the state's constitutional and statutory obligations than Louisiana's political leadership has been willing to embrace of its own accord—even after decades of VRA litigation and administrative oversight. This pattern of gradual progress, stimulated primarily by federal courts and the DOJ, remains constant for all aspects of political life in Louisiana. In light of the emphasis on New Orleans after Hurricane Katrina, the story of the persistent attempts to dilute African-American voting strength in Orleans Parish represents a useful starting place for the assessment of the VRA's effectiveness.

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<sup>76</sup> *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988).

<sup>77</sup> This record is summarized in Bullock & Gaddie, *supra* note 58, at 35 tbl.6, 36 tbl.7.

## A. VOTING DISCRIMINATION IN ORLEANS PARISH

The televised images from Hurricane Katrina may have caused the nation to reevaluate the extent of our progress in overcoming our history of entrenched racial discrimination, just as those of the “Bloody Sunday” march that led to the passage of the VRA did more than forty years ago.<sup>78</sup> President Bush conveyed the ongoing nexus between the history of discrimination and the circumstances of African-Americans from Orleans in his speech from Jackson Square following Hurricane Katrina:

Our third commitment is this: When communities are rebuilt, they must be even better and stronger than before the storm. Within the Gulf region are some of the most beautiful and historic places in America. As all of us saw on television, there’s also some deep, persistent poverty in this region, as well. That poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America. We have a duty to confront this poverty with bold actions. So let us restore all that we have cherished from yesterday, and let us rise above the legacy of inequality. When the streets are rebuilt, there should be many new businesses, including minority-owned businesses, along those streets. When the houses are rebuilt, more families should own, not rent, those houses. When the regional economy revives, local people should be prepared for the jobs being created.<sup>79</sup>

The short- and long-term impact of the unprecedented mass displacement of Orleans’s African-American citizens on their access to the political process is not yet known. However, it is appropriate to highlight, prior to assessing some of the new minority voting challenges that Hurricane Katrina and the response to it may cause, the substantial obstacles that African-American voters faced in Orleans Parish long before Hurricane Katrina struck.

The modern record of VRA enforcement in Orleans illustrates that Sections 5 and 2 have been essential minority voter protections. The post-1982 examples that follow illustrate this point.

## 1. Dilution of African-American Votes in Orleans Parish Pre-Katrina

## a. Section 5 in Orleans Parish

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<sup>78</sup> See Peyton McCrary et al., *Alabama*, in *QUIET REVOLUTION IN THE SOUTH*, *supra* note 11, at 38 (discussing the events of “Bloody Sunday”).

<sup>79</sup> Office of the Press Secretary, White House, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html> (providing a transcript of the President’s national address).

Since 1982, no fewer than a half dozen DOJ Section 5 objections were based, at least in part, on efforts by Louisiana officials to minimize African-American voting strength in Orleans Parish. The objections prevented dilution for various legislative and judicial seats. The persistence of the attempts to dilute minority voting strength in Orleans Parish, the most concentrated area of African-American population in the state, can be illustrated through the decennial line drawing for the Louisiana House of Representatives.<sup>80</sup> In 1982, DOJ explained Louisiana's failure to meet its obligations under Section 5 as follows:

Overall, the plan has the net effect of reducing the number of House districts with black majorities. In Orleans Parish, for instance, the number of such districts is reduced from eleven to seven. While this reduction may be justified to some extent by the general loss of parish population in comparison to overall statewide population gain, the loss of so many black majority districts in that parish has not been satisfactorily explained, especially since the black percentage of the population in Orleans Parish has increased from 45 to 55 percent over the past ten years.

Of particular concern in this regard is the Uptown New Orleans area of the parish, where the configuration of the proposed Districts 90 and 91 appears to result in needless dilution of minority voting strength. While we understand that incumbency considerations may explain in part why District 90 spans three parish wards, including noncontiguous portions of ward 12, our analysis shows that there are other means of addressing that concern without adversely impacting minority voting strength in the area.

Another problem in New Orleans involves the Ninth Ward. Under the proposed plan, a black majority district in this ward is eliminated for no apparent justifiable reason, leaving only one majority black House district out of the five emanating from that 61 percent black ward.<sup>81</sup>

The post-1990 round of redistricting was tainted by similar Section 5 violations. In the Section 5 objection letter that was provided to the state, the DOJ "examined the 1991 House redistricting choices in light of a pattern of racially polarized voting that appears to characterize elections at all

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<sup>80</sup> See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Charles Emile Bruneau, Jr., La. House of Representatives, David R. Poynter, Clerk, La. House of Representatives (June 1, 1982) (on file with author).

<sup>81</sup> *Id.* at 2. In the very same objection letter, Reynolds also objected to dilution in East Baton Rouge, East Feliciana, West Feliciana and St. Helena Parishes and noted that the legislature had adopted the dilutive plan despite the existence of non-dilutive alternative plans that would have adhered more closely to the state's other redistricting criteria, such as compactness and least change.

levels in the state.”<sup>82</sup> The DOJ found that while most of the statewide plan comported with Section 5 requirements, “[i]n seven areas, however, the proposed configuration of district boundary lines appears to minimize black voting strength, given the particular demography in those areas . . . .”<sup>83</sup> Once again, Orleans Parish was specifically identified. The DOJ observed that:

In general, it appears that in each of these areas the state does not propose to give effect to overall black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters the opportunity to participate in the political process and to elect candidates of their choice. . . .

In addition, our analysis indicates that the state has not consistently applied its own [redistricting] criteria, but it does appear that the decision to deviate from the criteria in each instance tended to result in the plan’s not providing black voters with a district in which they can elect a candidate of their choice.<sup>84</sup>

The pattern of consistent attempts to minimize African-American voting strength in Orleans Parish has been unremitting, as the post-2000 Census, Section 5 redistricting litigation makes plain. The post-2000 Census House of Representatives redistricting plan followed the familiar pattern, except that in this decade, Louisiana opted to file a declaratory judgment action seeking preclearance, rather than seek administrative preclearance from the DOJ. In *Louisiana House of Representatives v. Ashcroft*,<sup>85</sup> the DOJ, under John Ashcroft, opposed Louisiana’s effort to obtain preclearance. The NAACP LDF, on behalf of a bi-racial coalition of voters, and private counsel on behalf of the Louisiana Legislative Black Caucus, intervened and litigated together with the DOJ and against the State.

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<sup>82</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Jimmy N. Dimos, Speaker of the House of Representatives (July 15, 1991) [hereinafter July 15 Dunne Letter] (on file with author). The Louisiana State Senate also sought to reduce African-American voting strength in its 1991 redistricting plan, cracking apart African-American majorities in the northeastern part of the state and around Lafayette, while preserving majority-white districts for every white incumbent. See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Samuel B. Nunez, President of the Senate of the State of La., Dennis Bagneris, Chairman of the Comm. on Senate and Governmental Affairs (June 28, 1991) (on file with author). Assistant Attorney General John R. Dunne found that the Lafayette-area plan was “intended, at least in part, to suppress the African-American proportion to a level considered acceptable to a white incumbent.” *Id.* at 2.

<sup>83</sup> July 15 Dunne Letter, *supra* note 82, at 2.

<sup>84</sup> *Id.* at 3; see also *infra* Part IV.B.2.e.

<sup>85</sup> Civ. No. 02-0062-JR (D.D.C. 2002). The NAACP Legal Defense and Educational Fund, Inc. (NAACP LDF) served as counsel to the citizen intervenors in this Section 5 action.

Louisiana's theory for justifying its effort to eliminate an African-American opportunity district was unsupported by Section 5 precedent. The state sought preclearance of a plan, even though:

1. The state's theory was contingent upon persuading the court that white voters were entitled to proportional representation in Orleans Parish, though proportionality does not exist for African-Americans elsewhere in the state and is not required under the VRA;
2. The African-American population of Orleans had increased in real numbers and as a percentage of the Orleans Parish population;
3. Strong evidence of retrogressive effect and purpose was uncovered by the DOJ and intervenors, and Louisiana's own admissions provided the most compelling evidence;
4. Very high levels of racially polarized voting persisted;<sup>86</sup>
5. The court criticized plaintiffs' litigation tactics in unusually strong terms and compelled the production by the State of improperly withheld documents;<sup>87</sup>

Louisiana settled the case on the eve of trial, withdrew the offending plan and restored the African-American opportunity district in Orleans Parish.<sup>88</sup>

b. Section 2 in Orleans Parish

Section 2 of the VRA has played an important role in protecting African-American voters in Orleans as well. After the 1982 renewal, there was a major Section 2 case filed in federal court in Louisiana, *Major v. Treen*,<sup>89</sup> challenging the 1981 reapportionment of congressional districts. The plaintiffs, on behalf of a class certified as all African-American registered voters in the state, alleged that the reapportionment plan, "Act 20," was designed and had the effect of diluting minority voting strength by dispersing

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<sup>86</sup> See *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 51–79 (2005) (testimony of Richard Engstrom, Professor, University of New Orleans).

<sup>87</sup> After two rounds of summary judgment briefing, once it became clear that the State's theory could not meet the Section 5 standard, the State engaged in what the court characterized as "a radical mid-course revision in their theory of the case[,] . . . blatantly violating important procedural rules" in an attempt to justify its plan. *La. House of Representatives v. Ashcroft*, Civ. No. 02-0062-JR (D.D.C. Feb. 13, 2003) (order denying defendants' motion for summary judgment).

<sup>88</sup> Because *Louisiana House of Representatives* was a Section 5 VRA action filed before a three-judge panel and settled without any published opinion by the court, it is an example of some of the important results under the VRA that are not captured in a rote count of DOJ Section 5 objections. See *supra* note 41. Several important VRA settlements are achieved without published opinions, and the terms and significance of those settlements, known only to the litigators and parties, are difficult to identify and marshal.

<sup>89</sup> 574 F. Supp. 325 (E.D. La. 1983).



an African-American population majority in a parish into two congressional districts.<sup>90</sup> They filed claims under the Thirteenth, Fourteenth and Fifteenth Amendments to the federal Constitution, as well as Section 2 of VRA.<sup>91</sup>

According to the testimony in that case, based on the results of the 1980 Census, Orleans Parish had a slight decline in overall population, but a marked increase in African-American population from the 1970s to 1980, such that African-Americans were 55% of the total population, 48.9% of voting age population and 44.9% of registered voters.<sup>92</sup> Moreover, the African-American population was highly concentrated.<sup>93</sup>

Governor Dave Treen submitted three districting proposals—none of which contemplated a majority African-American district.<sup>94</sup> In fact, Treen “publicly expressed his opposition to the concept of a majority black district, stating that districting schemes motivated by racial considerations, however benign, smacked of racism, and in any case were not constitutionally required.”<sup>95</sup> However, the State Senate staff prepared more than fifty plans and was directed to formulate a plan containing an Orleans Parish-dominated district, which necessarily would have an African-American majority population.<sup>96</sup> The State Legislature passed one of the two plans with one African-American majority district in Orleans Parish and seven white majority districts.<sup>97</sup> Governor Treen threatened to veto the plan, and a number of legislators changed their position in response to the threatened veto.<sup>98</sup>

The court found that Treen’s opposition to the plan initially approved by the legislature was “predicated in significant part on its delineation of a majority [African-American] district centered in Orleans Parish.”<sup>99</sup> The Governor then proposed another plan, again with all eight white majority

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<sup>90</sup> *Id.* at 327.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 329–30.

<sup>93</sup> *Id.* at 329.

<sup>94</sup> *See id.* at 331.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (Only two plans out of the fifty made it out of the committee—both with one majority African-American and seven majority white districts. One plan had one majority African-American district with 54% African-Americans and 43% African-American registered voters. The Louisiana Black Caucus supported this plan. The other plan had one majority African-American district with 50.2% African-Americans and 44% African-American registered voters.).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 332.

<sup>99</sup> *Id.* at 334.

districts, which the Senate rejected.<sup>100</sup> African-American legislators were then excluded from subsequent legislative sessions to develop a plan, which ultimately concluded with the participants determining that the African-American minority interest in obtaining a predominantly African-American district would have to be sacrificed in order to satisfy both the Governor and the Jefferson Parish legislators.<sup>101</sup> The resulting Act 20, accepted by Governor Treen and signed into law, left African-American population concentrations within Orleans Parish wards disrupted, whereas white concentrations remained intact.<sup>102</sup>

The court accepted the plaintiffs' expert's testimony, showing racially polarized voting and that such voting played a significant role in the electoral process.<sup>103</sup> It also found that "Louisiana's history of racial discrimination, both *de jure* and *de facto*, continue[ed] to have an adverse effect on the ability of its black residents to participate fully in the electoral process."<sup>104</sup>

The court granted the plaintiffs' requested declaratory judgment that Act 20 violated Section 2 of VRA by diluting African-American voting strength; enjoined the State of Louisiana from conducting elections with Act 20 districts; and gave the legislature the opportunity to redraw the districts.<sup>105</sup> It was the resulting district that led to the election of Louisiana's first African-American congressional representative since Reconstruction.<sup>106</sup>

## 2. African-American Voting Issues in Orleans Parish Post-Katrina

Accordingly, the concerns about the future of Orleans Parish as a center of African-American political power following Hurricane Katrina are very well placed in light of the record of the state's vote denial and dilution. Hurricane Katrina displaced more than one million people from southern Louisiana alone.<sup>107</sup> Three hundred thousand of these citizens, the majority of whom are African-American, fled New Orleans,<sup>108</sup> where they

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 329.

<sup>102</sup> *Id.* at 329–37, 353.

<sup>103</sup> *Id.* at 337–39.

<sup>104</sup> *Id.* at 339–40 (emphasis added).

<sup>105</sup> *Id.* at 355–56.

<sup>106</sup> For an additional example of a successful Section 2 litigation regarding the drawing of lines for judicial seats, see *infra* Part IV.A.3.

<sup>107</sup> Jeremy Alford, *Population Loss Altering Louisiana Political Landscape*, N.Y. TIMES, Oct. 4, 2005, at A16.

<sup>108</sup> Center for American Progress and American Constitution Society for Law and Policy: *Voting Rights After Katrina: Ensuring Meaningful Participation*, 20 (Nov. 1, 2005), available at

formed a mobilized voting bloc in the only majority-minority congressional district in the state at the center of African-American political power.<sup>109</sup> The destruction of polling places, displacement of voters and candidates and general loss of electoral infrastructure initially forced Louisiana officials to postpone the fall 2005 municipal elections in Orleans and Jefferson Parishes.<sup>110</sup> These circumstances present substantial questions about whether, how and by whom African-American communities will be rebuilt, when displaced residents may return, and perhaps as importantly, who gets to decide. For example, will displaced voters be able to register, receive absentee ballots and vote?<sup>111</sup> While there is considerable uncertainty about the future of Louisiana's African-American communities post-Hurricane Katrina, the existence of VRA protections have provided some assurance to displaced African-Americans that their interests cannot be ignored with impunity; and that Section 5 preclearance requires that proposed voting changes be scrutinized.

In some respects, the VRA has already had a substantial impact on the state's plans to address electoral challenges caused by the hurricanes in 2005. A recent Section 2 lawsuit, *Wallace v. Blanco*,<sup>112</sup> did not result in a finding of vote denial in advance of the election. However, it seems clear that it was the possibility of judicial intervention in the forthcoming Orleans Parish municipal elections that moved the legislature, during a 2006 special legislative session, to relax some of the state's election laws that would have adversely affected displaced voters who are disproportionately African-American.<sup>113</sup> After the Louisiana State Legislature essentially refused to act to ameliorate the burdens on displaced voters in 2005, Secretary of State Al Ater and Attorney General Charles Foti both testified during committee hearings in the 2006 special session about the pending litigation and risks associated with a second legislative failure to act.<sup>114</sup> The pendency of the litigation resulted in a different and more favorable

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<http://www.americanprogress.org/kf/vak.pdf> [hereinafter Ater Remarks] (remarks of Sec'y of State Al Ater).

<sup>109</sup> Alford, *supra* note 107, at A16; Clarke-Avery & Gelfand, *supra* note 9.

<sup>110</sup> Mark Waller, *Fall Elections in Jefferson, N.O. Postponed*, NOLA, Sept. 14, 2005, [http://www.nola.com/newslogs/tporleans/index.ssf?/mtlogs/nola\\_tporleans/archives/2005\\_09\\_14.html#079542](http://www.nola.com/newslogs/tporleans/index.ssf?/mtlogs/nola_tporleans/archives/2005_09_14.html#079542).

<sup>111</sup> See LA. REV. STAT. ANN. § 18:562 (Westlaw through 2007 Sess.); see also Clarke-Avery & Gelfand, *supra* note 9.

<sup>112</sup> Civ. A. No. 05-5519 (E.D. La. 2005). The NAACP LDF served as trial counsel.

<sup>113</sup> See *Wallace v. Blanco*, Civ. A. No. 05-5519 (E.D. La. June 13, 2006) (order approving settlement agreement and dismissing remaining claims).

<sup>114</sup> See Evidentiary Hearing Transcript at 37-38, *Wallace v. Blanco*, Civ. A. No. 05-6487-B (E.D. La. Feb. 24, 2006) (on file with author).

outcome during the legislative session—a point that the trial judge recognized even as he denied any further relief.<sup>115</sup>

Because the DOJ or the U.S. District Court for the District of Columbia review Louisiana's voting changes under Section 5 to ensure that they do not have the "the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,"<sup>116</sup> voters throughout Louisiana—and citizens throughout the country—also recognize that the host of difficult decisions Louisiana and its political subdivisions face as they reconstruct their democratic institutions will be scrutinized. African-American leaders met with DOJ officials to discuss these issues in the context of the DOJ's Section 5 responsibilities.<sup>117</sup>

Although Section 5 gives the DOJ a role to play as the Louisiana electoral system in Orleans and elsewhere in the state is reestablished, the DOJ response also illustrates that Section 5 review of voting changes is a flexible tool that can be adapted to unique circumstances. On September 7, 2005, for example, Acting Assistant Attorney General Bradley J. Schlozman assured Louisiana's Secretary of State Ater that the DOJ "stands ready to expedite the review of any and all submissions of voting changes (especially scheduling and polling place changes) resulting from Hurricane Katrina."<sup>118</sup> Secretary of State Ater has expressed the view that the DOJ has been sensitive to the difficulties the state faces and the need for prompt preclearance where appropriate.<sup>119</sup> The VRA has provided an important framework as the Louisiana State Legislature, Secretary of State, Attorney General and Governor, DOJ and minority voting advocates seek to work through the complex voting challenges following Hurricanes Katrina and Rita. Although the future is unclear, it seems certain that minority voters would be considerably less well off in the absence of Section 5 providing leverage and serving as an important reminder of the state's duty to embrace minority inclusion in its political processes.

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<sup>115</sup> See *id.* at 77–78.

<sup>116</sup> 42 U.S.C. § 1973c (amended 2006).

<sup>117</sup> Press Release, Ricky Clemons, Nat'l Urban League, Civil Rights Leaders Meet with Attorney General Gonzales on Civil Rights Issues of Importance to All Americans (Feb. 8, 2006), *available at* <http://www.nul.org/PressReleases/2006/2006pr313.html>.

<sup>118</sup> Letter from Bradley J. Schlozman, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Al Ater, Sec'y of State, La. (Sept. 7, 2005), *available at* [http://www.usdoj.gov/crt/voting/la\\_katrina.htm](http://www.usdoj.gov/crt/voting/la_katrina.htm).

<sup>119</sup> Ater Remarks, *supra* note 108, at 6.

## B. VOTING DISCRIMINATION THROUGHOUT LOUISIANA

## 1. Section 5 Violations Overview

Even apart from the experience within Orleans Parish, a thorough review of Louisiana's experience strongly suggests that a further extension of the expiring provisions is warranted. The scope and persistence of the state's discriminatory practices since 1982 stands as powerful evidence of the pressing need for continued Section 5 protection. A fair reading of the minority voting experience in Louisiana makes it plain that voting discrimination persists and that if Section 5 is not renewed, the state will experience a sudden and unnecessary reduction of African-American access to the political process at every level of government.

The Civil Rights Division of the DOJ has objected to discriminatory voting changes by Louisiana officials 146 times since Section 5 coverage of the state began, and significantly, ninety-six times since Section 5 was last renewed in 1982.<sup>120</sup> In other words, 65% of the objections interposed against Louisiana have occurred *since* Congress last acted to extend VRA protections to minority voters. In the aggregate, these blocked voting changes would have impacted an exceedingly large, but difficult to quantify, number of African-Americans. Every redistricting plan, for example, affects large numbers of citizens throughout the area it covers—sometimes hundreds can be affected; at other times, thousands of citizens are impacted. Viewed from another perspective, voting changes blocked by the DOJ would have affected nearly every aspect of voting, including redistricting, polling place relocations, changes in voting and voter registration procedures, annexations and other alterations of elected bodies and even the attempted suspension of a presidential primary election.<sup>121</sup> Discriminatory changes were proposed at every level of government, including the Louisiana State Legislature, the state court system, the State Board of Education, parish councils, school boards, police juries, city councils and boards of aldermen.<sup>122</sup> And objections have been interposed by the DOJ under both Democratic and Republican presidential administrations.<sup>123</sup>

By any measure, attempts to dilute African-American voting strength in Louisiana have been widespread. Thirty-three—more than half—of Louisiana's sixty-four parishes and thirteen of its cities and towns have

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<sup>120</sup> See Department of Justice, *supra* note 41.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

proposed discriminatory voting changes since 1982, many more than once.<sup>124</sup> Between 1982 and 2003, the DOJ was compelled to object to thirty-three parish school board redistricting and expansion plans proposed by twenty-three parishes and one city,<sup>125</sup> thirty-one parish police jury redistricting and reduction plans proposed by twenty parishes,<sup>126</sup> seven parish council redistricting and reduction plans proposed by six parishes,<sup>127</sup> eleven city and town council redistricting plans proposed by ten cities and towns,<sup>128</sup> two board of alderman redistricting plans proposed by two cities<sup>129</sup> and six annexations proposed by the city of Shreveport alone.<sup>130</sup> The DOJ was also compelled to object seventeen times to attempts by the state itself to make changes that would have diminished minority voting rights in congressional, state legislative, State Board of Education and state court elections.<sup>131</sup> And, in a stark illustration of the persistence of the hostility to equal African-American participation in Louisiana's political process with statewide consequences, in *every* decade since the VRA was passed in 1965, the proposed Louisiana State House of Representatives redistricting plan was met with a DOJ objection—including three since 1982.<sup>132</sup>

Significantly, beyond the familiar Section 5 objections involving the failure of the state or its sub-jurisdictions to demonstrate the absence of discriminatory effects, Assistant Attorneys General in each of the past three decades have noted evidence of Louisiana officials' continuing intent to discriminate, including: rejection of readily available non-discriminatory

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<sup>124</sup> See *id.*

<sup>125</sup> See *id.* These included Madison, West Baton Rouge, Assumption, LaSalle, Winn, St. Helena, St. Martin, Franklin, St. Landry, East Carroll, Webster, Terrebonne, Lafayette, Vermilion, West Carroll, Evangeline, Washington, Iberville, St. Mary, Bossier, DeSoto, Pointe Coupee, Richland and City of Monroe.

<sup>126</sup> See *id.* These included Madison, Assumption, LaSalle, St. Helena, Pointe Coupee, Morehouse, Bienville, Jackson, DeSoto, Catahoula, St. Martin, West Feliciana, Franklin, St. Landry, East Carroll, Concordia, Webster, Richland, Caddo and Iberville.

<sup>127</sup> See *id.* These included East Baton Rouge, Jefferson, Terrebonne, Lafayette, Washington and Tangipahoa.

<sup>128</sup> See *id.* These included East Baton Rouge, City of New Iberia, City of St. Martinsville, City of Jennings, City of Tallulah, City of Lafayette, City of Minden, City of Plaquemine, City of Ville Platte and Town of Delhi.

<sup>129</sup> See *id.* These included City of Ville Platte and City of Winnsboro.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* Two of the proposals that received objections were administratively submitted to the DOJ for preclearance. The most recent proposal was submitted for preclearance before a three-judge panel in the D.D.C. in 2002 in *Louisiana House of Representatives v. Ashcroft*. See *supra* Part IV.A.1.a. That litigation, in which the NAACP/PLDF intervened to protect the interests of African-American voters, resulted in a settlement between the State, the DOJ and the minority intervenors that, among other things, restored a New Orleans African-American opportunity district that the legislature had intentionally sought to eliminate.

alternatives,<sup>133</sup> inconsistent application of standards,<sup>134</sup> drastic voting changes immediately following attempts by African-American candidates to win public office and even candid admissions of racism by state and local officials as recently as 2001.<sup>135</sup> As Assistant Attorney General John R. Dunne said of the 1991 redistricting plan for the Louisiana House of Representatives, “[T]he departures are explainable,’ at least in part, ‘by a *purpose* to minimize the voting strength of a minority group.’ ”<sup>136</sup> Although Louisiana is not alone in this regard, it is in part the evidence of *purposeful* discrimination in the state that requires the continuing vigilance of Section 5. Although the civil rights movement, judicial enforcement of federal protections and time have changed the minds and practices of many, some remain unapologetic. Many others in the state who remain committed to perpetrating voting discrimination have only become more sophisticated at concealing their objectives. But whether voting discrimination is ferreted out through recognition of invidious intentions or by its harmful effects, the consistent efforts to diminish African-American voting power in Louisiana are not inconsequential remnants of the distant past that can be ignored.

The magnitude and breadth of Section 5 objections are great, but the need for Section 5’s ongoing protection is even further enhanced when one considers that awareness of the Section 5 preclearance requirements has likely deterred what would have been even greater levels of voting discrimination. It stands to reason that the rational public official is less likely to discriminate if he or she knows that his or her jurisdiction will be called upon to explain publicly and justify and explain what it has done. In a sense, Section 5 has served to clear away many of the weeds in Louisiana, but there is a strong likelihood that any lapse in its protection would allow those weeds to grow back from the roots and once again choke off meaningful political opportunity for African-Americans.

Attempts at discrimination have not disappeared since 1982.<sup>137</sup> Indeed, it was a case involving a Louisiana parish school board that prompted Justice Souter to note in 2000, *thirty-five years after the enactment of the*

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<sup>133</sup> See, e.g., Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Dep’t of Justice, to Bill Robertson, Mayor of Minden, La. (July 2, 2002) (noting that the city rejected a non-discriminatory redistricting plan), available at [http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/1\\_070202.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_070202.pdf).

<sup>134</sup> See, e.g., July 15 Dunne Letter, *supra* note 82.

<sup>135</sup> *St. Bernard Citizens for a Better Gov’t v. St. Bernard Parish Sch. Bd.*, Civ. A. No. 02-2209-C(4), 2002 U.S. Dist. LEXIS 16540, at \*32–33 (E.D. La. Aug. 26, 2002).

<sup>136</sup> July 15 Dunne, *supra* note 82, at 4 (citation omitted) (emphasis added).

<sup>137</sup> See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

VRA, that Section 5 must continue to be interpreted to prevent jurisdictions from “pour[ing] old poison into new bottles.”<sup>138</sup>

Notwithstanding the history, a sense of optimism, skepticism or recent Supreme Court decisions<sup>139</sup> cause some to ask whether the Section 4 preclearance coverage formula has grown stale and whether Section 5 protections are still necessary. The original coverage formula, though never a perfect barometer of voting discrimination, was created as a legislative proxy designed to reach jurisdictions with some of the worst traditions of voting discrimination. Section 5, in turn, provided a powerful remedy in recognition of the fact that these traditions were deeply rooted. Although forty years of minority voter protection is a long time when measured against election cycles, it seems like a far more modest interval when measured against a period many times that length of entrenched racial exclusion from virtually every aspect of society, including the political process. In the case of Louisiana, the history has proven to be a strong predictor of the present. A period of forty years of VRA protection has been insufficient to erase the effects and continued practice of voting discrimination. Consequently, the Louisiana experience strongly suggests that what the Section 4 coverage formula reached in 1965, 1970, 1975 and 1982, the contemporary record continues to justify. The post-1982 renewal experience with Section 5 in Louisiana supplies important proof.

## 2. The Impact of Section 5 Since 1982

Since 1982, Section 5 objections have helped prevent discriminatory changes in every aspect of Louisiana voting, including redistricting, voter registration, election schedules, voting procedures, polling places and the structure of elected bodies. Section 5 has not only allowed the DOJ to nullify specific discriminatory changes, but it has also inhibited the practices that some officials use to promote such changes, including secrecy, exclusion of minorities from decision-making processes, manipulation of standards, invention of new strategies (“pour[ing] old poison into new bottles”) and frequent attempts to revive old dilutive strategies.

### a. Redistricting

Most of Louisiana’s ninety-six Section 5 objections since 1982 have involved redistricting.<sup>140</sup> Officials have consistently attempted to limit Af-

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<sup>138</sup> *Id.* at 366.

<sup>139</sup> See generally *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bossier Parish*, 528 U.S. at 322–76; *Cedar Rapids Cmty. Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>140</sup> See Department of Justice, *supra* note 41.



frican-American voters' political influence by over-concentrating them into a few districts ("packing"). In the alternative, other officials have favored "cracking"—dispersing African-Americans among several majority-white districts to prevent them from achieving a majority that provides the opportunity for communities to elect candidates of their choice—even in the face of extreme racial bloc voting.<sup>141</sup> This form of "second generation" discrimination, known as vote dilution, is designed to cabin minority voting power, and picked up where the more outright forms of vote denial left off. For example, in 1993, the Bossier Parish School Board had cracked African-American population concentrations so effectively that the parish still had no African-American opportunity districts at all, despite an African-American population of 20%, a twelve-member school board and the availability of an alternative plan that would have drawn two compact majority African-American districts.<sup>142</sup>

Significantly, in the course of interposing objections, multiple Assistant Attorneys General have noted the persistence of racially polarized voting in the state, most recently in April 2005.<sup>143</sup> In its extreme forms, racially polarized voting can block minority electoral success and operate to close off the political process.<sup>144</sup> The state itself acknowledged the persistence of "racial bloc voting" in 1996, the same year that the U.S. District Court for the Western District of Louisiana agreed that "racial bloc voting is a fact of contemporary Louisiana politics."<sup>145</sup>

The use of the redistricting process continues to be a preferred means of diminishing the effectiveness of minority votes. Because redistricting has historically corresponded with the decennial census, it occurs at a time

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<sup>141</sup> Since 1982, the DOJ has repeatedly noted the persistence of racially polarized voting in Louisiana. See, e.g., Letter from Ralph F. Boyd, Jr., *supra* note 133; Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Paul A. Labat, Council Clerk, Houma, La. (Jan. 3, 1992); Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Kenneth C. DeJean, Chief Counsel (Sept. 23, 1988).

<sup>142</sup> See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to W.T. Lewis, Superintendent of Bossier Parish Schs. (Aug. 30, 1993). Of course, the DOJ's Section 5 objection in this case was the subject of Supreme Court litigation culminating in a decision that drastically, and in the view of the NAACP/PLDF, inappropriately narrowed the Section 5 inquiry and vitiated the objection. However, the underlying record makes clear that intentional discrimination drove the creation of the school board redistricting plan at issue, and the Supreme Court's decision in *Bossier Parish*, 528 U.S. at 366, is itself a proper focus of the present renewal.

<sup>143</sup> See Letter from R. Alexander Acosta, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David A. Creed, Executive Dir., N. Delta Reg'l Planning & Dev. Dist. (Apr. 25, 2005) (on file with author).

<sup>144</sup> *Hays v. Louisiana*, 936 F. Supp. 360, 364 n.17 (W.D. La. 1996).

<sup>145</sup> *Id.*; see also Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to E. Kay Kirkpatrick, Dir., Civil Div., La. Dep't of Justice (Aug. 12, 1996).

when the ramifications of demographic shifts are squarely presented.<sup>146</sup> Typically, changes made during redistricting have an impact for a decade or even beyond. Based upon contemporary political realities, in certain situations, decision-makers of either major political party may be motivated to diminish minority voting power. While one party may see advantage in “packing” or over-concentrating minority voters, the other party may wish to “crack” cohesive populations in ways that eliminate existing opportunities to elect minority-preferred candidates. Although Louisiana employs an open primary system, intense partisan competition, when it exists in Louisiana and elsewhere, provides no shelter for minority voters. Section 5’s role in ensuring that minority political opportunities do not get trampled during redistricting has protected the rights of untold numbers of minority voters.

b. Old Poison into New Bottles: Mergers, Annexations, Reductions and Other Ways to Reduce the Impact of New Majority-Minority Districts

Just as vote dilution through redistricting arose as a strategy for maintaining white power after more direct tactics of vote denial and suppression were outlawed, so too have jurisdictions in Louisiana continued to pursue new ways to prevent African-American voters from achieving electoral power. One strategy has been the annexation of predominantly white areas to a city or parish that has recently seen inroads made by African-American candidates, thereby increasing the prospects for white candidates to win seats on an elected body and curtailing African-American political power. Another strategy has been to drastically change the size of an elected body, cutting African-American seats or adding seats that white voters are likely to control. The continued development of new vote dilution strategies bears special emphasis in the context of this VRA renewal because it exposes one of the central dangers faced by African Americans and other minority voters: the imposition of new and substantial barriers in direct response to actual, perceived or anticipated increases in minority political power. Though this danger is traceable to the pre-VRA period, it has consistently manifested itself since the passage of the VRA. As the following examples from the 1990s show, Section 5’s anti-backsliding principle is well designed to combat this regrettable but continuing reality.

In 1990, the city of Monroe attempted to annex white suburban wards to its city court jurisdiction. The DOJ noted in its objection that the wards in question had been eligible for annexation since 1970, but that there

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<sup>146</sup> See *Hays*, 936 F. Supp. at 362, 371.

had been no interest in annexing them until just after the first-ever African-American candidate ran for Monroe City Court.<sup>147</sup>

Annexation of white suburban wards to the Shreveport city court jurisdiction would have changed that at-large jurisdiction from 54% African-American to 45% African-American. After the DOJ objected to the first attempt at annexation in 1994, the city tried a total of five more times, twice in 1995, in 1996 and twice in 1997. Each time, the DOJ informed the city that it would have no objection to the annexation if the city changed its method of electing judges from at-large to single-member districts, and each time the city refused to make that change.<sup>148</sup>

After the Washington Parish School Board finally added a second majority African-American district in 1993 (bringing the total to two out of eight, representing an African-American population of 32%), it immediately created a new at-large seat to ensure that no white incumbent would lose his or her seat and to reduce the impact of the two African-American members (to two out of nine). The DOJ objected.<sup>149</sup>

In 1992, the year after Franklin Parish added a second majority African-American district to its police jury, it attempted to cut the size of the jury in half, eliminating the new African-American seat over protests by the African-American community, and inviting a DOJ objection.<sup>150</sup>

In 1991, the Concordia Parish Police Jury announced that it would reduce its size from nine seats to seven, with the intended consequence of eliminating one African-American district. The parish made the pretext-

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<sup>147</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Cynthia Young Rougeou, Assistant Attorney Gen., State of La. (Oct. 23, 1990). At present, the NAACP/PLDF is litigating a Section 2 case in Jefferson Parish involving the election of circuit court judges from a multi-member district. That election structure, like at-large plans, has operated together with racial bloc voting to bar African-Americans from serving on, and to deter them from even seeking to run for seats on, that court. See Complaint, *Williams v. McKeithen*, Civ. A. No. 05-1180 (E.D. La. 2005), available at [http://www.naacpldf.org/content/pdf/williams/Williams\\_v.\\_McKeithen.pdf](http://www.naacpldf.org/content/pdf/williams/Williams_v._McKeithen.pdf).

<sup>148</sup> See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Sherri Marcus Morris, Assistant Attorney Gen., State of La., Jerald N. Jones, City Attorney, City of Shreveport (Sept. 6, 1994) (on file with author); Letter from Loretta King, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jerald N. Jones, City Attorney, City of Shreveport (Sept. 11, 1995) (on file with author); Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jerald N. Jones, City Attorney, City of Shreveport (Dec. 11, 1995) (on file with author); Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jerald N. Jones, City Attorney, City of Shreveport (Oct. 24, 1996) (on file with author); Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jerald N. Jones, City Attorney, City of Shreveport (Apr. 11, 1997) (on file with author); Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jerald N. Jones, City Attorney, City of Shreveport (June 9, 1997) (on file with author).

<sup>149</sup> See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to G. Wayne Kuhn, Wash. Parish Sch. Bd. (June 21, 1993) (on file with author).

<sup>150</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Kay Cupp, Sec'y, Franklin Parish Police Jury (Aug. 10, 1992) (on file with author).

tual claim that the reduction was a cost-saving measure, but the DOJ noted in its objection that the parish had seen no need to save money until an influx of African-American residents transformed the district in question—originally drawn as a majority white district—into a majority African-American district.<sup>151</sup>

In each of these cases, local officials sought to eliminate or minimize the influence of majority African-American districts and, at times, remove African-American elected officials from office, without resort to the familiar “packing” or “cracking” associated with discriminatory redistricting techniques.

In another especially noteworthy example of the operation of Section 5 in a non-redistricting context, in 1994, the DOJ objected to Louisiana’s attempt to impose a photo identification requirement as a prerequisite for first-time voters who register by mail.<sup>152</sup> After reviewing relevant socioeconomic data, the DOJ noted that a picture identification requirement would have an adverse effect on the state’s African-American population.<sup>153</sup> The DOJ concluded that Louisiana had not satisfied its burden of showing that the submitted change had neither a discriminatory purpose nor a discriminatory effect.<sup>154</sup>

It is exactly this pattern of adaptive discriminatory voting changes that Congress identified and aimed to address when it designed Section 5 to “shift the advantage of time and inertia from the perpetrators of the evil to its victims.”<sup>155</sup> As the above-described examples dramatically illustrate, the experience in Louisiana in the last decade shows that voting discrimination continues to take many forms, of which redistricting manipulation is but one.

#### c. Old Poison Into the Same Old Bottles: The Persistence and Reemergence of At-Large Voting Arrangements

Attempts to submerge minority voters in at-large elections did not disappear with the DOJ’s first Section 5 objection on June 26, 1969.<sup>156</sup> In fact, the State has continued to attempt to expand and reinforce at-large voting for boards of aldermen, judges and school boards throughout the

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<sup>151</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Robbie Shirley, Sec’y-Treasurer, Concordia Parish Police Jury (Dec. 23, 1991) (on file with author).

<sup>152</sup> See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Sheri Marcus Morris, Assistant Attorney Gen., State of La. (Nov. 21, 1994) (on file with author).

<sup>153</sup> See *id.* at 1–2.

<sup>154</sup> *Id.* at 2.

<sup>155</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

<sup>156</sup> Letter from Jerris Leonard, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Jack P. Gremillion, Attorney Gen. of La. (June 26, 1969) (on file with author).

1980s, 1990s and even as recently as this decade.<sup>157</sup> In 1988, Louisiana adopted anti-single-shot devices in circuit court elections (drawing a Section 5 objection) and added more at-large judges to the circuit courts (drawing another Section 5 objection).<sup>158</sup> Despite DOJ objections and requests for more information, which the State ignored, Louisiana attempted to add at-large or multi-member judicial seats again in 1989,<sup>159</sup> twice in 1990,<sup>160</sup> 1991,<sup>161</sup> 1992<sup>162</sup> and 1994,<sup>163</sup> and again adopted anti-single-shot devices in 1990.<sup>164</sup> In its 1991 objection letter, the DOJ noted blatant noncompliance with Section 5.<sup>165</sup> As the objection letter noted, the State had gone ahead and held at-large elections for unprecleared judgeships from its last two submissions, and that white judges were now sitting in these seats.<sup>166</sup> These facts manifest a willful disregard for the VRA mandates.

Though this report is not primarily focused on Section 2 of the VRA, some Section 2 lawsuits in Louisiana serve to further illustrate the determination of state officials to continue employing at-large voting systems, despite the recognition that such systems result in the dilution of minority votes.<sup>167</sup> For example, in 1986, the city of Gretna's at-large election scheme for the selection of its Board of Alderman was found to be in violation of Section 2 because it prevented African-Americans from participating in the political process in a meaningful way.<sup>168</sup> Gretna was the largest city by population in Louisiana to utilize an at-large election system, and

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<sup>157</sup> See Letter from R. Alexander Acosta, Assistant Attorney Gen., Dep't of Justice, to Nancy P. Jensen, Capital Region Planning Comm'n (Dec. 12, 2003), available at [http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/1\\_121203.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_121203.pdf).

<sup>158</sup> See Letter from William Bradford Reynolds, *supra* note 141, at 1.

<sup>159</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Kenneth C. DeJean, Chief Counsel, State of La. (May 12, 1989) (on file with author).

<sup>160</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Cynthia Rougeou, Assistant Attorney Gen., State of La. (Sept. 17, 1990) (on file with author); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Cynthia Young Rougeou, Assistant Attorney Gen., State of La. (Nov. 20, 1990) (on file with author).

<sup>161</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Angie R. LaPlace, Assistant Attorney Gen., State of La. (Sept. 20, 1991) (on file with author).

<sup>162</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Richard P. Ieyoub, Attorney Gen., State of La. (Mar. 17, 1992) (on file with author).

<sup>163</sup> See Letter from Kerry Alan Scanlon, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Sheri Marcus Morris, Assistant Attorney Gen., State of La. (Oct. 5, 1994) (on file with author).

<sup>164</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Cynthia Rougeou, Assistant Attorney Gen., State of La., Charles L. Hamaker, City Attorney, Monroe, La. (Oct. 23, 1990) (on file with author).

<sup>165</sup> Letter from John R. Dunne, *supra* note 161, at 1-2.

<sup>166</sup> *Id.*

<sup>167</sup> See *St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd.*, Civ. A. No. 02-2209, 2002 U.S. Dist. LEXIS 16540 (E.D. La. Aug. 28, 2002); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987).

<sup>168</sup> *Citizens for a Better Gretna*, 636 F. Supp. at 1115.

the court found that it constituted an “unusually large election district for the purposes of electing the members of the Board of Aldermen.”<sup>169</sup> Despite the fact that African-Americans comprised nearly 25% of registered voters,<sup>170</sup> because of racially polarized voting no African-American candidate had ever been elected to municipal office in the city of Gretna under the at-large election system.<sup>171</sup>

In another example, in 2001, the Louisiana State Legislature adopted a plan, which, among other things, made it possible for the electors of St. Bernard Parish to reduce the size of the parish school board from eleven single-member districts to five single-member districts and two at-large seats.<sup>172</sup> Under the eleven single-member district plan, one district constituted a majority African-American voting district,<sup>173</sup> whereas under the proposed plan there would be no African-American majority district.<sup>174</sup> Not only was the new plan found to dilute the voting strength of the African-American community,<sup>175</sup> but the attitude of the highest ranking public official in St. Bernard Parish, State Senator Lynn Dean, provides a vivid example of the type of racial discrimination that, at times, is still overtly expressed and continues to hamper the political opportunities of African Americans in Louisiana. While testifying in a Section 2 hearing for the defendant school board, Senator Dean was asked whether he had heard the word “nigger” used in the parish.<sup>176</sup> The Senator responded that “he uses the term himself, ha[d] done so recently, that he does not necessarily consider it a ‘racial’ term and that it is usable in jest, as well.”<sup>177</sup> The composition of the St. Bernard Parish School Board was an important matter to Senator Dean, who had served on that body for ten years prior to his election to the State Senate.<sup>178</sup> Dean’s term in the State Senate concluded in 2004.

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<sup>169</sup> *Id.* at 1124.

<sup>170</sup> *Id.* at 1119.

<sup>171</sup> *Id.* at 1120.

<sup>172</sup> *St. Bernard Citizens for Better Gov’t*, 2002 U.S. Dist. LEXIS 16540, at \*1–2; *see also* 2001 La. Acts 173 (H.B. 180). Adopted by both the Louisiana House of Representatives and the Louisiana State Senate, and signed by the Governor, H.B. 180 provided that where a parish (1) is governed by a home rule charter, (2) consists of a seven member governing authority where five members are elected in single-member districts and two members are elected at-large and (3) has an eleven-member school board elected by single-member districts, “the school board shall reapportion itself when required to do so by the electors of the parish” and, if so required, “shall adopt the same number and the same election districts as the parish governing authority.”

<sup>173</sup> *St. Bernard Citizens for Better Gov’t*, 2002 U.S. Dist. LEXIS 16540, at \*12.

<sup>174</sup> *Id.* at \*13.

<sup>175</sup> *Id.* at \*34.

<sup>176</sup> *Id.* at \*33.

<sup>177</sup> *Id.*

<sup>178</sup> *See id.*

At-large election structures have played a substantial role in diminishing the effectiveness of minority votes. Section 5 has operated to check further expansion of the harms that can flow from election structures that structurally submerge minority votes.

d. Repeat Offenders

The degree of intransigence of some state and local officials is illustrated by the large number of jurisdictions that proposed objectionable voting changes multiple times since 1982.<sup>179</sup> In a typical scenario, Pointe Coupee Parish's school board and police jury redistricting plans were found to be retrogressive by the DOJ three decades in a row, in 1983,<sup>180</sup> 1992<sup>181</sup> and 2002.<sup>182</sup> In 1983, the parish attempted to pack as much of the African-American population as it could into a single district, while submerging the remaining African-American voters in ten majority-white districts; the result was that African-Americans made up a majority in only one of the eleven police jury districts, despite making up 42% of the parish population.<sup>183</sup> In the 1992 redistricting cycle, the parish again attempted to pack African-American voters into a single urban district in the city of New Roads, while fragmenting rural African-American voters to prevent them from amassing a majority in the northern part of the parish.<sup>184</sup> Each of these attempts to minimize African-American voting strength was blocked by a Section 5 objection.<sup>185</sup> Ten years later, in 2002, the DOJ was compelled to object yet again when the parish, without explanation, eliminated one majority African-American district from its school board redistricting plan, despite an increase in the African-American population of the parish.<sup>186</sup> In each of these redistricting cycles, the DOJ noted that local African-American leaders had protested the discriminatory redistricting plans and had proposed alternative plans that were ignored or rejected.<sup>187</sup>

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<sup>179</sup> See Department of Justice, *supra* note 41.

<sup>180</sup> Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to E. Kenneth Selle, President, Tri-S Assocs., Inc. (Aug. 22, 1983) (on file with author).

<sup>181</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Clement Guidroz, President, Pointe Coupee Parish Police Jury (Feb. 7, 1992) (on file with author).

<sup>182</sup> Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Gregory B. Grimes, Superintendent, Pointe Coupee Parish Sch. Dist., Ronald E. Weber, President, Campaign & Opinion Research Analysts, Inc. (Oct. 4, 2002), *available at* [http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/1\\_100402.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_100402.pdf).

<sup>183</sup> Letter from William Bradford Reynolds, *supra* note 180, at 1–2.

<sup>184</sup> See Letter from John R. Dunne, *supra* note 181, at 1–2.

<sup>185</sup> See *id.*; Letter from William Bradford Reynolds, *supra* note 180.

<sup>186</sup> Letter from Ralph F. Boyd, Jr., *supra* note 182, at 2.

<sup>187</sup> *Id.*; Letter from William Bradford Reynolds, *supra* note 180; Letter from Ralph F. Boyd, Jr., *supra* note 182.

Unfortunately, Pointe Coupee is not an exceptional case. Between 1982 and 2003, ten other parishes were “repeat offenders,” and thirteen times the DOJ noted that local authorities were merely resubmitting objected-to proposals with cosmetic or no changes.<sup>188</sup> The tenacity of local resistance to compliance is reflected in several examples.

First, white officials in DeSoto Parish attempted to reduce the number of majority African-American police jury districts in 1991,<sup>189</sup> and the number of majority African-American school board districts in 1994<sup>190</sup> and 2002,<sup>191</sup> each time despite increases in the African-American percentage of the parish population and the availability of alternative plans that preserved African-American districts that were less expensive to implement and were more consistent with prior district lines.

Second, after a 1991 Section 5 objection to its attempt to pack African-American voters in the city of Bastrop,<sup>192</sup> the Morehouse Parish Police Jury made cosmetic changes and resubmitted the same plan.<sup>193</sup> The DOJ objected again, and the police jury again resubmitted the same plan with only cosmetic changes.<sup>194</sup> Only after the DOJ objected a third time in 1992 did the police jury address the substance of the first objection and draw district lines that did not over-concentrate African-American voters.<sup>195</sup>

Finally, after the DOJ objected to East Carroll Parish’s packing of African-American voters into four out of nine school board districts (despite an overall African-American population of 65%) in 1991,<sup>196</sup> the parish resubmitted the same redistricting plan with “minimal changes” in 1992<sup>197</sup>

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<sup>188</sup> Author’s study of objection letters issued between 1982 and 2003.

<sup>189</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to R. U. Johnson, President, DeSoto Parish Police Jury (Oct. 15, 1991) (on file with author).

<sup>190</sup> Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Walter Lee, Superintendent of DeSoto Schs. (Apr. 25, 1994) (on file with author).

<sup>191</sup> Letter from Andrew E. Lelling, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Walter C. Lee, Superintendent, Parish Sch. Bd., B.D. Mitchell, President, Parish Police Jury (Dec. 31, 2002), available at [http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/l\\_123102.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_123102.pdf).

<sup>192</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Ray Yarbrough, President, Morehouse Parish Police Jury (Sept. 27, 1991) (on file with author).

<sup>193</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Ray Yarbrough, President, Morehouse Parish Police Jury (May 26, 1992) (on file with author).

<sup>194</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to David E. Verlander, McLeod, Verlander, Eade & Verlander (Sept. 14, 1992) (on file with author).

<sup>195</sup> See *id.* at 1.

<sup>196</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to E. Kenneth Selle, President, Tri-S Assocs., Inc. (Dec. 20, 1991) (on file with author).

<sup>197</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Mary Edna Wilson, Sec’y-Treasurer, E. Carroll Parish Police Jury (Aug. 21, 1992) (on file with author).



and 1993.<sup>198</sup> After the white majority on the board watched an African-American candidate run for police jury and fail in 1994, they quickly adopted the same districting plan as the police jury.<sup>199</sup>

Other repeat offenders include the parishes of Madison, East Baton Rouge, West Feliciana, St. Landry, Webster, Richland, Lafayette and Washington, and the municipalities of Shreveport, Monroe, St. Martinville, Ville Platte and Minden.<sup>200</sup>

As these examples underscore, although the media and many academics train their focus on Section 5's impact on congressional elections because data about those races are easy to access, much of Section 5's important work involves the protection that it extends to local communities outside the glare of media, national or otherwise. The political climate in these communities is often unknown outside of the locality, and their limited access to the expertise and resources of the handful of organizations and attorneys with VRA litigation expertise, coupled with the often prohibitive cost of Section 2 litigation, strongly suggest that most of these discriminatory voting changes would have succeeded but for the prophylactic review that Section 5 affords.

e. Inconsistent Standards

To justify diluting the African-American vote, local officials have often claimed to be fulfilling neutral redistricting or other criteria, such as compactness or "least change." But such policies have been applied selectively to serve discriminatory purposes. Local officials have used the policy of "least change" to justify rejecting plans proposed by African-American leaders, only to adopt retrogressive plans that changed district lines more radically than the African-American leaders' proposals would have. For example, in 1989, Jefferson Parish Council officials rejected a proposal by African-American voters to draw the parish's first ever majority African-American district, claiming that the majority-white district they adopted was more compact and followed natural geographic boundaries.<sup>201</sup> The DOJ pointed out in its objection that this majority-white district was the *only* compact district and the *only* district to follow natural geographic

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<sup>198</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to James David Caldwell, Dist. Attorney, State of La. (Jan. 4, 1993) (on file with author).

<sup>199</sup> Letter from Isabelle Katz Pinzler, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Gerald Stanley, Superintendent of Schs., E. Carroll Parish (Aug. 19, 1994) (on file with author).

<sup>200</sup> See *supra* note 188; see also Department of Justice, *supra* note 41.

<sup>201</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Harry A. Rosenberg, Phelps, Dunbar, Marks, Claveria & Sims (Nov. 17, 1989) (on file with author).

boundaries in the entire parish.<sup>202</sup> In a related Section 2 lawsuit, the U.S. District Court for the Eastern District of Louisiana found that voting in the parish was so racially polarized that no African-American candidate had ever advanced beyond a primary election.<sup>203</sup>

f. Manipulation of Standards on a Statewide Basis: the Section 5 Violations of the Louisiana House of Representatives

Once again demonstrating that discriminatory voting practices have statewide manifestations, as has been described above, the Louisiana House of Representatives has been consistent in its dilutive objectives, but has been among the most inconsistent electoral bodies when it comes to uniform application of the districting standards in the state. In 1991, the DOJ objected that the House redistricting plan prioritized compactness when that meant fragmenting an African-American population concentration among three districts in the north-central part of the state, but the House had no problem abandoning compactness to fragment the African-American population southward in the Delta Parishes.<sup>204</sup> Assistant Attorney General John R. Dunne wrote in his objection letter that “the decision to apply or deviate from the criteria in each instance tended to result in the plan’s not providing African-American voters with a district in which they can elect a candidate of their choice.”<sup>205</sup>

The conduct of the Louisiana House of Representatives during its 2002 Section 5 redistricting litigation, also discussed above, further illustrates its pattern of cloaking discrimination with pretextual justification. In that litigation, the State sought judicial preclearance of its House of Representatives redistricting plan. Although there are many aspects of this very recent litigation that bear on the question of the need for renewal of Section 5,<sup>206</sup> the State’s attempt to justify its intended elimination of an African-American opportunity district in New Orleans based upon the theory that white voters in Orleans Parish were entitled to proportional representation, though African-Americans elsewhere in the state were not, epitomizes the lengths to which some will continue to go to dilute minority votes.

During the course of the litigation, the House and plaintiff and Speaker Pro Tempore, Charles Emile “Peppi” Bruneau, Jr.,<sup>207</sup> sought to

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<sup>202</sup> *Id.* at 2–3.

<sup>203</sup> *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 691 F. Supp. 991, 1002 (E.D. La. 1988).

<sup>204</sup> See July 15 Dunne Letter, *supra* note 82, at 3–4.

<sup>205</sup> *Id.* at 3.

<sup>206</sup> See *supra* Part IV.A.

<sup>207</sup> Bruneau had overseen decades of House redistricting in Louisiana.

cover the tracks of the legislative intentions by improperly withholding documents that evidenced the House's purpose to retrogress in its redistricting plan through frivolous assertions of attorney-client or work product privilege. The NAACPLDF secured a court order to require Bruneau and the other plaintiffs to produce versions of the redistricting guidelines that were distributed at the outset of the line drawing process to facilitate their work.<sup>208</sup> These documents revealed that Bruneau had overseen the process that culminated in the removal of the provision in the guidelines that reminded legislators specifically of their obligation to comply with the VRA.<sup>209</sup> Bruneau and the other witnesses for the Louisiana House explained that they removed the provision—which had been included in the guidelines for decades before the process began—in order to make the guidelines plain and understandable.<sup>210</sup> Accordingly, even before Congress had the opportunity to reevaluate the renewal of Section 5, legislators in Louisiana took it upon themselves to attempt to rewrite the law governing their redistricting activities.

Of course, Bruneau himself understood that the plan that he had ushered through the House eliminated an African-American opportunity district from Orleans Parish, despite growth in the African-American voting-age population percentage there. Faced with a strong Section 5 defense by the DOJ, a coalition of concerned voters (represented by NAACPLDF) and the Louisiana Legislative Black Caucus, the court issued an order unusually critical of the State's litigation tactics.<sup>211</sup> The Louisiana plaintiffs settled the case on the eve of trial by agreeing to restore the eliminated Orleans opportunity district, among other concessions favorable to Louisiana's minority voters. The court's order that brought Louisiana to the settlement table in this statewide redistricting case read in part: the Louisiana House

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<sup>208</sup> Excerpts from the transcript reflecting the court's command to the plaintiffs to produce the requested documents are on file with the author. It is worth mentioning that even after this order was entered, plaintiffs again were prepared to flout the court's ruling. Plaintiffs initially refused to make the witnesses with knowledge of the revisions to the compelled documents available to be deposed. Only once all of the litigants had joined a conference call and were awaiting the judge's participation in the call did the plaintiffs finally concede. The judge had earlier warned that the losing party would be sanctioned, and it was only in face of this further threat that the State relented and allowed the depositions to go forward.

<sup>209</sup> Documents on file with the author.

<sup>210</sup> Excerpts of Deposition Transcript of Charles Emile Bruneau, Jr., Speaker Pro Tempore of the La. House of Representatives 33–34, 54–56, 62–63 (Jan. 7, 2003) (on file with author) (explaining that the purpose of the guideline revisions was to make them understandable to members of the House of Representatives; conceding that the guideline revisions substituted the direct reference to the VRA and other relevant federal constitutional and statutory provisions by requiring that proposed redistricting plans abide by "all" laws; asserting that the guideline revisions effectuated "minimal" changes).

<sup>211</sup> See *La. House of Representatives v. Ashcroft*, Civ. No. 02-0062-JR (D.D.C. Feb. 13, 2003) (order denying defendants' motion for summary judgment).

of Representatives has “subverted what had been an orderly process of narrowing the issues in this case by making a radical mid-course revision in their theory of the case and by blatantly violating important procedural rules.”<sup>212</sup>

It is far more efficient to expose this type of discriminatory manipulation of standards when jurisdictions have the burden of explaining their conduct under Section 5 than it would be to uncover the very same discriminatory motives in more costly and complicated Section 2 litigation.

g. Secrecy and Exclusion of African-American Citizens from Decision-Making Processes

On March 15, 1965, as President Lyndon Johnson sent the Voting Rights Bill to Congress, he warned the nation that, “[E]ven if we pass this bill, the battle will not be over . . . I know how difficult it is to reshape the attitudes and the structure of our society.”<sup>213</sup> The record in Louisiana demonstrates just how deeply rooted the “attitudes and structures” of voting discrimination are today. Not only have officials often excluded local African-American citizens from the decision-making process, they also have often made important decisions in secrecy.

In 1994, the St. Landry Parish Police Jury was advised by a white alderman in the town of Sunset that whites were uncomfortable walking into an African-American neighborhood to vote at the Sunset Community Center.<sup>214</sup> Without holding a public hearing, seeking any further public input, or advertising the change in any way, the police jury moved the polling place to the Sunset Town Hall.<sup>215</sup> African-American leaders in Sunset did not hear of the change until informed of it by DOJ officials performing a Section 5 preclearance review, at which time they “expressed vehement opposition” to the change, because the proposed Town Hall had been the site of historical racial discrimination and many African-American citizens did not feel welcome there.<sup>216</sup> As the DOJ pointed out in its objection letter, “the decisionmaking process considered the presumed desires of white voters, but made no effort to consider the desires of African-American voters.”<sup>217</sup> If not for the light shone by the Section 5 preclearance process, Af-

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<sup>212</sup> *Id.* at 1.

<sup>213</sup> President Lyndon Baines Johnson’s Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281 (Mar. 15, 1965).

<sup>214</sup> Letter from Kerry Scanlon, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Kathy Moreau, Sec’y, St. Landry Parish Police Jury (Sept. 12, 1994) (on file with author).

<sup>215</sup> *Id.* at 1.

<sup>216</sup> *Id.* at 2.

<sup>217</sup> *Id.*

rican-American voters might not have known of the change until after they arrived at the wrong polling place on election day in 1994, at which point the retrogressive impact would have already been felt.

Significantly, in the absence of a vigorous Section 5 enforcement, under cover of darkness, jurisdictions such as St. Landry would be free to make small changes that would have the pronounced impact of narrowing the opportunities for African-Americans to participate in the political process. For example, even if under the circumstances described African-American citizens could have filed Section 2 litigation, the suit certainly would not have stopped St. Landry from using secrecy to exclude African-American voters from providing input and could have provided a remedy only after voters had suffered the harm. In situations such as this, Section 2 litigation, which is expensive, complex and time consuming, is no substitute for Section 5 preclearance. Absent Section 5 protection, officials would know that, as a practical matter, African-American citizens and their counsel simply could not stop most changes by utilizing Section 2 litigation. Based on the situation that we have described in Louisiana since the time of the 1982 renewal, without a strong Section 5 preclearance process secret polling place and other harmful changes would likely proliferate.

As the following examples make clear, the St. Landry polling place relocation was only one of many instances in which African-American citizens learned of discriminatory voting changes or practices only because of Section 5 review. In 1994, the East Carroll Parish School Board hastily adopted a redistricting plan “without the knowledge of black leaders and unsuccessful black . . . candidates, who would have spoken in opposition.”<sup>218</sup> In 1992, the Morehouse Parish Police Jury listened to redistricting proposals by African-American citizens; then, at the end of the process, quickly adopted a different proposal that had not been debated, but drew a Section 5 objection for diluting the African-American vote in the rural part of the parish.<sup>219</sup> At another point in the redistricting process, the police jury adopted a plan that gerrymandered an African-American incumbent into a majority-white district in retaliation for his championing of an alternative plan; the DOJ again objected.<sup>220</sup> Finally, in 1994, the DOJ found that the DeSoto Parish School Board held sham public debates before adopting, without discussion, a redistricting plan that the board members had privately agreed upon a month earlier.<sup>221</sup>

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<sup>218</sup> Letter from Isabelle Katz Pinzler, *supra* note 199, at 2.

<sup>219</sup> See Letter from James P. Turner, *supra* note 194, at 1–2.

<sup>220</sup> See Letter from John R. Dunne, *supra* note 193, at 2.

<sup>221</sup> Letter from Deval L. Patrick, *supra* note 190, at 2.

One of the often-overlooked aspects of the preclearance process is that Section 5 coverage is not simply limited by external factors, such as the congressionally-established effective dates. Eligibility for bailout under Section 4 is also determined by factors that jurisdictions can control, like compliance with Section 5 submission rules.<sup>222</sup> Many Louisiana officials still stubbornly resist DOJ requests for even the most basic information about voting changes. For example, in 1993, when Morehouse Parish attempted to reduce the number of its elected justices of the peace, the DOJ noted that the parish's initial submission "contained virtually none of the information required"; that the parish ignored a request for more information for over a year; and that the response, when finally received, still contained no population data by race and included maps of such poor quality that "we cannot determine the dividing lines between existing and proposed districts."<sup>223</sup> The DOJ noted similar efforts by Louisiana officials to withhold information in the city of Cottonport in 1987,<sup>224</sup> Jackson Parish in 1991,<sup>225</sup> Evangeline Parish in 1993<sup>226</sup> and Richland Parish in 2003.<sup>227</sup> Objections followed in each instance.

#### h. The Relationship Between State and Local Governments

Voting discrimination in Louisiana has operated on many levels, with state government actions enabling or reinforcing local government actions. In 1998, the Louisiana State Legislature provided local governments with an excuse for not drawing additional majority-minority districts when it passed a law absolutely freezing local voting precinct lines through 2003, including the three crucial redistricting years following the 2000 Census.<sup>228</sup> In its objection letter, the DOJ noted that during the 1990s, many local governments claimed to be unable to redraw districts to accommodate minority voting interests because state law forbade the drawing of district

<sup>222</sup> 42 U.S.C. § 1973b(a)(1)(D) (2006); *see also infra* Part IV.B.2.j.

<sup>223</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Angie Rogers LaPlace, La. Assistant Attorney Gen. (Mar. 26, 1993) (on file with author).

<sup>224</sup> Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to M.E. Kenneth Selle, President, Tri-S Assocs., Inc. (Apr. 10, 1987) (on file with author).

<sup>225</sup> Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Troy L. Smith, President, Jackson Parish Police Jury (Oct. 8, 1991) (on file with author).

<sup>226</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Dale Reed, Sec'y-Treasurer, Evangeline Parish Police Jury (Sept. 17, 1993) (on file with author).

<sup>227</sup> Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to John R. Sartin, Superintendent, Richland Parish Sch. Bd., David A. Creed, Executive Dir., N. Delta Reg'l Planning & Dev. Dist. (May 13, 2003), *available at* [http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/l\\_051303.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_051303.pdf).

<sup>228</sup> Letter from Bill Lann Lee, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Angie Rogers LaPlace, La. Assistant Attorney Gen. (Jan. 13, 1998), *available at* [http://www.usdoj.gov/crt/voting/sec\\_5/ltr/L\\_011398.pdf](http://www.usdoj.gov/crt/voting/sec_5/ltr/L_011398.pdf).

lines that crossed precinct lines.<sup>229</sup> But for another DOJ objection that nullified the 1998 law,<sup>230</sup> local officials would have been able to rely on state law, thrown up their hands, and claimed that they simply did not have the ability to draw districts that provided electoral opportunities for African-Americans. It is precisely this kind of nexus between state and local governments united in discriminatory purpose and practice that requires the outside intervention provided for by Section 5.

i. More Information Letters

Under Section 5, the burden of showing that a proposed change is not retrogressive is on the jurisdiction proposing the change.<sup>231</sup> If officials refuse to provide enough information to evaluate the change, review is delayed because of the jurisdiction's own acts, and the change cannot be pre-cleared. By sending "more information" letters to submitting jurisdictions, which point out deficiencies in a submission and require jurisdictions to provide supplementary information, the DOJ has deterred and/or effectively blocked additional discriminatory voting changes in Louisiana. No fewer than forty-five submissions were withdrawn since the 1982 renewal after additional information was requested.<sup>232</sup> It stands to reason that the DOJ's request for more information put the jurisdictions on notice of the deficiencies of their submissions. Accordingly, in these situations, the jurisdictions withdrew the submissions rather than face a likely objection.

The pattern makes it clear that but for the prophylactic scrutiny of the Section 5 preclearance process, white officials would have successfully shut African-American citizens out of decisions with substantial impact on voters. If Section 5 is allowed to expire, the burden of proof will once again be on the victims of discrimination, and secrecy will be on the side of the officials who practice it.

j. Failures to Submit Voting Changes for Preclearance and Judicial Preclearance Determinations

With an effective Section 5 administrative process in place, federal courts are only rarely called upon to decide Section 5 issues—primarily when the government completely avoids its obligations to seek preclearance of voting changes, or when it seeks judicial review of administrative

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<sup>229</sup> *Id.* at 3. Districts are areas that correspond with a particular seat at issue in an election; precincts are smaller areas served by a particular polling place.

<sup>230</sup> *Id.*

<sup>231</sup> *Branch v. Smith*, 538 U.S. 254, 263 (2003).

<sup>232</sup> Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 47, 61 tbl.3.3 (Ana Henderson ed., 2007).

determinations. Despite the limited need for judicial involvement in Section 5 determinations, the federal courts have taken Louisiana and its subdivisions to task on multiple occasions since 1982 for Section 5 violations.

At the statewide level, courts have enforced Section 5 by preventing Louisiana from diluting the voting strength of African-Americans in situations ranging from elections for state judges to discriminatory annexations. Under Louisiana's Constitution of 1973, citizens elect judges to the various state courts, including the Louisiana Supreme Court, its courts of appeal, district courts and family courts.<sup>233</sup> The delegates to the 1973 Constitutional Convention voted overwhelmingly to maintain the method of electing state judges that had been in place prior to VRA, which provided for at-large election of district judges by district, as well as both division and at-large election of circuit judges.<sup>234</sup> Since the enactment of the VRA, the Louisiana legislature has often sought preclearance when adding new judgeships for the various district courts, family courts and courts of appeal.<sup>235</sup> However, "the state failed to obtain the requisite preclearance" for eleven districts for district court (sometimes with multiple divisions each) and two districts for the circuit court.<sup>236</sup> At the time of the litigation, there were a total of forty district courts and five circuit courts of appeal.<sup>237</sup> Therefore, for 27.5% of the districts created for district court judges and 40% of the districts for circuit court judges the State ignored its preclearance obligations. Given Louisiana's African-American population of about 1,299,281 following the 1990 Census,<sup>238</sup> the failure to obtain preclearance as required for district court election districts potentially affected the voting rights of hundreds of thousands of African-Americans, while the failure to obtain preclearance for circuit court election districts potentially adversely affected several hundred thousand African-American citizens of the state.

Rejecting any contention that these failures were merely *de minimus* violations, the district court strongly rebuked the State:

The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act of 1965. If this were the first time a three-judge court in the Middle District of Louisiana was

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<sup>233</sup> Clark v. Roemer, 751 F. Supp. 586, 588 (M.D. La. 1990), *rev'd*, 500 U.S. 646 (1991).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 589.

<sup>236</sup> *Id.* at 589, 600.

<sup>237</sup> Brief for Appellees at 1, Clark v. Roemer, 500 U.S. 646 (1991) (No. 90-952), 1991 WL 11007874.

<sup>238</sup> U.S. Census Bureau, 1990 Census Summary File 1, at tbl.P006, available at <http://factfinder.census.gov> (last visited Jan. 24, 2008).



confronted with the problem of hearing suit seeking to enjoin an election because of the state's failure to obtain preclearance, the Court might avoid commenting on the matter. It appears to this Court that those in charge of the election process in Louisiana should undertake a very careful and detailed inventory of all legislation which relates to the election of officials in Louisiana and determine once and for all whether preclearance has been obtained from the Attorney General if such is required under the Voting Rights Act of 1965. The people of the State of Louisiana, the candidates and incumbents, and the federal courts deserve nothing less.<sup>239</sup>

In order to balance the Section 5 rights of plaintiffs, the interests of state and local authorities and public confidence in criminal convictions and civil judgments issued by judges from unprecleared election districts, the district court allowed the elections to proceed and the elected judges to take office on a provisional basis while the State sought preclearance from the Attorney General or the District Court of the District of Columbia; should the State have failed to obtain preclearance, the court would have set aside the elections.<sup>240</sup> On appeal, underscoring the seriousness of the Section 5 violation, the U.S. Supreme Court unanimously found this remedy inadequate, instead requiring the district court to enjoin all such elections immediately until the State received the requisite judicial or administrative preclearance.<sup>241</sup> Had the Supreme Court not intervened to enforce vigorous remedies for Section 5 violations, a substantial proportion of Louisiana's African-Americans would have continued to face discriminatory elections for district court judgeships and approximately 520,000 African-American Louisianans would have continued to face discriminatory elections for circuit court judgeships.

Louisiana's record of complying with Section 5 for local elections is even worse than its record for state elections, which is precisely why Section 5 arguably plays its most important role in Louisiana in preventing voting discrimination for local office. The District Court for the Western District of Louisiana has enjoined multiple elections in jurisdictions that failed to preclear voting changes. In 1991, it enjoined the city of Monroe from holding elections in Wards 1, 2 and 4 until the city obtained preclearance for elections to the city court,<sup>242</sup> in a jurisdiction of approximately

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<sup>239</sup> *Clark*, 751 F. Supp. at 589 n.10.

<sup>240</sup> *Id.* at 594-96.

<sup>241</sup> *Clark v. Roemer*, 500 U.S. 646, 659-60 (1991).

<sup>242</sup> *Hunter v. City of Monroe*, Civ. A. No. 90-2031, 1991 WL 12799, at \*1 (W.D. La. 1991).

18,000 African Americans.<sup>243</sup> In 1994, the same district court enjoined elections under the Vernon Parish School Board's post-1990 reapportionment, because the school board failed to submit its 1994 modified reapportionment resolution.<sup>244</sup> The school board's reapportionment also violated the "one-person, one-vote" standard.<sup>245</sup> At that time, Vernon Parish's African-American population was approximately 13,000.<sup>246</sup>

Redistricting in Bossier Parish<sup>247</sup> and annexations in Shreveport,<sup>248</sup> though, proved more controversial than the Monroe and Vernon Parish violations. Following the 1990 Census, Bossier Parish drew the districts for its school board elections with the discriminatory, though allegedly nonretrogressive, purpose of diluting African-American voting strength.<sup>249</sup> The 1990 Census required the Bossier Parish School District to redraw districts for electing its members.<sup>250</sup> Like the police jury, which governs the parish generally, the school board is composed of twelve members elected from single-member districts.<sup>251</sup> As of 1995, no African-American candidate had been elected to membership on the board,<sup>252</sup> although by 2000, three African-Americans won office on the board.<sup>253</sup> Candidates for the board faced "majority voting requirements: a candidate must receive a majority of

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<sup>243</sup> The city of Monroe has five districts. See City of Monroe, City Council, <http://www.monroela.us/citycouncil.php> (last visited Jan. 24, 2008). After the 1990 Census, it had an African-American population of 30,504. U.S. Census Bureau, 1990 Census Summary File 1, at tbl.P006, available at <http://factfinder.census.gov> (last visited Jan. 24, 2008).

<sup>244</sup> Dye v. McKeithen, 856 F. Supp. 303, 308–09 (W.D. La. 1994).

<sup>245</sup> *Id.* at 312.

<sup>246</sup> U.S. Census Bureau, 1990 Census Summary File 1, at tbl.P006, available at <http://factfinder.census.gov> (last visited Jan. 24, 2008).

<sup>247</sup> Bossier Parish Sch. Bd. v. Reno (*Bossier Parish I*), 907 F. Supp. 434 (D.D.C. 1995); Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 520 U.S. 471 (1997); Bossier Parish Sch. Bd. v. Reno (*Bossier Parish III*), 7 F. Supp. 2d 29 (D.D.C. 1998); Reno v. Bossier Parish Sch. Bd. (*Bossier Parish IV*), 528 U.S. 320 (2000).

<sup>248</sup> United States v. Louisiana, 952 F. Supp. 1151, 1154 (W.D. La. 1997), *aff'd*, 521 U.S. 1101 (1997).

<sup>249</sup> *Bossier Parish III*, 7 F. Supp. 2d at 39 (Kessler, J., dissenting); see also *Bossier Parish IV*, 528 U.S. at 356–57 (Souter, J., dissenting). Justice Souter noted in his dissent:

There is no reasonable doubt on this record that the Board chose the Policy Jury plan for no other reason than to squelch requests to adopt the NAACP plan or any other plan reflecting minority voting strength, and it would be incredible to suggest that the resulting submergence of the minority voters was unintended by the Board whose own expert testified that it understood the illegality of dilution. If, as I conclude below, . . . dilutive but nonretrogressive intent behind a redistricting plan disqualifies it from § 5 preclearance, then preclearance is impossible on this record.

*Bossier Parish IV*, 528 U.S. at 356–57 (Souter, J., dissenting).

<sup>250</sup> See *Bossier Parish I*, 907 F. Supp. at 437.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 437–38.

<sup>253</sup> *Bossier Parish IV*, 528 U.S. at 341 (Thomas, J., concurring).

the votes cast, not merely a plurality, to win an election.”<sup>254</sup> Initially, the school board sought to redraw its districts together with the police jury; because the incumbents of those two bodies had divergent interests, however, such cooperation proved impossible.<sup>255</sup> Facing the prospect of redistricting on its own, the school board hired a consultant to prepare a plan.<sup>256</sup> Shortly after the process had begun, the president of the local chapter of the NAACP wrote to the school board asking to be involved in the process and indicating that the NAACP would oppose plans that lacked majority African-American districts.<sup>257</sup> In 1992, the NAACP prepared a redistricting plan that included two majority African-American districts and presented them to the school board, which, in turn, dismissed the plan because it “required splitting a number of voting precincts.”<sup>258</sup>

When the board members met with the consultant preparing the redistricting plan, many of them made statements evidencing a discriminatory intent in their redistricting plans.<sup>259</sup> On October 1, 1992, the board adopted the police jury redistricting plan, rather than the NAACP plan.<sup>260</sup> The police jury plan pitted incumbent school board members against each other and did not distribute school districts evenly.<sup>261</sup> On August 30, 1993, the Attorney General interposed an objection to the plan, based on information acquired since preclearing the same plan for the police jury itself, on the grounds that it “unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice.”<sup>262</sup> The school board then sought judicial preclearance from the United States District Court for the District of Columbia.<sup>263</sup>

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<sup>254</sup> *Bossier Parish I*, 907 F. Supp. at 437.

<sup>255</sup> *Id.* at 438.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* Louisiana law requires school board districts to contain whole precincts, but also allows school boards to request precinct changes from the police jury in order to accommodate new plans. The board never approached the police jury to make such requests. *Id.*

<sup>259</sup> *Id.* at 438 n.4. Such statements included testimony that while some favor “having black representation on the board, other school board members oppose the idea,” that “the Board was ‘hostile’ toward the idea of a black majority district” and that one of the white members had “worked too hard to get [his] seat and that he would not stand by and ‘let us take his seat away from him.’” *Id.* (some internal quotation marks omitted).

<sup>260</sup> *Id.* at 439.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* (internal quotation marks omitted).

<sup>263</sup> *Id.*

In analyzing whether judicial preclearance was proper, the D.C. District Court and the Supreme Court both considered the case twice.<sup>264</sup> In so doing, they accepted many stipulations of the parties, such as: (1) the plan had no retrogressive effect;<sup>265</sup> (2) voting is racially polarized in Bossier Parish;<sup>266</sup> (3) one or two majority African-American districts could have been drawn while respecting traditional districting principles;<sup>267</sup> (4) when the police jury plan was opened for public comment it was widely criticized for diluting minority voting strength and garnered no public support;<sup>268</sup> and (5) the police jury plan had a discriminatory impact “in falling ‘more heavily on blacks than on whites’ . . . and in diluting ‘black voting strength.’”<sup>269</sup>

Indeed, the judges on the D.C. District Court and the Justices on the Supreme Court nearly agreed that Bossier Parish adopted the police jury plan with a discriminatory purpose.<sup>270</sup> In granting judicial preclearance, the district court noted that “[e]vidence in the record tending to establish that the board departed from its normal practices . . . establishe[d] rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise, but [wa]s not evidence of retrogressive intent.”<sup>271</sup> Rather, the evidence proved a “tenacious” intent “to maintain the status quo”<sup>272</sup>—in this case, the exclusion of African-Americans from opportunities to elect candidates of choice, resulting in an all-white school board. The dissent characterized Bossier Parish’s adoption of the police jury plan as motivated by a “nonretrogressive but nevertheless discriminatory intent” to “maintain th[e] discriminatory status quo by unconstitutionally diluting black voting strength.”<sup>273</sup> In affirming the district court, the Supreme Court did not disturb the lower court’s factual findings since it reasoned that Section 5 does

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<sup>264</sup> See *id.* at 463; *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 520 U.S. 471 (1997); *Bossier Parish Sch. Bd. v. Reno (Bossier Parish III)*, 7 F. Supp. 2d 29 (D.D.C. 1998); *Reno v. Bossier Parish School Board (Bossier Parish IV)*, 528 U.S. 320 (2000).

<sup>265</sup> *Bossier Parish I*, 907 F. Supp. at 440.

<sup>266</sup> *Id.* at 454 (Kessler, J., dissenting).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 457 (Kessler, J., dissenting).

<sup>269</sup> *Bossier Parish IV*, 528 U.S. at 349 (Souter, J., dissenting).

<sup>270</sup> See *Bossier Parish III*, 7 F. Supp. 2d at 39 (Kessler, J., dissenting); *Bossier Parish IV*, 528 U.S. at 356–57 (Souter, J., dissenting).

<sup>271</sup> *Bossier Parish III*, 7 F. Supp. 2d at 32. The court did, however, conclude that though it could “imagine a set of facts that would establish a ‘non-retrogressive, but nevertheless discriminatory, purpose,’ . . . those imagined facts are not present here.” *Id.* at 31.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 39 (Kessler, J., dissenting). Cf. *Bossier Parish IV*, 528 U.S. at 356–57 (Souter, J., dissenting).

not prohibit preclearance of a redistricting plan enacted with a discriminatory, but nonretrogressive, purpose.<sup>274</sup>

In short, the Bossier Parish School Board adopted an admittedly dilutive redistricting plan, which the courts judicially precleared on the grounds that, while the school board may have acted with intent to discriminate, it did not act with intent to retrogress or worsen the position of the parish's African-American citizens. The Supreme Court and the D.C. District Court allowed this plan, adopted with discriminatory purpose, in a parish without any minority-preferred representation on the elected body that was responsible for the policy decisions about the education of all of the children in the parish.<sup>275</sup> This result seems particularly troubling in a state with such a well-documented and protracted history of discrimination in education and voting. Indeed, the practical impact of the Supreme Court's holding in *Bossier II* is that the Court has effectively created a "discrimination dividend" standard whereby jurisdictions that have effectively maintained adherence to exclusion of African-Americans remain free to *intentionally* do so in the future, consistent with Section 5 of the VRA.

While Bossier Parish purposefully drew dilutive districts, Louisiana, acting on behalf of Shreveport, resisted its Section 5 obligations for hundreds of annexations, which diluted the African-American vote in Shreveport for nearly two decades. In 1976 and 1978, the city of Shreveport submitted its city charter and various annexations, as they affected the city council, to the Attorney General for preclearance.<sup>276</sup> Shreveport failed to identify any effect these annexations would have on the city court, a political body distinct from the city council.<sup>277</sup> In 1978, the Attorney General precleared "(1) the annexations as they affected the City Council elections and (2) the City Charter."<sup>278</sup> In 1989, the city submitted additional annexations for preclearance, which the Attorney General denied.<sup>279</sup> In 1992, Louisiana, acting on behalf of the city, submitted for preclearance legislation that created a fourth city court judicial position and changed the method of electing its court judges from at-large to a combination of multimember and single-member districts; again, the Attorney General denied

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<sup>274</sup> *Bossier Parish IV*, 528 U.S. at 328.

<sup>275</sup> See *Bossier Parish I*, 907 F. Supp. at 437 (17.6% of Bossier Parish's 86,088 residents, after the 1990 Census, are African-American and of sufficient age to vote); *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 520 U.S. 471, 490 (1997).

<sup>276</sup> *United States v. Louisiana*, 952 F. Supp. 1151, 1154 (W.D. La. 1997), *aff'd*, 521 U.S. 1101 (1997).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 1154–55.

<sup>279</sup> *Id.*

preclearance.<sup>280</sup> In 1993, the city submitted for preclearance “321 annexations to the boundaries and jurisdiction of the City Court that had been implemented between 1967 and 1992,” and in 1994, it submitted six more annexations.<sup>281</sup> Yet again, the Attorney General interposed an objection, explaining that “the proposed changes effectuated an eleven percentage-point decrease in black voting strength.”<sup>282</sup>

Following this objection and in direct response to it, Louisiana “did an about-face.”<sup>283</sup> “In a September 16, 1994 letter from the Assistant Attorney General of Louisiana, the State, *for the first time*, argued that Section 5 preclearance of the annexations to the City Court was unnecessary because the Attorney General had previously precleared annexations for the City Council elections.”<sup>284</sup> The State remained intransigent in this position,<sup>285</sup> which the court viewed as patently unreasonable.<sup>286</sup> Remarkably, despite “the City’s and State’s failure to obtain administrative or judicial preclearance for the annexations affecting the Shreveport City Court elections, the City” moved ahead with these elections.<sup>287</sup> Finding separate preclearance necessary for the Shreveport City Court,<sup>288</sup> but concluding that the annexations never received preclearance as they affected the city court elections,<sup>289</sup> the court crafted an appropriate injunction that balanced the gravity of complying with Section 5’s obligations with the need not to upset the city’s judiciary, which elected judges for decades through districts not properly precleared.<sup>290</sup> The court ordered the city and State “to seek judicial preclearance” and enjoined Louisiana’s “Secretary of State from issuing the ‘elected’ City Court judges their commissions for a new six-year term,” but it also permitted the incumbent city court judges “to holdover in

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<sup>280</sup> *Id.* at 1155.

<sup>281</sup> *Id.* (emphasis added).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1156.

<sup>286</sup> *See id.* at 1173.

<sup>287</sup> *Id.* at 1156. As it turned out, the judges seeking office ran unopposed and were, thus, statutorily deemed elected without having actually to contest the election and win votes. After the United States modified its complaint to reflect the relief that would be proper absent a contested election, the district court heard the case on the merits. *Id.*

<sup>288</sup> *Id.* at 1167. The court identified three primary grounds for the reasonableness of this position. First, the city court and city council were established under different legislation. Second, they enjoy separate electorates. Third, they employ differing methods of election—the city court holds elections at-large, while the city council has used single-member districts since the 1970s. *Id.* The court also sought to give Section 5 a broad interpretation and to maintain the specificity requirement for administrative preclearance. *Id.* at 1168.

<sup>289</sup> *Id.* at 1169–72.

<sup>290</sup> *Id.* at 1173.

their offices until the merits of the [judicial preclearance action] have been conclusively determined.”<sup>291</sup> In the relevant period, the actions of Shreveport and the state affected the voting rights of approximately 89,000 African-Americans.<sup>292</sup>

Since the 1982 reauthorization, local Louisiana governments have conducted elections without first attempting to preclear voting changes, have designed districts with discriminatory (though nonretrogressive) purposes and have flatly and unreasonably insisted that preclearance obligations do not bind hundreds of voting changes though the law makes plain that they do. The State of Louisiana has often adopted the patently unreasonable positions asserted by its local governments and has itself resisted full compliance with its obligations to obtain preclearance for voting changes affecting elections for state judges. By vigorously enforcing Section 5 obligations for state and local elections since 1982, the federal courts have protected hundreds of thousands of African-Americans in Louisiana against discrimination in voting. This very recent history of failures to comply with the VRA provides some indication of the extent of the backsliding in African-American opportunities to participate in the political process and elect candidates of choice that would ensue in the absence of Section 5 preclearance.

President Johnson’s 1965 challenge—to change the attitudes and structures from which voting discrimination arises—has not been met. Intransigent officials throughout the state, and at its highest levels of power, are commonplace and have persisted in discriminatory behavior through decades in order to dilute the African-American vote. The post-1982 renewal experience in Louisiana reveals that too many officials cling to old strategies of dilution, even while they develop new ones, resist transparency, conceal public information and attempt to shut African-American citizens out of decision-making processes. With the roots of discrimination still so firmly in place in Louisiana, Section 5 appears, in many respects, to be as necessary now as it was in 1965, 1970, 1975 and in 1982 in order to avoid dramatic, unnecessary and, unfortunately, inevitable retrogression in African-American political opportunity.

k. Federal Observers

The federal observer provisions are another useful aspect of the VRA’s minority protection statutory goal. Upon a threshold showing of

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<sup>291</sup> *Id.* at 1174.

<sup>292</sup> U.S. Census Bureau, 1990 Census Summary File 1, at tbl.P006, available at <http://factfinder.census.gov> (last visited Jan. 24, 2008).

credible complaints of election-related irregularities, the DOJ can dispatch observers to monitor elections and record their observations.<sup>293</sup> The observer provisions serve two useful purposes. First, the presence of federal election monitors has a deterrent effect on would-be violators. Second, where deterrence does not work, the observer reports provide a firsthand factual predicate for additional DOJ enforcement efforts. The DOJ has dispatched observers to parishes in Louisiana more than a dozen times since 1982.<sup>294</sup> The DOJ maintains records relating to the federal observer reports.

### 3. Section 2 Violations

The protections of one of the permanent enforcement provisions of the VRA, Section 2, have worked in combination with Section 5 preclearance to enhance political opportunities for African-Americans in Louisiana. At the heart of a Section 2 vote dilution claim lies the issue of whether racial or language minorities' right to have an equal opportunity to elect their candidates of choice has been undermined by voting practices or procedures.<sup>295</sup> The cases reviewed in this section demonstrate why courts have consistently determined since 1986, and as recently as 2002, that African-Americans in Louisiana have been denied this most fundamental opportunity. The violations that affect various public offices, including judicial, aldermanic, councilmanic and school boards, have unjustly burdened many thousands of African-American citizens in Louisiana.

#### a. Judicial Offices Section 2 Violations

Beginning in 1986, Louisiana's system for the election of judges was alleged to violate VRA. In the *Clark v. Roemer*<sup>296</sup> line of cases, African-American voters and African-American attorneys qualified to be elected judges to various courts throughout the state's court system finally decided that enough vote dilution was enough. In a case alleging that the use of multimember districts to elect judges operated to dilute African-American voting strength in violation of Section 2 of VRA, the parties stipulated to facts that provided the most compelling evidence of African-Americans' inability to effectively participate in the political process in Louisiana.<sup>297</sup>

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<sup>293</sup> See Department of Justice, Federal Observers and Election Monitoring, [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm) (last visited Jan. 24, 2008).

<sup>294</sup> DOJ response to the FOIA request of Jon Greenbaum, Director of the Lawyers' Committee for Civil Rights Under Law's Voting Rights Project (Feb. 4, 2005) (on file with author).

<sup>295</sup> *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 497 (5th Cir. 1987).

<sup>296</sup> *Clark v. Roemer (Clark-2 III)*, 750 F. Supp. 200 (M.D. La. 1990); *Clark v. Roemer (Clark-2 II)*, 777 F. Supp. 445 (M.D. La. 1990); *Clark v. Edwards (Clark-2 I)*, 725 F. Supp. 285 (M.D. La. 1988).

<sup>297</sup> *Clark-2 I*, 725 F. Supp. at 287-94.



For example, of 156 district court judgeships in Louisiana outside of Orleans Parish, only two African-Americans had *ever* been elected in the state's history.<sup>298</sup> During the whole twentieth century, in Orleans Parish—where there has been a consistently high concentration of African-Americans (as high as two-thirds of the population)—only one African-American attorney had ever served on the criminal district court and only three had been elected to serve on the civil district court.<sup>299</sup> Of the forty-eight court of appeal judgeships in the state, only one judge was African-American.<sup>300</sup> No African-American citizen had ever been elected to any statewide office, to the U.S. Congress or to the Louisiana Supreme Court.<sup>301</sup>

The vote dilution claims involved all of the Louisiana courts of appeal and most of the state's forty-one judicial district courts. The federal district court initially found that the state's entire at-large scheme for judicial elections violated Section 2.<sup>302</sup> Initially, although minority vote dilution had not been proven in every district, the court enjoined elections for all family, district and appellate courts until the state system could be revised.<sup>303</sup> The Louisiana State Legislature then proposed a group of constitutional and statutory changes in response to the court's ruling, but the voters rejected them.<sup>304</sup>

The district court subsequently vacated the statewide injunction because it determined that *Thornburg v. Gingles*<sup>305</sup> requires district-by-district findings; thus, it issued revised findings that eleven districts, excluding the 23rd Judicial District Court (JDC), violated Section 2 of the VRA.<sup>306</sup> For those eleven districts, the court concluded that subdistricts had to be created in order to enhance the chances of minority judicial candidates.<sup>307</sup>

Both parties appealed, placing at issue the findings of Section 2 violations in some districts and the refusal to enter such findings in others, including the 23rd JDC. The imperative to end the struggle eventually

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<sup>298</sup> *Id.* at 288.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 290. Jesse Stone, an African-American attorney, was appointed to a vacancy on the Louisiana Supreme Court for seventeen days, from November 2, 1979 through November 19, 1979.

<sup>302</sup> *Clark v. Edwards (Clark-2 I)*, 725 F. Supp. 285, 302 (M.D. La. 1988).

<sup>303</sup> *Id.* at 303.

<sup>304</sup> *Prejean v. Foster*, 227 F.3d 504, 507 (5th Cir. 2000) (discussing history surrounding *Clark-2 I*).

<sup>305</sup> *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>306</sup> *Prejean*, 227 F.3d at 507.

<sup>307</sup> *Clark v. Roemer (Clark-2 II)*, 777 F. Supp. 445, 450 (M.D. La. 1990).

yielded a settlement calling for revisions of fifteen judicial districts, including the eleven that had been covered by the district court's remedial order for subdistricting and the 23rd JDC. The . . . plaintiffs . . . drop[ped] their challenges to the other districts. . . . Preclearance of the plan was granted. Act 780 was the end result of the settlement agreement.

Act 780 of the 1993 Regular Session of the Louisiana Legislature increased from four to five the number of district judges for the 23rd JDC . . . . In the process, Act 780 created two electoral subdistricts within the district. In the whole district, the population ratio is about 70% white/30% black. Subdistrict one is 75% black, contains roughly 20% of the total population, and elects one of the five district judges for the 23rd JDC; sub-district two is 80% white, contains roughly 80% of the total population, and elects four of the district judges.<sup>308</sup>

But before the decade could end, in *Prejean v. Foster*, plaintiffs—residents and voters in the district of the 23rd JDC—alleged the *Clark v. Roemer* settlement itself intentionally discriminated among voters and, thus, violated the Fourteenth and Fifteenth Amendments and Section 2 of the VRA because it effected an impermissible racial gerrymander.<sup>309</sup> Following a grant of summary judgment in the district court (itself “no doubt frustrated by the recent vicissitudes of voting rights law”)<sup>310</sup> for the defendants (the parties to the original *Clark* settlement), the matter proceeded to the U.S. Court of Appeals for the Fifth Circuit.

As described above, the challenged settlement plan divided the 23rd judicial district into two subdistricts, with one majority African-American subdistrict containing 20% of the population and electing only one of five judges.<sup>311</sup> The other majority white subdistrict contained 80% of the population and elected the other four judges.<sup>312</sup> Because of subdistricting, voters in the majority African-American subdistrict could only elect one of the five judges and had no right to vote on the other four.<sup>313</sup> Conversely, voters in the white subdistrict could vote for four of the trial judges but not for the fifth one.<sup>314</sup> But since jurisdiction of the judges elected under Act 780

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<sup>308</sup> *Prejean*, 227 F.3d at 507–08 (footnote omitted). Alvin Turner became the first African-American judge in the 23rd JDC when he was elected in subdistrict one.

<sup>309</sup> *Id.* at 508.

<sup>310</sup> *Id.* at 507.

<sup>311</sup> *Id.* at 508.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

covered all three parishes in the 23rd JDC, any citizen could be a party in the court of a judge, or judges, in whose selection he or she had no role.<sup>315</sup>

After a couple more rounds of remands and appeals, the Fifth Circuit ultimately held that Section 2 of VRA was satisfied and that the trial court had not clearly erred in finding that race was not the predominant factor in the creation of the subdistrict.<sup>316</sup> The court found substantial evidence that the districts were drawn according to traditional districting factors and while race played a role, it was not the predominant factor.<sup>317</sup>

In one other line of cases dealing with the election of state judges, captioned *Chisom v. Roemer*,<sup>318</sup> five African-American registered voters in Orleans Parish, along with the Louisiana Voter Registration Education Crusade, filed a class action suit on behalf of all African-American registered voters in the parish. These plaintiffs, like those in *Clark v. Edwards*,<sup>319</sup> alleged that the system of electing two at-large supreme court justices from the Parishes of Orleans, St. Bernard, Plaquemines and Jefferson violated the VRA, the Fourteenth and Fifteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983 by impermissibly diluting, minimizing and canceling the voting strength of African-American registered voters in Orleans Parish.

Louisiana's Supreme Court consisted of seven judges, five of whom were elected by five respective districts, and two of whom were both elected by one district, the First District.<sup>320</sup> This district was composed of four parishes, three of which were majority white, and one, Orleans Parish, which was majority African-American.<sup>321</sup>

The plaintiffs produced data showing that the First Supreme Court District of Louisiana contained approximately 1,102,253 residents, of whom 63.4% were white and 34.4% were African-American.<sup>322</sup> The First Supreme Court District had 515,103 registered voters, 68% of whom were white and 31.6% of whom were African-American.<sup>323</sup> Plaintiffs contended

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 519–20.

<sup>317</sup> *Id.* at 509–19.

<sup>318</sup> *Chisom v. Roemer (Chisom V)*, 501 U.S. 380 (1991); *Chisom v. Roemer (Chisom IV)*, No. 86-4057, 1989 WL 106485 (E.D. La. 1989); *Chisom v. Edwards (Chisom III)*, 839 F.2d 1056 (5th Cir. 1988); *Chisom v. Edwards (Chisom II)*, 690 F. Supp. 1524 (E.D. La. 1988); *Chisom v. Edwards (Chisom I)*, 659 F. Supp. 183 (E.D. La. 1987).

<sup>319</sup> *Clark v. Roemer (Clark-2 III)*, 750 F. Supp. 200 (M.D. La. 1990); *Clark v. Roemer (Clark-2 II)*, 777 F. Supp. 445 (M.D. La. 1990); *Clark v. Edwards (Clark-2 I)*, 725 F. Supp. 285 (M.D. La. 1988).

<sup>320</sup> *Chisom II*, 690 F. Supp. at 1526.

<sup>321</sup> *Id.*

<sup>322</sup> *Chisom I*, 659 F. Supp. at 183–84.

<sup>323</sup> *Id.*

that the First Supreme Court District of Louisiana should have been divided into two single districts.<sup>324</sup> Plaintiffs suggested that because Orleans Parish's population was 555,515 persons, roughly half the present First Supreme Court District, the most logical division was to have Orleans Parish elect one supreme court justice and the Parishes of Jefferson, St. Bernard and Plaquemine together elect the other supreme court justice.<sup>325</sup> Under the plaintiffs' proposed plan, the First Supreme Court District, encompassing only Orleans Parish, would then have an African-American population and voter registration comprising a majority of the district's population.<sup>326</sup> The other district, comprised of Jefferson, Plaquemines and St. Bernard Parishes, would be majority white.<sup>327</sup>

Plaintiffs sought: (1) a preliminary and permanent injunction against the defendants restraining the further election of justices for the First Supreme Court District until the court made a determination on the merits of their challenge; (2) an order requiring defendants to reapportion the First Louisiana Supreme Court in a manner which "fairly recognize[d] the voting strengths of minorities in the New Orleans area and completely remedie[d] the present dilution of minority voting strength; (3) an order requiring compliance with the VRA; and (4) a declaration from the court that the Louisiana Supreme Court election system violated the VRA and the Fourteenth and Fifteenth Amendments to the U.S. Constitution.<sup>328</sup>

The district court held, erroneously, that Section 2 of the VRA was not applicable to state judicial elections and that plaintiffs had failed to state a claim of intentional discrimination for which relief could be granted under the Fourteenth and Fifteenth Amendments.<sup>329</sup> The Fifth Circuit reversed and remanded, holding that Section 2 applied to every election in which registered voters were permitted to vote.<sup>330</sup> In so holding, the court rejected the argument that the VRA did not apply to the election of judges because judges were not representatives within the meaning of Section 2 of the VRA.<sup>331</sup> But the Fifth Circuit's decision was short-lived, as it was overruled by its subsequent decision in *League of United Latin American Citizens Council No. 4434 v. Clements*,<sup>332</sup> in which the court held that the

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<sup>324</sup> *Id.* at 184.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 189.

<sup>330</sup> *Chisom v. Edwards (Chisom III)*, 839 F.2d 1056, 1064-65 (5th Cir. 1988).

<sup>331</sup> *Id.* at 1064.

<sup>332</sup> 914 F.2d 620 (5th Cir. 1990).

results test in the VRA only applied to elections for representative, political offices, but not to vote dilution claims to judicial elections. The Supreme Court ultimately resolved the matter, determining that vote dilution claims for state judicial elections were included within the ambit of the VRA.<sup>333</sup> The case was later settled.

b. Aldermanic Section 2 Violations

Resistance to opportunities for African-Americans to elect candidates of choice in Louisiana is by no means limited to judgeships or candidates for other state or national offices; it is also evident at the municipal level. If “all politics is local,” VRA protections remain vital to ensuring a level playing field where key decisions about people’s lives are being made every day. No African-American had ever been elected to municipal office in the city of Gretna since its incorporation in 1913, despite equivalent African-American and white voter registration rates.<sup>334</sup> This was in large part due to an informal slating process, known as the “Miller-White Ticket,” which generally ensured a white candidate for every office.<sup>335</sup> The political environment in Gretna was “characterized by a constant reference” to the Miller-White Ticket, comprised of a father and son combination (the Millers) that had served as Chief of Police for sixty consecutive years and a mayor (White) who had served for thirty-four years at the time of the litigation.<sup>336</sup>

In *Citizens for a Better Gretna v. City of Gretna*, African-American voters of Gretna brought an action under Section 2 of the VRA challenging the city’s at-large aldermanic elections.<sup>337</sup> Plaintiffs presented evidence, which the court found “cogent[] and convincing[],” that African-Americans were excluded from the Miller-White Ticket and, by extension, meaningful participation in the political process in Gretna.<sup>338</sup>

The district court found that African-American citizens of Gretna “historically suffered disadvantages relative to white citizens in public and private employment . . . .”<sup>339</sup> In detailing what it considered the relevant facts of the case, the court noted that “Blacks generally suffer higher incidences of unemployment and hold lower paying jobs than do whites.”<sup>340</sup> The me-

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<sup>333</sup> *Chisom v. Roemer (Chisom V)*, 501 U.S. 380 (1991).

<sup>334</sup> *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1117–20 (E.D. La. 1986), *aff’d*, 834 F.2d 496 (5th Cir. 1987).

<sup>335</sup> *Id.* at 1122–23.

<sup>336</sup> *Id.* at 1122.

<sup>337</sup> *Id.* at 1114.

<sup>338</sup> *Id.* at 1123.

<sup>339</sup> *Id.* at 1118.

<sup>340</sup> *Id.*

dian income “[f]or blacks . . . [is] only 52% of [that] . . . for whites.”<sup>341</sup> Less than 10% of “whites in Gretna lived below the poverty line” compared to “34.1% of blacks.”<sup>342</sup> Moreover, while defendants urged that any official discrimination in Gretna prior to the adoption of the VRA did not impede contemporary African-American political participation, the court held that “[t]he record fails to support this conclusion.”<sup>343</sup>

The city had an at-large voting system for its board of aldermen, as well as a majority vote requirement.<sup>344</sup> As noted above, no African-American had ever been elected to the board, despite a population of 28%.<sup>345</sup> The district court found the election system violated the VRA,<sup>346</sup> and the city appealed. The Fifth Circuit upheld the lower court decision, finding that at-large aldermanic elections violated Section 2 of the VRA.<sup>347</sup> The court also observed that

[t]he history of black citizens’ attempts, in Louisiana since Reconstruction, to participate effectively in the political process and the white majority’s resistance to those efforts is one characterized by both *de jure* and *de facto* discrimination. Indeed, it would take a multi-volumed treatise to properly describe the persistent, and often violent, intimidation visited by white citizens upon black efforts to participate in Louisiana’s political process.<sup>348</sup>

Similarly, in *Westwego Citizens for Better Government v. Westwego*,<sup>349</sup> another case involving aldermanic elections, African-American citizens sued to challenge the city’s method of at-large elections, claiming it diluted African-American voting strength. The city is governed by a mayor and a board of five alderman, who exercise considerable authority in the city, ranging from issuing permits, approval of zoning changes and land use requests, to grants of licenses to operate a business or sell alcoholic beverages.<sup>350</sup> Once again, in this small town, no African-American candidate had ever been elected to the board of alderman or any other municipal office in Westwego.<sup>351</sup> Following a series of district court findings for the city and Fifth Circuit remands, the court of appeals finally held that the at-

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<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 1119.

<sup>344</sup> *Id.* at 1115.

<sup>345</sup> *Id.* at 1118.

<sup>346</sup> *Id.* at 1135.

<sup>347</sup> See *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987).

<sup>348</sup> *Citizens for a Better Gretna*, 636 F. Supp. at 1116.

<sup>349</sup> 946 F.2d 1109 (5th Cir. 1991).

<sup>350</sup> *Id.* at 1113.

<sup>351</sup> *Id.*

large system effectively barred African-American citizens from any meaningful role in the city's government in contravention of Section 2.<sup>352</sup> The city was given 120 days to come up with an appropriate remedy that could be precleared.<sup>353</sup>

c. School Board Section 2 Violations

In *St. Bernard Citizens for Better Government v. St. Bernard Parish School Board*,<sup>354</sup> the 2000 Census revealed that eleven districts, which had been in existence since the school board's inception, were impermissibly unequal in population, with a deviation of 33.7%.<sup>355</sup> A demographer determined that the districts could be redrawn with one majority African-American district in compliance with the Equal Protection Clause and VRA.<sup>356</sup> Such a plan was developed and presented to ten of the eleven board members, all of whom were "acceptive" of the plan.<sup>357</sup> However, the board never voted on the plan.<sup>358</sup> As was the case in Jefferson Parish (detailed below), no African-American candidate had ever been elected to the St. Bernard Parish School Board.<sup>359</sup> Further, to ensure that African-Americans would not have any representatives in the future, the parish voters approved a plan to reduce the size of the parish school board from eleven members elected from single-member districts to seven members, including five elected from single-member districts and two elected at-large.<sup>360</sup>

The plaintiffs contended that the five-two plan injured African-American voters.<sup>361</sup> The court found the five-two plan to be dilutive and to violate Section 2 of the VRA, based on the *Gingles* and totality of the circumstances tests, a history of discrimination, continuing socioeconomic effects and racially polarized and bloc voting—including the fact that a majority in the precinct voted for David Duke in the primary and run-off gubernatorial election.<sup>362</sup> The court held that the eleven-member proposed

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<sup>352</sup> *Id.* at 1124–25.

<sup>353</sup> *Id.* at 1124.

<sup>354</sup> Civ. A. No. 02-2209, 2002 U.S. Dist. LEXIS 16540 (E.D. La. Aug. 28, 2002).

<sup>355</sup> *Id.* at \*11.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* at \*12.

<sup>359</sup> *Id.* at \*19.

<sup>360</sup> *Id.* at \*1–2.

<sup>361</sup> *Id.* at \*2–3.

<sup>362</sup> *Id.* at \*26–34.

plan was objective, workable and reasonable.<sup>363</sup> Therefore, plaintiffs prevailed under Section 2.<sup>364</sup>

In *Fifth Ward Precinct 1A Coalition & Progressive Association v. Jefferson Parish School Board*,<sup>365</sup> several coalitions of registered voters and residents of Jefferson Parish sought declaratory and injunctive relief against the district boundaries for election of members to the Jefferson Parish School Board. The parties entered into a consent judgment providing for the creation of an African-American majority district.<sup>366</sup>

d. Councilmanic Section 2 Violations

In *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*,<sup>367</sup> the parish's seven council members were elected through a combination of single-member, floater and at-large districts, utilizing a majority vote requirement.<sup>368</sup> The parish was apportioned into four districts.<sup>369</sup> Each district elected one councilperson: one was elected at-large from Districts 1 and 2, another was elected at-large from Districts 3 and 4 and the last was elected from the parish at-large.<sup>370</sup> Under these electoral arrangements, no African-American candidate had ever been elected to Jefferson Parish Council.<sup>371</sup>

Plaintiffs, associations and a number of African-American registered voters in Jefferson Parish, brought suit against the parish, alleging that the plan for apportioning the seats on the Jefferson Parish Council violated Section 2 of the VRA.<sup>372</sup> The district court, after finding a Section 2 violation, accepted a new districting plan submitted by the parish.<sup>373</sup> However, the DOJ refused to preclear it, suggesting that the plan "may well have been motivated by an invidious purpose to minimize black voting strength . . ."<sup>374</sup> After the parish submitted yet another plan, this time with a majority-minority district, the DOJ cleared the plan and filed a memorandum with the district court requesting that the court amend its prior finding that

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<sup>363</sup> *Id.* at \*17.

<sup>364</sup> *Id.* at \*34.

<sup>365</sup> Civ. A. No. 86-2963, 1989 U.S. Dist. LEXIS 467 (E.D. La. Jan. 18, 1989).

<sup>366</sup> *Id.* at \*1-3.

<sup>367</sup> 926 F.2d 487 (5th Cir. 1991).

<sup>368</sup> It is worth noting that Jefferson Parish was the only parish in Louisiana that used a combination of three types of districts to elect its council.

<sup>369</sup> *Id.* at 489.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 490.

<sup>374</sup> *Id.* (quoting DOJ letter).



African-Americans were widely dispersed throughout the parish.<sup>375</sup> After the court amended its prior finding, as the DOJ recommended, the parish appealed yet again.<sup>376</sup> The Fifth Circuit, again affirming a lower court opinion in favor of plaintiffs under Section 2, held that the district court's finding that the *Gingles* factors were satisfied was not clearly erroneous.<sup>377</sup> The court upheld the finding that African-Americans were geographically compact and politically cohesive, that there was racial polarization in council elections and that a white bloc vote consistently defeated the minority-preferred candidate.<sup>378</sup> This case is one example of the important nexus between Section 2 and Section 5.

Although there have been significant Section 2 rulings for plaintiffs in every decade since the time of the last renewal in 1982, Section 2 by itself would not provide adequate protection absent Section 5, because the proof of such claims is complicated under the totality of the circumstances analysis and expensive to marshal—often requiring the retention of a handful of experts whose fees are unreimbursable, even for a successful party. Moreover, while Section 5 stops discrimination before it occurs, Section 2 is a remedy that seeks to undo distortions to the political process. The cost, time and expertise factors suggest that while Section 2 is a necessary complement to Section 5 preclearance, it cannot fairly be said to be an adequate substitute. Whether the Section 2 violations occur in the context of judicial elections, aldermanic elections or school board and parish council elections, the record is clear: Louisiana and its political subdivisions have yet to fully embrace the notion of political equality for African-Americans.

#### 4. Constitutional Voting Rights Cases

An important redistricting case following the 1990 Census illustrates political realities in Louisiana that justify renewal of Section 5 at the same time that it points to constitutional limits on VRA enforcement that have been established by the Supreme Court. During the post-1990 Census round of redistricting, the DOJ conveyed to Louisiana its view that a second majority-minority congressional district would be necessary to obtain preclearance. The federal courts limited the DOJ's ability to leverage Section 5 as a tool for requiring the drawing of additional districts in a series of cases captioned *Hays v. Louisiana*.<sup>379</sup>

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<sup>375</sup> *Id.* at 490–91.

<sup>376</sup> *Id.* at 491.

<sup>377</sup> *Id.* at 493–94.

<sup>378</sup> *Id.*

<sup>379</sup> *Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188 (W.D. La. 1993); *Hays v. Louisiana (Hays II)*, 862 F. Supp. 119 (W.D. La. 1994); *United States v. Hays (Hays III)*, 515 U.S. 737 (1995); *Hays v. Lou-*

Following the 1990 Census, Louisiana's apportionment of Representatives in the U.S. House of Representatives fell from eight to seven members.<sup>380</sup> The state, therefore, had to redraw its districts for electing representatives to federal congressional office.<sup>381</sup> Prior to 1990, African-Americans comprised a majority of voters in only one of Louisiana's eight congressional districts.<sup>382</sup> This district, covering metropolitan New Orleans, had itself been created in response to a 1983 court order finding a violation of Section 2 of the VRA,<sup>383</sup> and "in 1990 that district elected Louisiana's first black representative since Reconstruction."<sup>384</sup>

In drawing the new congressional districts, the Louisiana State Legislature had to comply with the constitutional command to reapportion its congressional delegation, "one-person, one-vote" and the preclearance requirements of Section 5 of the VRA.<sup>385</sup> Because the legislature failed to adopt a redistricting plan in 1991, it was under severe pressure to develop a lawful plan in 1992 in time for the congressional elections.<sup>386</sup> This pressure required the legislature to be reasonably certain that any redistricting plan it adopted would "receive immediate preclearance."<sup>387</sup> In its communications with the DOJ, the "legislators received unmistakable advisories from the Attorney General's office that only redistricting legislation containing two majority-minority districts would be approved ('precleared'), so the Legislature directed its energies toward crafting such a plan."<sup>388</sup> The DOJ demanded a second majority-minority district in order to mitigate the dilution that African-American voters would otherwise suffer due to the continued presence of racially polarized voting.<sup>389</sup> Indeed, the DOJ recognized that, at the time of the *Hays* litigation, Louisiana's population was

30% black, [but] no black candidate ha[d] been elected to any statewide office in this century, and no black candidate in this century ha[d] won

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isiana (*Hays IV*), 936 F. Supp. 360 (W.D. La. 1996). The NAACP/PLDF, the Lawyers' Committee for Civil Rights Under Law and A. Leon Higginbotham, Jr. intervened in *Hays IV* on behalf of African-American citizens, the Louisiana Legislative Black Caucus and then-Congressman Cleo Fields.

<sup>380</sup> *Hays II*, 862 F. Supp. at 122.

<sup>381</sup> *Id.*; see also U.S. CONST. art. I, § 2, cl. 3.

<sup>382</sup> *Hays I*, 839 F. Supp. at 1190.

<sup>383</sup> See *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983).

<sup>384</sup> *Hays III*, 515 U.S. at 740 n.\*.

<sup>385</sup> *Hays I*, 839 F. Supp. at 1195-96.

<sup>386</sup> *Id.* at 1196.

<sup>387</sup> *Id.*

<sup>388</sup> *Hays v. Louisiana (Hays IV)*, 936 F. Supp. 360, 363 (W.D. La. 1996); see also *Hays I*, 839 F. Supp. at 1196 n.21 ("[T]he Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least two 'safe' black districts out of seven.").

<sup>389</sup> The district court later identified this racial polarization, finding "an average, net white crossover vote in non-judicial elections of between 10% and 25%." *Hays I*, 839 F. Supp. at 1208.

election either to Congress or to the Louisiana Legislature from a district where whites comprise a majority of the registered voters. Statistical analyses of voting patterns demonstrate[d] indisputably that voting in Louisiana elections, including congressional elections, is severely polarized along racial lines; black voters cohesively support black candidates, but are consistently unable to elect them to office in white-majority districts because of white bloc voting for white candidates. . . . It is difficult to imagine a stronger record supporting the conclusion that a majority-black district is necessary “to ensure equal political and electoral opportunity” for black voters.<sup>390</sup>

In reaching this conclusion, the DOJ analyzed congressional elections leading up to the 1990 round of redistricting:

For example, from 1986 through 1990, black candidates ran on five occasions in old District 8, the white-majority congressional district having the greatest concentration of black voters (35% black). Black voters in these elections strongly supported black candidates, but each time the black candidate was defeated by the white bloc vote for white candidates. On average, the black candidates in these elections received 87.5% of the black vote but only 9.3% of the white vote.<sup>391</sup>

Therefore, in order to comply with the DOJ’s suggestion that a second majority-minority district would be necessary to avoid diluting minority voting strength, the Louisiana State Legislature made sure to include African-American majorities in two of the seven congressional districts.<sup>392</sup> The Attorney General precleared this plan.<sup>393</sup> The district court held this plan, Act 42 and its later revision in Act 1 to be unconstitutional racial gerrymanders, violating Equal Protection under *Shaw v. Reno*<sup>394</sup> and its progeny. The court found that the legislators relied primarily on race, rather than traditional districting concerns, such as uniting communities of interest, in drawing the districts and did not narrowly tailor the districts to address any compelling governmental interest.<sup>395</sup>

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<sup>390</sup> Brief of Appellants at 30–32, *United States v. Hays*, 515 U.S. 737 (1995) (No. 94-627), 1995 WL 58555 (internal citations omitted).

<sup>391</sup> *Id.* at 31 n.37.

<sup>392</sup> *Hays IV*, 936 F. Supp. at 363.

<sup>393</sup> *Id.*

<sup>394</sup> 509 U.S. 630 (1993).

<sup>395</sup> *Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188, 1208–09 (W.D. La. 1993); *Hays v. Louisiana (Hays II)*, 862 F. Supp. 119, 125, 128 (W.D. La. 1994); *Hays IV*, 936 F. Supp. at 371. The Supreme Court, in the meantime, dismissed the challenge to Act 1, as originally complained of, for lack of standing. *United States v. Hays (Hays III)*, 515 U.S. 737, 747 (1995). Plaintiffs cured this infirmity to the district court’s satisfaction in their amended complaint in *Hays IV*. The district court found the plan insufficiently tailored to satisfy the prerequisites of Section 2 because the second majority-minority district was not compact. *Hays I*, 839 F. Supp. at 1196 n.21; *Hays II*, 862 F. Supp. at 124; *Hays IV*, 936

The four *Hays* opinions explain in detail how the Louisiana Legislature's adoption of its redistricting plans with a second majority-minority congressional district came exclusively in response to the DOJ's demand, rather than from any desire in Louisiana to enhance the political voice of African-Americans.<sup>396</sup> The fact that the DOJ's analysis compelled a second majority-minority district to avoid racial vote dilution, while the district court's analysis found that the DOJ lacked the power to impose such a requirement, should not overshadow the role that Section 5 had on Louisiana's actions. By all accounts, the State of Louisiana would not have acted on its own to mitigate the dilutive effects of continued racially polarized voting at all had the DOJ not pressured them to do so. Indeed, the pattern before and after *Hays*, and most recently in the post-2000 Census redistricting case of *Louisiana House of Representatives v. Ashcroft*, makes clear that efforts to minimize African-American voter strength persist. So even in this case, in which the federal courts essentially held that the DOJ had overreached in its zealous enforcement of the VRA as to the remedy for vote dilution, the underlying facts and record evidence presented are relevant to the assessment of contemporary barriers for minority voters and candidates. Additionally, it bears emphasis that David Duke described the court-ordered redistricting plan that followed, once the plan with a second majority-minority congressional district was invalidated, as "tailor made" for his candidacy.<sup>397</sup>

The constitutional limits that the Supreme Court established on VRA enforcement, and redistricting decisions more specifically, in the *Shaw-Miller* line of cases appear to have been largely internalized by legislators because the expected crop of post-2000 Census constitutional challenges have not materialized.

## V. CONCLUSION

Prior to the enactment of the VRA, Louisiana stood out among the Southern states by having one of the most severe, adaptive and violent his-

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F. Supp. at 370. It similarly found that the plan was not justified by Section 5 concerns because a plan with one majority-minority district out of seven would have been a non-retrogressive change, as compared with the prior apportionment of one majority-minority district out of eight. *Hays IV*, 936 F. Supp. at 370.

<sup>396</sup> *Hays I*, 839 F. Supp. at 1196 n.21 (documenting how Louisiana's desire to maintain its traditional districts with their "historical, cultural, political, economic, and religious significance" was eventually overcome by the DOJ's "insistence" on a second majority-minority district even at the expense of those concerns).

<sup>397</sup> See Cleo Fields & A. Leon Higginbotham, Jr., *Why the Anxiety When Blacks Seek Political Power?*, NEW ORLEANS TIMES-PICAYUNE, July 23, 1996, at B5.

tories of discrimination in voting. While African-American voters and candidates have made demonstrable progress since 1965 in Louisiana and elsewhere, the progress is not simply attributable to a change of heart or practice on the part of white elected officials and decision-makers. Rather, it is, in large part, the result of the determination and hard work of African-American communities, their advocates and the involvement of and oversight by the federal government under the VRA in general, and Section 5 in particular. If Section 5 had not been renewed in 1982, nearly one hundred attempts to dilute African-American voting strength would have had the force of law in Louisiana, leading to deprivations of our most fundamental right to tens of thousands of African-Americans. The record shows that the need for Section 5 coverage of Louisiana has not declined since the last reauthorization in 1982. In fact, the average number of objections per year actually increased after 1982.

Examination of Louisiana's conduct in connection with line drawing in Orleans Parish in general, and with respect to its state House of Representative redistricting plans from 1965 through the present, permits one to trace an unbroken pattern of voting discrimination. The record shows that President Johnson's 1965 challenge—to change the attitudes and structures from which voting discrimination arises—has not been fully met. Intransigent officials throughout the state, and at its highest levels of power, are commonplace and have persisted in discriminatory behavior through the decades in order to dilute the African-American vote. The post-1982 renewal experience in Louisiana reveals that some officials cling tenaciously to old strategies of dilution, even while they develop new ones, resist transparency, conceal public information and attempt to shut African-American citizens out of decision-making processes. With the roots of discrimination still so firmly in place in Louisiana, Section 5 is as necessary now as it was in 1965, 1970, 1975 and in 1982 to avoid dramatic, unnecessary and, unfortunately, inevitable retrogression in African-American political opportunity.