

**SWORD, SHIELD, AND COMPASS: THE USES AND MISUSES OF  
RACIALLY POLARIZED VOTING STUDIES IN VOTING RIGHTS  
ENFORCEMENT**

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I. INTRODUCTION

The persistence of racially polarized voting (“RPV”), in legal and scholarly circles, is viewed as a social ill that must be rendered ineffective or eliminated entirely in public life.<sup>1</sup> Among the primary

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1. See, e.g., Samuel Issacharoff, *Polarized Voting and the Political Process: The*

legal tools used to pursue this end are the Fifteenth Amendment of the Constitution and various federal antidiscrimination statutes, including the Voting Rights Act (the “Act” or “VRA”).<sup>2</sup> In its traditional formulation, evidence of RPV has been deployed as an offense-oriented weapon, or a sword, in identifying the communities and jurisdictions where significant patterns of race discrimination in politics demanded federal intervention.<sup>3</sup>

As commonplace as this traditional function of RPV has been in the voting rights legal regime, there are additional uses for this kind of information that have often gone ignored, underutilized, or misused in the law. And in the current era, these oversights account for problems in pursuing the political interests of racial minority groups in particular and society’s aforementioned antidiscrimination goals more generally.

Aside from the role it can play in litigation, for example, RPV analysis can also be utilized in a defensive manner—as a jurisdiction’s shield against a lawsuit.<sup>4</sup> Just as any potential defendant might do, jurisdictions can independently run RPV studies to decide whether it is necessary to adopt specific district schemes or other structural reforms that help entrench political opportunity for nonwhite voters.<sup>5</sup> To the extent that these studies reveal little or no indication of entrenched polarized voting, a jurisdiction can deter

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*Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1833-91 (1992); Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 SOC. SCI. HIST. 507, 510-14 (1990); Yishaiya Absoch, Matt A. Barreto & Nathan D. Woods, *An Assessment of Racially Polarized Voting for and Against Latino Candidates in California*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 107, 107-09 (Ana Henderson ed., 2007).

2. See U.S. CONST. amend. XV; Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-6 (2006).

3. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 52-54 (1986) (discussing significance of data offered to show existence of RPV to a section 2 action under VRA). The use of the “sword” and “shield” analogy here is similar to the construction devised in some scholarly and judicial accounts. See, e.g., Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1439 (1996); Edward D. Re, *Remedial Legislation: Sword or Shield?*, 10 ST. JOHN’S J. LEGAL COMMENT. 477, 477 (1995).

4. See, e.g., Bartlett v. Strickland, 556 U.S. 1 (2009); Shaw v. Reno, 509 U.S. 630 (1993) (invoking compliance with VRA provisions, including section 2, as a defense against various legal claims).

5. See Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH 335, 336-37 (Chandler Davidson & Bernard Grofman eds., 1994); Bernard Grofman, *Multivariate Methods and Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 SOC. SCI. Q. 826, 827 (1991) (“[RPV analyses] are now commonly used by social scientists testifying on behalf of defendants as well as by those testifying on behalf of plaintiffs.”).

potential plaintiffs from suing or, otherwise, win an early dismissal of allegations about unlawful minority voting dilution. As a preventive measure, conducting an RPV analysis is an especially helpful way to assess and resolve any legal exposure that may accompany a given policy decision.<sup>6</sup>

Further still, RPV analysis can serve a third distinct purpose in the law. It can help to direct the application of the special remedies contained in the preclearance regime of the VRA. Beyond its use in defending a given jurisdiction's proposed change to a voting rule or procedure under section 5, a more systematic collection of RPV data in these processes over time can help chart the nation's progress toward political equality.<sup>7</sup> This extra-litigative application of RPV data can offer an important measure of social progress toward the Fifteenth Amendment's guarantee of the equal enjoyment of the electoral franchise regardless of race. These studies, taken together, can help shed light on whether the special remedies in section 5 remain necessary in covered states and localities.<sup>8</sup> Handled in this manner, RPV studies can provide a kind of social "compass," to chart the responsiveness of a given state or locality to antidiscrimination norms over time.

While the "shield" and "compass" applications of RPV studies are not completely foreign to the ongoing discourse about voting rights, the argument presented in this Article is that they have been severely underutilized or misused. This Article provides illustrations of the misuse of RPV in the current era and helps to explain why it exists. This Article also provides an argument for why it is crucial to revive the use of RPV as "shield" and as "compass" in the project of realizing equality in the political arena.

The organization of the Article proceeds as follows: Part II lays out the theoretical and doctrinal foundations for RPV analysis and the role they have played in the development of voting rights law; Part III elaborates on the earlier claim about the multiple purposes of RPV, highlighting examples showing the distinct ways that this analysis has been misused in decision making; Part IV offers an explanation for why the shield and compass functions of RPV have been misused; and finally, Part V develops an argument and set of recommendations for lawyers and policymakers to revive these additional uses for RPV.

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6. See generally Handley & Grofman, *supra* note 5; Charles S. Bullock III, *Racial Crossover Voting and the Election of Black Officials*, 46 J. POL. 238 (1984) (analyzing RPV data for existence of polarization).

7. See H.R. REP. NO. 109-478, at 34-35 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 637-39.

8. See *id.*

## II. A PRIMER ON RACIALLY POLARIZED VOTING

## A. Definitions

By definition, RPV refers to a sustained pattern of individual voting decisions in which race and ethnicity determine election outcomes, in whole or in large part.<sup>9</sup> For a significant portion of America's political history, nonwhite candidates and voters have encountered this barrier in realizing their political strength. In-group identity and bias heavily inform the way that voters behave in elections that are racially polarized.<sup>10</sup> Individual voters in these electorates regularly prefer the candidates who belong to their own racial group, and they typically refuse to support anyone else who does not belong.<sup>11</sup> They consequently withhold support from both those candidates who are members of different racial groups, along with some in-group candidates who are perceived as allies of these other groups.<sup>12</sup> In a severely racially polarized community, demographics are destiny in elections. Where RPV is present, one can reliably predict the results of future campaigns because these in-group preferences are hardened and sustained over time.<sup>13</sup>

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9. Handley & Grofman, *supra* note 5, at 337-39; see also *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986); H.R. REP. NO. 109-478, at 34, reprinted in U.S.C.C.A.N. 618, 638 ("Racially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence the Committee has before it of the continued resistance [sic] within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process.")

10. See Nicholas A. Valentino & David O. Sears, *Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 49 AM. J. POL. SCI. 672, 684-87 (2005); see also David O. Sears et al., *Is It Really Racism? The Origins of White Americans' Opposition to Race-Targeted Policies*, 61 PUB. OPINION Q. 16, 33 (finding through statistical analysis that defense of the white in-group is less important than general animosity toward blacks) (1997); cf. Lawrence Bobo, *Whites' Opposition to Busing: Symbolic Racism or Realistic Group Conflict?*, 45 J. PERSONALITY & SOC. PSYCHOL. 1196, 1208-09 (1983) (positing that white opposition to busing was based on self-interested perceptions of group conflict rather than symbolic racism).

11. See KEITH REEVES, *VOTING HOPES OR FEARS* 45-90 (1997) (using experimental data to show the effects of in-group bias on vote choices); James M. Glaser, *Back to the Black Belt: Racial Environment and White Racial Attitudes in the South*, 56 J. POL. 21, 23 (1994). It is important to note that the pattern of exclusively in-group voting has not been uniform across racial groups. African Americans and other nonwhite racial groups have not exhibited the same level of pronounced in-group voting, as have white voters, most likely due to the late incorporation of these groups into the political system. See Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL'Y 71, 101 (2006) (noting that Latinos do not display "racial solidarity" when voting).

12. See Rory Allan Austin, *Seats That May Not Matter: Testing for Racial Polarization in U.S. City Councils*, 27 LEGIS. STUD. Q. 481, 483 (2002).

13. "In elections characterized by racially polarized voting, minority voters alone are powerless to elect their candidates. Moreover, it is rare that white voters will cross

RPV presents an especially troubling concern for the law for several reasons. First, severe political divisions that track ethnicity, though arguably part of the private sphere, have representational consequences for minority voters and their preferred candidates in the public realm.<sup>14</sup> By definition, this sustained division means that members of the majority group are unable or unwilling to support the issues and candidates associated with the minority group. Because demographics are destiny, RPV legitimizes and sustains group-based biases into the formal arena.<sup>15</sup> Minority viewpoints and their policy preferences cannot succeed in an election where they never have the chance to succeed due to ingrained group bias. Absent any possibility for coalitions across racial lines, minority groups will find themselves on the losing end of almost all political contests.<sup>16</sup>

Second, social science research demonstrates that unchecked racial and ethnic polarization ossifies oppositional relationships within political systems.<sup>17</sup> This behavior is regarded as severely out of step with America's conception of politics. Various theories of political competition include the expectation that public decisions are dynamic and deliberative—today's partners can always become tomorrow's opponents, and vice versa.<sup>18</sup> America's structure depends upon a vibrant engagement of ideas and positions that are not artificially bound by state, party, and group lines. Indeed, even long-term coalition partners in this political system rarely find complete agreement across a series of political issues. The insight of the "cross-cutting coalition" forms the basis of many of Alexis de Tocqueville's observations about the strengths of democracy in nineteenth-century America.<sup>19</sup> Racial polarization is contrary to this

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over to elect minority preferred candidates. For example, in 2000, only 8 percent of African Americans were elected from majority white districts." H.R. REP. NO. 109-478, at 34, *reprinted in* U.S.C.C.A.N. 618, 638.

14. See Cashin, *supra* note 11, at 93-98 (noting the success of the "southern strategy" that exploited racial tensions that existed after the civil rights revolution in order to draw white voters to the Republican Party); Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1390-94 (2001); Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 POL. BEHAV. 1, 4-8 (2004).

15. See Sidney Verba, Kay Lehman Schlozman & Henry Brady, *Race, Ethnicity, and Political Participation*, in CLASSIFYING BY RACE 354, 368-73 (Paul E. Peterson ed., 1995) (discussing the differences between whites, African American, and Latinos in issues that motivate political activity).

16. See Bullock, *supra* note 6, at 247-50; LANI GUINIER, THE TYRANNY OF THE MAJORITY 51 (1994).

17. See DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 18-21 (2000).

18. Issacharoff, *supra* note 1, at 1872-73.

19. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 109-15 (Henry Steele Commager ed., Henry Reeve trans., Oxford Univ. Press 1947); Issacharoff, *supra* note 1, at 1862.

conception, since it reifies a single sense of identity that overrides all others. The “lockup” of this set of interests denies the normal course of competition among political parties in the market for electoral advantage.

Finally, there is a socially corrosive element inherent in the persistence of RPV that might also be viewed with trepidation. Where such a pattern of behavior is enduring and lines of difference remain, the trend disrupts the model for political parties to develop a competing sense of political identity grounded in values and principles.<sup>20</sup> Because it so essentializes racial group identity, the endurance of RPV over time encourages parties either to pander to racial groups for support or to ignore them entirely.<sup>21</sup> In either case, RPV cements this single feature as a fundamental basis for organizing a citizen’s relationship with his neighbors and with the state.<sup>22</sup> Over several election cycles, relying on this narrow understanding of identity directly challenges the model of color blindness that informs the prevailing view about equality in the Supreme Court’s jurisprudence.<sup>23</sup> If significant numbers of voters continue to resist supporting candidates who are not part of their own racial group, the prospects of a robust color-blind agenda for public policy would diminish considerably.

#### *B. Varieties of RPV Analysis*

Generally speaking, there have been three general methods in social science for measuring RPV. Each approach relies on specific types of information to derive estimates for the voter support for a given candidate within a specific racial group.<sup>24</sup> Where a particular candidate’s level of support varies greatly across racial groups, there may be a basis for finding that RPV is present. By comparison, the level of support for a given candidate who forges cross-racial

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20. See GUINIER, *supra* note 16, at 14-16 (discussing the advantages of “cumulative voting,” which “allows voters to organize themselves on whatever basis they wish”).

21. CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 52-59, 209 (1993) (describing harms to color-blindness posed by polarized voting in certain contexts).

22. See Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 717-19 (2002).

23. See *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003) (arguing that the VRA should be interpreted to encourage an integrated society that does not see color in their daily lives); *Shaw v. Reno*, 509 U.S. 630, 647-49 (1993) (rejecting North Carolina’s redistricting plan as predominantly motivated by the purpose of segregating races for voting); *Miller v. Johnson*, 515 U.S. 900, 917-20 (1995) (rejecting congressional redistricting predominantly motivated by race in Georgia); *Bush v. Vera*, 517 U.S. 952, 976-81 (1996) (rejecting Texas’ redistricting plan as an unconstitutional racial gerrymander).

24. See McCrary, *supra* note 1, at 510-12.

alliances should not have wide gaps in support across racial groups. In that case, one cannot reach such a reliable conclusion about RPV. While there are several more specific methodological points that can be made about the operation of each type of RPV analysis, it suffices for present purposes to explain their function and explain their merits and challenges.

### 1. Exit Polls

In the earliest voting rights cases, the most frequently preferred method for RPV analysis was the exit poll, a method commonly employed to gauge public opinion in several contexts. Because they provide valuable information about trends in the electorate, exit polls remain popular in contemporary political coverage on elections both among campaign operatives and in the press.<sup>25</sup> This approach involves deploying survey questioners to polling places to ask voters about their preferences soon after they have cast a ballot. By including a sufficient sample size for each racial group of interest in the study, one can develop rough estimates of each candidate's level of support among the voters in each racial group so comparison is possible.<sup>26</sup>

One advantage of the exit survey approach for gauging RPV is that the method involves a live report from specific voters about their choices. The designers of the survey instrument can identify the scope, size, and makeup of the target respondent group. The tailoring allows for a customized view of a specific geographical area or within a particular racial category.<sup>27</sup> On the other hand, there are issues concerning reliability. A significant drawback of the exit poll and similar survey methodologies is that they rely on self-reported data from voters instead of data from the official vote count from officials; the reported estimates sometimes can differ wildly from the actual results.<sup>28</sup>

A wealth of social science research confirms that people have a

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25. A variety of news outlets and related campaign sites include polling and surveys that vary in degrees of sophistication. See, e.g., 270TOWIN, <http://www.270towin.com> (last visited Sept. 21, 2012); REALCLEARPOLITICS, <http://www.realclearpolitics.com/polls/> (last visited Sept. 21, 2012) (constructing a "poll of polls," which averages various polls); Nate Silver, N.Y. TIMES FIVETHIRTYEIGHT BLOG, <http://fivethirtyeight.blogs.nytimes.com> (last visited Sept. 21, 2012) (a blog that captures both pre- and post-election survey results).

26. See generally BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 83-128 (1992).

27. See generally Mark R. Levy, *The Methodology and Performance of Election Day Polls*, 47 PUB. OPINION Q. 54 (1983) (describing the methodology of election day polling and discussing how journalists utilize this data).

28. See, e.g., Raquel Prado & Bruno Sansó, *The 2004 Venezuelan Presidential Recall Referendum: Discrepancies Between Two Exit Polls and Official Results*, 26 STAT. SCI. 517, 526 (2011).

tendency to misreport their preferences, at times due to simple error but also intentional misreporting due to social pressures.<sup>29</sup> The latter consideration is quite often relevant for survey instruments that explore questions having to do with race.<sup>30</sup> Coupled with general challenges of obtaining truthful answers when the questioner and respondent are not the same race, this problem can threaten the accuracy of a survey in places with a history of RPV issues. In both cases, one may yield an estimate that is wildly inconsistent with the actual vote count at the polling place.

## 2. Homogenous Precinct Analysis

A second common method for RPV studies focuses on the actual votes cast rather than on self-reporting. This method derives its estimate using information about each racial group's support for a candidate by taking advantage of one of the consequences of social segregation.<sup>31</sup> Since most cities and counties tend to organize polling places based on residency,<sup>32</sup> many contain at least a share of precincts that are heavily, if not totally, populated by a single racial group. The consequence of these racially defined housing patterns is that a social science researcher can take the electoral results from areas to approximate the level of support by members of the same racial group throughout the entire jurisdiction.<sup>33</sup> In its simplest form, one can compare the estimates for a candidate's support in homogenous black versus homogenous white precincts to assess the impact of RPV in a given election.

Of course, the underlying assumptions of this method make the reliability of this method far from perfect. The accuracy of the analysis is almost completely dependent on the racial distribution of the precincts located in the jurisdiction.<sup>34</sup> Where communities have become less segregated and where the percentage of African Americans has decreased over time, precincts do not neatly fall at the extremes as often.<sup>35</sup> Thus, where the homogenous precincts are few

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29. *See id.*

30. *See* Andrew Kohut, Op-Ed., *Getting It Wrong*, N.Y. TIMES, Jan. 10, 2008, at A31 (“[G]ender and age patterns tend not to be as confounding to pollsters as race, which to my mind was a key reason the polls got New Hampshire so wrong.”); GROFMAN ET AL., *supra* note 26, at 85.

31. NCSL *National Redistricting Seminar Highlights: Measuring Minority Vote Dilution*, REDISTRICTINGONLINE.ORG (Jan. 25, 2011), <http://redistrictingonline.org/sancls2011mvdtalk.html>.

32. *See, e.g.*, CONN. GEN. STAT. § 9-12 (2009); LA. REV. STAT. ANN. § 18:101 (2012); MONT. CODE ANN. § 13-2-110 (2011); *see also* GROFMAN ET AL., *supra* note 26, at 85.

33. *See* Richard L. Engstrom & Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 URB. LAW. 369, 371-77 (1985) (discussing homogenous precinct analysis).

34. *See id.* at 373.

35. *See* McCrary, *supra* note 1, at 511-14.

in number, or such precincts are sparsely populated, the electoral information from this second analysis may tell very little about the voting tendencies of people in the more racially mixed precincts.<sup>36</sup> In other words, there may be some fundamental differences in less homogenous types of precincts that might be driven by nonracial factors.

In fact, the underlying assumption that the behavior of individual voters living in homogeneously black or white precincts is a function of voter behavior in racially mixed districts may also be tenuous.<sup>37</sup> To the extent that white-black conflict is more pronounced in one type of district than another, the homogenous precinct approach may well skew the complete picture of voter behavior throughout the electorate.

### 3. Ecological Inference

Finally, the most sophisticated and recent approach devised to assess RPV is the method of Ecological Inference (“EI”), which attempts to harness information from all types of districts to develop estimates for “same-race” and “cross-over” voting.<sup>38</sup> This third type of analysis provides a more tailored level of information because it utilizes information both about the variance of the vote total in a precinct along with the variance of the size of a particular racial group.<sup>39</sup> Using known information about turnout and variance of the racial proportions of a given precinct, the method helps determine the probability of each racial group’s support for a given candidate. The estimate limits the likely values of that figure in each precinct, yielding a better estimate for RPV in most cases.<sup>40</sup>

While there are certainly methodological critiques of using EI as a method of deriving measures of RPV,<sup>41</sup> it nevertheless stands as the best available approach to assessing this behavior in elections.<sup>42</sup>

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36. See Engstrom & McDonald, *supra* note 33, at 373.

37. See generally Thomas M. Carsey, *The Contextual Effects of Race on White Voter Behavior: The 1989 New York City Mayoral Election*, 57 J. POL. 221, 228 (1995) (calling for further research to more clearly evaluate contextual effects of race); Liu Baodong, *The Positive Effect of Black Density on White Crossover Voting: Reconsidering Social Interaction Theory*, 82 SOC. SCI. Q. 602, 612-14 (2001) (pointing to multiple causes of white crossover voting, including black density at the neighborhood level).

38. See GARY KING, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA 8-9 (1997); Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 56-57 (2006).

39. Moke & Saphire, *supra* note 38, at 56-58.

40. See *id.* at 57-58.

41. See D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 465, 470-72 (2001) (discussing the flaws of EI).

42. See, e.g., Ernesto Calvo & Marcelo Escolar, *The Local Voter: A Geographically*

Most studies will employ EI in combination with one of other methods to support the overall findings about the presence or severity of this behavior in a jurisdiction.<sup>43</sup>

### C. Scholarship & RPV

Scholars tend to agree that RPV is an evil that is the target of statutes like the Voting Rights Act.<sup>44</sup> Since the decline of overt rules that deny and exclude voters based upon race and the demise of public figures who sought to limit the influence of the votes cast by these groups, RPV remains the clearest evidence to date of race discrimination in the electoral arena. However, there is an interesting divergence of opinion among scholars today concerning recent trends in RPV.<sup>45</sup>

In service to those who find that RPV is an ill that ought to be eliminated, the 2008 election provided promising evidence that white voters would vote in large numbers for a nonwhite candidate who appealed to broader and nonracialized concerns. Many of them highlighted the fact that the successful campaign strategy of a candidate who emerged from a majority-white state constituency helped construct an operating narrative that focused on matters that did not divide voters along lines of race.<sup>46</sup> Indeed, Barack Obama's success in the Iowa Caucuses along with other very heavily white constituencies attest to the sharp decline in the traditional

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*Weighted Approach to Ecological Inference*, 47 AM. J. POL. SCI. 189, 200-02 (2003); Claudine Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 AM. POL. SCI. REV. 589, 592-93 (2000); Daron R. Shaw, *Estimating Racially Polarized Voting: A View From the States*, 50 POL. RES. Q. 49, 52-53 (1997).

43. Moke & Saphire, *supra* note 38, at 59 (explaining that a combination of methods works best).

44. See Janai S. Nelson, *White Challengers, Black Majorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287, 1289 (2007) [hereinafter *Black Majorities*].

45. For articles supporting a decreasing trend in the prevalence of RPV, see, for example, Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 413, 414-16 (2008); Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1253 (1999); Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2229 (2003) [hereinafter *The Future*]; Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1522 (2002). For articles supporting a continuing or increasing trend in the prevalence of RPV, see, for example, Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 85 (2009); Janai S. Nelson, *Defining Race: The Obama Phenomenon and the Voting Rights Act*, 72 ALB. L. REV. 899, 906 (2009) [hereinafter *Defining Race*]; Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1589 (2010).

46. See, e.g., Lawrence D. Bobo & Michael C. Dawson, *A Change Has Come: Race, Politics, and the Path to the Obama Presidency*, 6 DU BOIS REV. 1, 9, 11 (2009).

limitations that had challenged previous black national candidates.<sup>47</sup> With some of his most ardent supporters coming from liberal white constituencies, Obama succeeded in establishing himself as a credible and viable leader for all groups regardless of race.<sup>48</sup>

For example, a recent Harvard Law Review note contends that the decline in polarized voting is so considerable that majority-minority districts have become unnecessary.<sup>49</sup> In some parts of the nation, minority candidates can be elected even when the majority of the district's population is white.<sup>50</sup> In fact, in the early 1990s, a federal court in Ohio found multiple examples of African American candidates who attained office in districts where African Americans comprised only 35% of the voting age population.<sup>51</sup> Therefore, it is suggested that there are districts, like those in Ohio, where majority-minority districts are no longer needed and that such districts could be replaced with coalition districts.<sup>52</sup> In these districts, minority voters would constitute a third or more of the voting population but not a majority.<sup>53</sup> If these scholars are correct, coalitional districts in these jurisdictions would satisfy the section 2 requirement of the VRA since minorities would still have the opportunity to elect their preferred candidate given the decrease in RPV.<sup>54</sup>

Similarly, an article by Richard Pildes also supports the widespread use of coalition districts.<sup>55</sup> While RPV was "pervasive" in the 1980s,<sup>56</sup> he claims that white voters in the 1990s more willingly voted for minority candidates.<sup>57</sup> Pildes places special importance on three significant changes in partisan politics just before the turn of the century: the beginning of genuine two-party competition in the South, the growing importance of primary elections, and the decline of racial polarization.<sup>58</sup> In light of these changes and current social-scientific data, Pildes suggests that in some districts African American candidates could be elected "where the black voting-age population is 33% to 39% and the district is Democratic."<sup>59</sup> In other

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47. See *Obama's Rise Creates History in 2008*, NBCNEWS.COM (Dec. 12, 2008, 3:06 PM), [http://www.msnbc.msn.com/id/28279293/ns/us\\_news-year\\_in\\_review\\_2008/t/obamas-rise-creates-history/#.UD-yGCKd6So](http://www.msnbc.msn.com/id/28279293/ns/us_news-year_in_review_2008/t/obamas-rise-creates-history/#.UD-yGCKd6So).

48. See *Defining Race*, *supra* note 45, at 902.

49. See *The Future*, *supra* note 45, at 2229.

50. *Id.* at 2209.

51. *Id.* at 2218.

52. *Id.* at 2209-10.

53. Pildes, *supra* note 45, at 1517.

54. *The Future*, *supra* note 45, at 2219.

55. Pildes, *supra* note 45, at 1517.

56. *Id.* at 1524.

57. *Id.* at 1530.

58. See *id.* at 1529.

59. *Id.* at 1538.

words, it is suggested that coalitional districts are now sufficient in some parts of the country due to the decrease in RPV.<sup>60</sup>

On the other hand, those who question the proposition that RPV is largely a “thing of the past” suggest that this same election confirms much of what they have claimed about racial bias in American politics—that it is an enduring feature that must be managed rather than eliminated. Aiding their cause are three points showing how the effects of racial polarization bear responsibility for the outcome. First, Barack Obama’s success is owed to the kinds of remedies that address existing racial bias. He began his career representing a majority-black constituency, which supports the necessity of these formalized structures to offset polarization.<sup>61</sup> Additionally, the Obama candidacy would not have succeeded in the Democratic Primary without the African American voters who dominated the Southern primary states.<sup>62</sup> Obama was able to run up huge margins (and therefore delegates) in heavily nonwhite electorates due to “white flight” from these state parties since 1965.<sup>63</sup> Finally, and equally as important, Obama succeeded in the general election despite receiving fewer white votes than the previous Democratic (and white) nominee; ample social science research demonstrates that in none of the states of the Deep South did the 2008 Democratic ticket manage to win a majority of white votes.<sup>64</sup>

Contrary to the assertions of many scholars, others counter that RPV is not decreasing, but rather is merely idling at past rates.<sup>65</sup> Under section 5 of the VRA, certain jurisdictions, which have a history of discriminatory voting practices, may not make any changes to their voting system without preclearance from the Department of Justice (“DOJ”) or a federal district court three-judge panel.<sup>66</sup> While it is possible for jurisdictions to prove that they no longer employ discriminatory practices, very few have done so.<sup>67</sup> In fact, the current map that illustrates those jurisdictions covered by section 5 of the Act is “nearly identical to the 1965 version.”<sup>68</sup> This appears to be

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60. *See id.*

61. *See* KAREEM U. CRAYTON, *You May Not Get There With Me: Barack Obama and the Black Political Establishment*, in *BARACK OBAMA AND BLACK POLITICAL EMPOWERMENT 201-02* (Manning Marable & Kristen Clarke eds., 2009).

62. *See* Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Religion, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1431-33 (2010).

63. *See id.*

64. *See id.* at 1387, 1422-23.

65. *See, e.g., id.* at 1435-36.

66. 42 U.S.C. § 1973c(a) (2006); *see also* John Gibeaut, *New Fight for Voting Rights*, 92 A.B.A. J. 43, 45 (2006).

67. Gibeaut, *supra* note 66, at 45-46.

68. *Id.*

contrary to the assertion that racial polarized voting is significantly decreasing. In fact, scholars that reject this contention insist that “acute racism” persists in voting practices and that RPV continues “in striking form.”<sup>69</sup>

One illustration of the persistence of group-based tendencies in voting practices is the fact that both white Republicans and white Democrats are less likely to vote their party’s candidate if he or she is African American.<sup>70</sup> For example, if the democratic candidate for the House of Representatives is African American, “white Democrats are thirty-eight percent less likely to vote for their party’s candidate.”<sup>71</sup> Thus, many scholars contend that RPV remains widespread.<sup>72</sup>

Adopting a more moderate position, Sheryll Cashin concludes that today there is a “continued, albeit less pronounced, strain of race loyalty in voting patterns.”<sup>73</sup> While the instances of RPV are becoming less frequent, “white voters are not yet color blind in their voting preferences.”<sup>74</sup> Neither are African Americans.<sup>75</sup> According to a recent study cited in the *North Carolina Law Review*, black crossover voting is virtually nonexistent in races in which one candidate is white and the other is African American.<sup>76</sup> This is illustrated by statistics like those from Southern congressional elections where 98% of black voters voted for the black candidate.<sup>77</sup> In Cashin’s opinion, while progress has been made, RPV is still prevalent in voting practices.<sup>78</sup>

#### *D. Evolution of RPV in the Law*

The historical pedigree of RPV confirms its place as a fundamental element in voting rights cases. This factor has consistently shaped the development of the doctrine. From its early constitutional interpretations of the Voting Rights Act, the U.S. Supreme Court has recognized that confronting polarized voting behavior is a key to promoting equality in the political sphere. In

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69. *Black Majorities*, *supra* note 44, at 1289.

70. *Id.*

71. *Id.* (quoting *Black Candidates, White Voters: A Numbers Game*, National Public Radio (July 11, 2006)).

72. See, e.g., Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 219 (2007).

73. Cashin, *supra* note 11, at 75.

74. *Id.* at 97.

75. See Pildes, *supra* note 45, at 1530-31.

76. *Id.* at 1531 (citing Bernard Grofman, Handley & Lublin, *supra* note 14, at 1402).

77. *Id.*

78. See Cashin, *supra* note 11, at 75 (“There is a continued, albeit less pronounced, strain of race loyalty in voting patterns . . .”).

*South Carolina v. Katzenbach*, the Court's first formal review of the Act, the majority rejected a claim that the statute exceeded Congress's authority to enforce the Constitution.<sup>79</sup> In its careful review of the legislative record, the Court cited numerous cases in the lower courts that involved findings of constitutional violations throughout the South that had not abated over time.<sup>80</sup> Chief Justice Warren stated his expectation that enforcing the Act would assure that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live."<sup>81</sup>

And as several commentators have noted, racial equality in the political sphere for the Warren Court was a rather expansive concept.<sup>82</sup> It applied not only to casting a ballot, but also—as the majority explained in *Allen v. State Board of Elections*—to all state processes needed to make that ballot effective.<sup>83</sup> Thus, the VRA applied a series of election rules and procedures that could work in concert with the reality of polarized voting by whites to deny nonwhite voters the chance to realize their political power. The right to participate would ring hollow without a realistic chance to elect candidates, and certain rules would foreclose this possibility. For example, the Court found that oversight protections were applicable to address a state decision to change the constituencies for certain offices from single-member district to at-large settings.<sup>84</sup> These smaller settings might offer geographically concentrated minority groups of nonwhites the chance to elect candidates that a larger, more polarized electorate would not.

Later courts that applied section 2 of the Act, which prohibits rules or procedures that dilute the political power of protected groups, more explicitly considered the presence of RPV in their decisions.<sup>85</sup> In these cases, the presence of significant levels of RPV was cited as a major determinant in their decision to invoke these protections.<sup>86</sup> State and local laws that were facially neutral could not withstand scrutiny in light of the circumstances in which these rules were employed.<sup>87</sup> In what would later be characterized as a

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79. 383 U.S. 301, 327 (1966).

80. *Id.* at 310-12.

81. *Id.* at 337.

82. See, e.g., John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 368-70 (1995).

83. 393 U.S. 544, 565-66 (1969).

84. *Id.* at 569.

85. See, e.g., *Jordan v. Winter*, 604 F. Supp. 807, 810-12 (N.D. Miss. 1984) (weighing presence of RPV to determine if section 2 had been violated by redistricting plan); *DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992) (same).

86. See *Jordan*, 604 F. Supp. at 812-13; *DeGrandy*, 794 F. Supp. at 1086-89.

87. See *Jordan*, 604 F. Supp. at 810-12; *DeGrandy*, 794 F. Supp. at 1085-86.

circumstantial analysis, the courts reviewed elements like the electoral history of a jurisdiction to assess the impact on racial minority voters. A series of failed candidates who were supported by the minority community generally weighed against a jurisdiction trying to defend a challenged law.<sup>88</sup>

In an earlier dilution case, *White v. Regester*, the lower courts conducted a thorough analysis of local elections in Texas to show that adopting single-member districts was necessary to resolve a dilution claim.<sup>89</sup> The Court noted, in some cases, an unbroken trend of white-preferred candidates who won despite near uniform opposition from racial minorities.<sup>90</sup> At the same time, nonwhite candidates had a very strong record of unsuccessful campaigns that would only have been possible with sustained RPV.<sup>91</sup> Similarly, a trial court in a dilution case from Burke County, Georgia, reviewed the submissions from expert witnesses who studied the election history.<sup>92</sup> Its conclusion was that the county was replete with “overwhelming evidence of bloc voting along racial lines.”<sup>93</sup>

Perhaps the most oft-cited case of this era that cites information on RPV is *Zimmer v. McKeithen*, in which the Court similarly explained why polarized voting was such an influential part of the political analysis of the challenged statute.<sup>94</sup> The ability of a group to elect candidates hinges on the size and makeup of the constituency in the district in which he or she must run. Given the clear trend of polarized voting in elections for multiple offices, the Court found it was unrealistic to expect even a largely mobilized minority racial group to successfully elect candidates.<sup>95</sup> Following the lead of *White*, the judge in *Zimmer* took care to examine the various features of the political system that contributed to the finding of dilution.<sup>96</sup> But chief among these was RPV. The strong trend of polarization indicated that the likely results, absent judicial intervention, were unlikely to differ.<sup>97</sup>

Taken together, these court decisions secured RPV’s place as an accepted part of deciding whether a jurisdiction violated section 2 of the VRA. In 1982, Congress relied on these very same cases to inform its reauthorization of the law.<sup>98</sup> As with most congressional

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88. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 624-27 (1982).

89. 412 U.S. 755, 759-64 (1973).

90. See *id.* at 766-68.

91. See *id.*

92. *Rogers*, 458 U.S. at 625-27.

93. *Id.* at 623.

94. 485 F.2d 1297, 1302-03 (5th Cir. 1973).

95. See *id.* at 1307.

96. See *id.* at 1305-07.

97. See *id.* at 1307.

98. See S. REP. NO. 97-417, at 19-24 (1982), reprinted in 1982 U.S.C.C.A.N. 177,

enactments, the drafting process yielded a politically acceptable but doctrinally confusing standard. The most contentious part of the legislative debate was the adoption of an “effects only” prong of the dilution standard in section 2.<sup>99</sup>

In making their case for the change, the civil rights bar pointed to the various cases similar to *White* to explain how the courts could apply such a standard in live litigation.<sup>100</sup> Conservatives ultimately forced in language to prevent plaintiffs from explicitly relying on proportional representation rationales,<sup>101</sup> but the final version of the provision also incorporated language to support the analytical factors taken from *White* and *Zimmer*.<sup>102</sup> Specifically, members of the U.S. Senate adopted a statement to encourage federal district judges in dilution cases to make various circumstantial inquiries that largely tracked these earlier courts.<sup>103</sup> Among the major elements in the analysis is the extent to which the challenged jurisdiction has a prolonged history of polarized elections.<sup>104</sup> The so-called “Senate Factors” remain an important guide for relevant evidence in dilution challenges.<sup>105</sup>

The current understanding of section 2 reflects an even more explicit consideration of evidence on RPV. Following the statutory reauthorization by Congress in 1982, the U.S. Supreme Court developed its own restatement to harmonize the more ambiguous elements of the vote dilution standard. The decision in *Thornburg v. Gingles*, involving a challenge to districting practices in North Carolina’s legislature, establishes a three-part prima facie test to establish a claim of vote dilution.<sup>106</sup> Aside from providing a straightforward procedural rule for the lower courts, the decision ironed out seemingly conflicting elements in the law.

Specifically, it resolved the dueling directives that barred any entitlement to greater representation based on population size and that turned the judicial inquiry to effects rather than intent. Under this standard, a plaintiff alleging vote dilution (especially in a districting case) must provide evidence to the court of the following factors:

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196-202.

99. *See id.* at 128-41.

100. *See id.* at 36.

101. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1373 (1983).

102. *See id.* at 1400.

103. *See* S. REP. NO. 97-417, at 23-30, reprinted in 1982 U.S.C.C.A.N. 177, 200-08.

104. *Id.* at 29.

105. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 648-50 (2006).

106. 478 U.S. 30, 50-51 (1986).

1. They are part of a sufficiently large and “geographically compact” group;
2. They are an identifiable group that is “politically cohesive”; and
3. White voters usually cast votes as a bloc in a manner to usually defeat the preferred candidate of the nonwhite group.<sup>107</sup>

The linchpin in the Court’s restatement of section 2 is the attention to an RPV analysis. Prongs two and three of *Gingles* call for evidence that race largely drives election choices and outcomes in the challenged jurisdiction.<sup>108</sup> One needs to show not only that the plaintiff’s racial group is a politically salient and cohesive segment of the electorate, but also that his or her political power is usually rendered ineffective due to a tendency by white voters to support their own preferred candidates.<sup>109</sup> Taken together, these two categories of evidence embody the core of any RPV study. Thus, *Gingles* essentially transforms the suggested review of RPV data language contained in the Senate Report into an explicit judicial prerequisite for a prospective plaintiff to have a chance at obtaining relief. The reshaped version of section 2 places RPV at the center of the Court’s analysis.

Taken in whole, RPV has remained an important feature of vote dilution challenges over more than four decades. Importantly, much of its work has been used as a tool in the offense-oriented mode. Through its various refinements, the analysis has made clear the specific negative electoral consequences that are associated with mass race-based decisions in the voting booth. Furthermore, it provides the factual foundation for trial courts to justify their use of structural remedies and reforms to improve the political position of previously disadvantaged nonwhite plaintiffs.

### III. USES & MISUSES OF RPV STUDIES

Traditionally, RPV studies have been a primary part of the puzzle in combating vote dilution in section 2 cases. The previous section traced the ways that the studies have been utilized by plaintiffs to provide vote dilution in voting rights lawsuits. Aside from its established use as an offensive tool, additional uses for RPV studies have been seriously underutilized in the voting rights discourse.<sup>110</sup> This section lays out these alternative uses of the analysis, with special attention to specific illustrations of how various actors have either ignored or misused RPV in ways that

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107. *Id.*

108. *See id.* at 61-62.

109. *Id.* at 56.

110. *See Way, supra* note 3, at 1442-44.

severely undermine the pursuit of voting rights enforcement.

*A. (Mis)using RPV as Shield*

As a shield, RPV studies can serve a purpose distinct from the way they are commonly utilized by the offense-minded plaintiff. Rather than being deployed in the midst of litigation, this second use of RPV studies arises from a decision by a jurisdiction seeking to adopt a new election scheme.<sup>111</sup> The RPV-related information can aid in the determination of whether special measures are needed to respond to equal opportunity concerns for minority groups.<sup>112</sup> Most commonly, the information has been a helpful consideration in whether to abandon at-large or multimember district schemes or, where single-member districts are in place, whether to adopt majority-minority (or minority opportunity) districts.<sup>113</sup>

By adopting RPV studies in this preventive fashion, officials can establish the parameters for the discussion and debate about other local concerns. The information helps reveal the permissible ways under federal law that the jurisdiction can adjust its system. Put differently, showing early attention to the demands of federal law can help to specify the range of options that are open to debate concerning other important issues that might concern a city.<sup>114</sup> Thus, an initial finding about the extent of racial division in past elections makes it possible to address other nonracial factors that favor a particular policy action.

This shield function is distinct from the use of RPV studies in dilution lawsuits, where the parties dispute the relevance of a specific campaign or the extent that racial bias explains an outcome. A jurisdiction can pre-empt a possible lawsuit by examining RPV on its own for two main reasons. First, in the event that a legal claim is later filed in court, there is ready evidence in the legislative record that can be used to support any policy decisions reached by the decision makers.<sup>115</sup> Second, there is the additional benefit that the decision to employ a study would help to forestall claims that the

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111. *See id.* at 1449.

112. *See id.*

113. Yishaiya Absoch, Matt A. Barreto & Nathan D. Woods, *An Assessment of Racially Polarized Voting for and Against Latino Candidates in California*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 107, 108 (Ana Henderson ed., 2007).

114. *See Way, supra* note 3, at 1449 (“[T]he Justice Department has been able to . . . fulfill the broad remedial purposes of the Act by forcing jurisdictions to adopt changes that provide minority voters with greater opportunities to elect minority candidates.”).

115. *See, e.g., Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 465 (D.D.C. 2011), *aff’d*, 679 F.3d 848 (D.D. Cir. 2012) (citing various studies in the legislative record showing discriminatory conduct in redistricting plans to support legislative decisions).

resulting decision was motivated by any prohibited intent.<sup>116</sup>

In the current era, conducting RPV studies in a preventive manner is all the more important not just because of what it might uncover—but because of what it might not. A jurisdiction may learn from the study, for example, that (1) RPV does NOT exist in certain geographical regions or in specific kinds of elections; (2) robust coalitions (which would rebut a finding of RPV) are present in whole or in part of the jurisdiction; or (3) there is a strong trend of nonwhite candidates who succeed in majority-white settings, along with white candidates who successfully compete in majority-black constituencies.<sup>117</sup> Each of these findings, in their own way, could support a conclusion that the more traditional remedies that follow vote dilution findings are not necessary.

Despite the various advantages that using RPV analysis in this manner can provide local officials, few jurisdictions actually take the initiative to conduct a RPV study. And those jurisdictions that attempt to take such steps at times either misunderstand or misuse the relevant information. Two specific illustrations of this trend may prove helpful.

### 1. North Carolina Redistricting

In 2011, a new Republican legislative majority in the North Carolina General Assembly approved district maps that systematically sharply increased the number of election districts in which African Americans were a majority population.<sup>118</sup> For example, in the House of Representatives, the proposed map increased the number of majority black districts from ten to twenty-three, while reducing the number of “coalition districts” with black populations between 40% and 50% from eleven to two.<sup>119</sup> African American incumbents already represented all but three of these districts in question, and the remaining districts were represented by white Democrats with majority-black constituencies.<sup>120</sup> The

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116. *But see* Thornburg v. Gingles, 478 U.S. 30, 62 (1986) (holding that intent is irrelevant to establishing RPV under section 2).

117. *See id.* at 63-68.

118. Editorial, *Mapped – GOP’s Districts May Not Pass DOJ Muster*, FAYETTEVILLE OBSERVER, Oct. 2, 2011, <http://fayobserver.com/articles/2011/10/02/1126295?sac=Opin>; *see also* 2011 Redistricting, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/representation/redistricting.aspx> (last visited Sept. 21, 2012).

119. *See* Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee 2 (July 12, 2011) [hereinafter July Joint Statement], *available at* [http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis\\_7-12-11.pdf](http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_7-12-11.pdf).

120. *See* Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting

explanation for the Republican plans, notwithstanding the frequent objections from African American voters and associated public interest groups, was that the strategy was necessary to comply with federal antidiscrimination law.<sup>121</sup> The story in the North Carolina Senate was even more drastic. Not a single district in that chamber had a majority-black constituency, even though seven out of the fifty sitting members were African American.

The leaders of the mapping process argued that if the state had failed to create many more districts with African American majorities, the plan would likely violate section 2 of the VRA. For each one of the maps they adopted, the chairmen asserted that federal law compelled drawing districts with black voting age population ("BVAP") of at least 50% wherever possible.<sup>122</sup> In particular, they claimed that this changed approach was necessary for two reasons: (1) because North Carolina was covered under section 5, jurisdictions had to avoid retrogressive effects in the plans; and (2) prudence demanded that the state try to forestall all possible vote dilution lawsuits under section 2.<sup>123</sup>

These claims were, at best, questionable. Very little substantive evidence existed to provide any cause for concern about a potential dilution lawsuit.<sup>124</sup> Most obviously, the leaders could point to no individual or group who even threatened such a lawsuit. The very groups most likely to file, including the NAACP, spoke out against the Republican plans. More importantly, any plaintiff making such an allegation in court would need to present evidence to satisfy all three prongs of *Gingles*, including the presence of RPV. But the substantial numbers of African American incumbent legislators whose very presence is owed to the lack of RPV (insofar as whites

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Committee 3 (June 17, 2011) [hereinafter June Joint Statement], available at [http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis\\_6.17.11.pdf](http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/Joint%20Statement%20by%20Senator%20Bob%20Rucho%20and%20Representative%20David%20Lewis_6.17.11.pdf).

121. For instance, according to the Chairmen's Joint Statement of July 12, 2011: "[I]n light of *Bartlett*, we see no principled legal reason not to draw all VRA districts at the 50% or above level when it is possible to do so. . . . [A]ny decision to draw a few selected districts at less than a majority level could be used as evidence of purposeful discrimination or in support of claims against the State filed under Section 2. . . . [I]n order to best protect the State from costly and unnecessary litigation, we have a legal obligation to draw these districts at true majority levels." July Joint Statement, *supra* note 119, at 5.

122. *Id.*

123. *See id.* at 4-5 (explaining their preference to create *more* majority black districts than even civil rights advocacy groups had proposed).

124. The redistricting chairs did release information regarding racial polarization in North Carolina. *See generally* THOMAS L. BRUNELL, REPORT ON RACIALLY POLARIZED VOTING IN NORTH CAROLINA (2011), available at [http://www.stategovernmentradio.com/files/Documents/2011/061411\\_Brunell\\_report.pdf](http://www.stategovernmentradio.com/files/Documents/2011/061411_Brunell_report.pdf). However, the quality of the information contained in this study is questionable at best.

were supporting them) belied any such assertion.

Among the major factual findings cited to support the Republican Chairmen's maps were that (1) a pair of African American incumbents in the state senate lost their re-election campaigns in 2010 (both of whom represented districts where white voters were more than 70% of the eligible population); (2) several North Carolina counties had been cited in the past by the courts for racial vote dilution in *Gingles*, a case dating back to 1986; and (3) there were specific examples of political campaigns where RPV trends seemed present in certain parts of the state, but all of them dated back to the *Gingles* era as well.

Even by the most forgiving estimates, the quality of this RPV analysis as the basis for drawing majority-black districts across the state is severely incomplete. Not only does this record fail to account for the terribly dated nature of the judicial findings of discrimination, but also it fails to use the same evidentiary standard for RPV that would apply to a voting rights plaintiff.

First, none of the data cited above in the Republican-proffered study notes or contends with a crucial fact that distinguishes the political landscape in North Carolina. African American candidates frequently succeed in election contests due to cross-racial voting, and white candidates not infrequently receive strong support in majority-black constituencies.<sup>125</sup> Not one member of the Senate's black caucus represented a majority-black constituency, and at least one of the few majority-black constituencies in that chamber elected a white candidate (who was the preferred candidate of that community).<sup>126</sup> Standing alone, the observation that a pair of the Senate's black members lost their re-election bids—in a campaign where enough Democratic incumbents were defeated statewide that the party lost majority control—simply cannot sustain a finding of RPV.

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125. The North Carolina House of Representatives at the outset of the process included eighteen Legislative Black Caucus members, at least a third of whom represented sub-50% districts. See *House Legislative Races with Minority Candidates 2006-2010*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/CommitteeDocs/House%20Races%202006-2010%20handouts.pdf> (last visited Sept. 21, 2012) [hereinafter *N.C. House Legislative Races*]. In the Senate, none of the seven members of the Legislative Black Caucus represented a majority black district. See *Senate Legislative Races with Minority Candidates 2006-2010*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/CommitteeDocs/Senate%20Races%202006-2010%20handouts.pdf> (last visited Sept. 21, 2012) [hereinafter *N.C. Senate Legislative Races*].

126. See *N.C. Senate Legislative Races*, *supra* note 124. Similar, though less pronounced, cross-racial trends existed in the state House and the U.S. Congress, where both African American members represented majority-white constituencies. See *N.C. House Legislative Races*, *supra* note 124; *Congressional Races with Minority Candidates 1992-2010*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/GIS/Download/ReferenceDocs/2011/CommitteeDocs/Congressional%20Races%201992-2010%20Handouts.pdf> (last visited Sept. 21, 2012).

In the same manner, the evidence relating to the outdated RPV findings made by the *Gingles*-era courts also overlooks the import of the level of diversity in the legislature. The same counties cited in the RPV findings for past violations were the ones that had long ago adopted single-member districts—including those that have since elected nonwhite members to the legislature.<sup>127</sup> For instance, the state's two largest counties by population—Wake and Mecklenburg—have consistently elected nonwhite candidates from white majority districts.<sup>128</sup> These cross-racial coalitions have been durable and effective over decades. Further, the demographic reality of growth makes any measures of polarization taken in 1986 extremely unreliable. Both Wake and Mecklenburg, along with several other counties, had doubled in population size, due largely to a massive growth in the population of white voters.<sup>129</sup> With so many new voters moving into the state since 1986, one would at least want a cursory examination of more recent elections to determine whether the trends observed in the 1980s have continued.

Put simply, the presence of several nonwhite incumbents elected from white majority constituencies, as well as the lack of information about current voting trends in areas of substantial growth, raise serious doubts about the presence of RPV. Thus, the legal necessity to radically transform the racial composition of these districts was an open question that deserved a more current and widespread review of the election returns than the majority in the legislature applied.

## 2. Los Angeles Redistricting

A second illustration of an RPV problem—where such information is underutilized—occurred in Los Angeles during that city's recently completed council remapping. Decision makers refused to conduct any RPV study, despite the very complicated

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127. See Paul T. O'Connor, *Landmark Dates and Events in Redistricting*, N.C. INSIGHT, December 1990, at 43. For example, the massive growth in two counties in particular that were cited as past violators of vote dilution are not remotely comparable to the populations that now live there. In Wake County, the number of white registered voters increased from 132,654 in 1980 to 424,248 by 2010. Similarly in Mecklenburg, the number of white registered voters increased from 161,461 in 1980 to 373,335 in the same period. See *NC State Board of Elections Voter Statistics*, N.C. STATE BD. OF ELECTIONS, [http://www.app.sboe.state.nc.us/webapps/voter\\_stats/results.aspx?date=12-25-2010](http://www.app.sboe.state.nc.us/webapps/voter_stats/results.aspx?date=12-25-2010) (last visited Sept. 21, 2012).

128. See *N.C. Senate Legislative Races*, *supra* note 125.

129. See *Mecklenburg County Population by Race*, CENSUS SCOPE, [http://www.censusscope.org/us/s37/c119/chart\\_race.html](http://www.censusscope.org/us/s37/c119/chart_race.html) (last visited Sept. 21, 2012); *Census and Population*, WAKEGOV.COM, <http://www.wakegov.com/planning/population/default.htm> (last visited Sept. 17, 2012); *NC State Board of Elections Voter Statistics*, N.C. STATE BD. OF ELECTIONS, [http://www.app.sboe.state.nc.us/webapps/voter\\_stats/results.aspx?date=12-25-2010](http://www.app.sboe.state.nc.us/webapps/voter_stats/results.aspx?date=12-25-2010) (last visited Sept. 21, 2012).

terrain that made such analysis imperative.<sup>130</sup> The governing rules directed line drawers to gather community of interest testimony from the public. This information would be the primary basis for establishing districts, unless federal law (including VRA compliance) demanded otherwise. The substantive issue sparking the controversy in this case was whether to maintain the existing balance of Latino-majority and African American-majority districts in the city.<sup>131</sup> Maintaining the existing balance required the modification of an existing coalition downtown district—where neither group of voters enjoyed a majority—that had been effective in electing an African American preferred incumbent with substantial support among both Latino and Asian American constituencies.<sup>132</sup>

Even though two of the Latino-majority districts in the initial map had lost significant population, decision makers agreed to shore up these districts by dismantling the coalition district. In its place was a new majority-Latino district, which allegedly addressed a perceived dilution problem. Dismantling the existing coalition district ran counter to the weight of community testimony, which criticized the creation of “poverty pits,” as well as from the residents in the downtown portion of the district that would be reshuffled.<sup>133</sup> In essence, the map drawers gave priority to maintaining and expanding the number of Latino-majority districts based on a perceived necessity under federal law—specifically complying with section 2 of the VRA. For fear of a dilution lawsuit, they therefore disregarded the contrary public input that favored protecting the coalition district.<sup>134</sup>

But here, too, the legal necessity of the city’s approach was entirely dependent upon the presence of RPV. To the extent there was any effort to respond to an official request for this evidence,

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130. See David Zahniser, *Race’s Role in L.A. Remap is Challenged; Two Black Council Members Protest the Redistricting Process Ahead of Friday Vote on New Boundaries*, L.A. TIMES, Mar. 16, 2012, at AA1.

131. *Id.* (“[Black] [c]ouncil members . . . said the 21-member Redistricting Commission violated the [VRA] by failing to show discriminatory voting patterns that would justify five proposed districts with high concentrations of Latino voters.”). *But cf. Latinos Missing from L.A. Redistricting Process*, NEW AM. MEDIA, Feb. 6, 2012, <http://newamericamedia.org/2012/02/latinos-missing-from-la-redistricting-process.php> (encouraging Latino support for an additional, sixth Latino-majority district).

132. See Zahniser, *supra* note 130; *May 24, 2012—Visions for LA: Jan Perry*, CTR. FOR ASIAN AMS. UNITED FOR SELF EMPOWERMENT, <http://causeusatestsite.org/index.php/news/news/217> (last visited Sept. 21, 2012) (“[Jan Perry] also said that in addition to a strong base of supporters in the African American Community, she has an unexpected base in the Latino Community. With this, she plans to add Asian Americans to her list of supporters, as she sees the AP1 vote ‘very, very, very[] critical’ to her success.”).

133. See Zahniser, *supra* note 130.

134. See *id.* (According to a counsel for the city, “[d]ismantling such heavily minority districts would leave the city vulnerable to a legal challenge.”).

advocates for the city's plan cited previous findings from the state redistricting process showing: (1) the City of Compton, California (which is south of Los Angeles) had been cited by a court for diluting Latino votes; and (2) in a primary contest for Attorney General, a Latino-preferred candidate (the former city attorney for Los Angeles) had been defeated by an African American candidate.<sup>135</sup> However, no independent analysis was conducted to assess political trends in the city itself.

Had the city actually conducted the complete analysis of RPV as contemplated by the dissenters, the results would likely have raised difficult questions about prioritizing the Latino-majority districts at the expense of others. As in North Carolina, the pattern of nonwhite candidates who succeeded in white majorities was quite strong. The final district map was signed by a Latino mayor (elected as a preferred candidate of the same community) in his second term of representing a majority-white city electorate.<sup>136</sup> The same cross-racial voting supported the election of council members representing coalition districts—including the one that had been dismantled in the new plan.<sup>137</sup> Further, the findings taken in the City of Compton have little relevance in light of the affirmative evidence weighing against a finding of significant RPV. All of this casts serious doubts about the success of any possible lawsuit that might have sought an additional Latino-majority district as a remedy.

In both of these examples, the misuse of RPV information contributes in large part to the failure of the jurisdiction to arrive at a policy that fairly reflects what is required by federal law. In either case, a hypothetical plaintiff bringing either set of the underlying political circumstances to court to demand a remedy would likely meet a swift and successful motion to dismiss on the ground that the evidence fails to satisfy the third prong of *Gingles*.<sup>138</sup> Yet the jurisdiction's lack of a full and complete analysis in a defensive posture leaves substantial questions about the legal necessity for these maps that a court might later be obliged to explore. In fact, in each of these cases, the jurisdiction's failure to conduct a complete RPV review, despite public requests to do them, have actually raised

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135. See Ann M. Simmons & Abby Sewell, *Latinos Seek a Compton Voice*, L.A. TIMES, Dec. 20, 2010, at AA1.

136. See Kate Linthicum, *L.A. Council Boundaries Were Decided in Secret, Activists Charge*, L.A. TIMES, Aug. 7, 2012, <http://latimesblogs.latimes.com/lanow/2012/08/herb-wesson-city-council-koreatown.html>; David Zahniser & Phil Willon, *Los Angeles Elections: Villarraigosa's Future*, L.A. TIMES, Mar. 5, 2009, at A13; *Los Angeles (city), California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/0644000.html> (last visited Sept. 21, 2012).

137. See *City Council District 9*, DEP'T OF CITY PLAN., <http://cityplanning.lacity.org/dru/StdRpts/StdRptscd/StdRptcd009.pdf> (last visited Sept. 21, 2012).

138. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

important legal challenges that race unduly predominated the line drawing process.

### *B. RPV as Compass*

RPV analysis can be instructive in a more general way as well, yet this use has been commonly overlooked in practice. The actors who stand to benefit from the use of RPV as a “compass” extend beyond those who are regularly involved in making election policy—including local officials, racial minorities, and legislators. In this case, society’s broader march toward equality has much to gain from the proper use of this information. And as an illustration, nowhere is this truth more evident than in the endless debate concerning the maintenance of the preclearance provisions of the VRA.

What is most apparent about this debate is that there is a fundamental disconnect about the basis of measuring progress. Even though the 2006 legislative debate on the extension of the VRA and the one from 1982 were separated by decades, each debate mirrored the other to a startling degree. Some of the personalities in the House on each side of the question changed, but their substantive claims about the legislation almost perfectly tracked the ones delivered by their predecessors.<sup>139</sup> The 2006 version of the VRA may be a “new” statute, but the underlying considerations about the Act’s means and ends decidedly were not.<sup>140</sup> Members revisited old debates about fundamental aspects of section 5, and as before, these differences remained unresolved by the final vote.<sup>141</sup> In the ways described below, the recent debate “re-enacted” the same disagreements from 1982 (and in some cases, even from 1965).

One way of explaining how the two “reenactment” debates reflect each other is to examine three of the core issues that occupied much of the discussion on the floor. The members who voted against the Act in 2006 did so using arguments that replayed the very same issues raised by their predecessors in the 1982 session of Congress.<sup>142</sup> These include (1) the existence of conditions that justified the remedy, (2) the distinct performance of Southern states, and (3) the constitutionality of the proposed legislation.<sup>143</sup> But what was absent was any serious consideration of RPV analysis. Below is a consideration of these three debates from both legislative discussions.

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139. See, e.g., Rep. Jim Sensenbrenner, Op-Ed., *Politicizing the Voting Rights Act*, POLITICO, Jul. 29, 2012, <http://www.politico.com/news/stories/0712/79090.html> (discussing the similarities between the 2006 and 1982 debates); Kareem Crayton, *Introduction to the Reports*, 17 S. CAL. REV. L. & SOC. JUST. 65, 66 (2007).

140. I use the phrase “new” in the slightly ironic manner that Nate Persily does in describing the 2006 extension. See Persily, *supra* note 72, at 182.

141. See *id.*

142. See 152 CONG. REC. 14,229-30 (statement of Rep. Sensenbrenner) (2006).

143. *Id.*

### 1. A Prolonged Emergency?

The first topic that binds these episodes is the claim that the preclearance system had lost its justification as a remedial policy. Not all of the House members who voted against the 1982 and 2006 bills rejected the concept of a federal oversight remedy outright.<sup>144</sup> Several of them (at least in public) conceded the legitimacy of using the remedy to address the distinct political circumstances that existed in the 1960s.<sup>145</sup> The VRA's original framers crafted the preclearance system as a drastic, but temporary, answer to the emergency of official Southern resistance to black voting rights.<sup>146</sup> Thus, some in the extension debate claimed that as the emergency situation subsided, so too would the necessity of the oversight regime.<sup>147</sup>

In both years of reenactment, opponents found that the emergency originally warranting section 5 had largely disappeared but the statute's provisions had only grown stronger.<sup>148</sup> With the exception of a very small number of local jurisdictions that had successfully "bailed out" of the system, the original states targeted in 1965 remained subject to the review process.<sup>149</sup> This line of criticism held that implementing the law without major revisions amounted to a legislative overreach. Akin to recent public differences about the basis of executive authority in antiterrorism policy, this first set of claims questioned the legitimacy of maintaining a special remedy born in crisis once the emergency no longer existed.<sup>150</sup>

In the first "reenactment," the House members speaking most often against renewing section 5 were those like Representative Collins of Texas, who registered misgivings about the motivations of the sponsors of the proposed extension.<sup>151</sup> The main reason for his distaste was that there were no longer the kinds of extraordinary circumstances that had justified the remedy.<sup>152</sup> For example, he urged colleagues not to short-circuit a serious review of the provision

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144. *Id.*

145. *Id.*

146. *See* *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969).

147. *See, e.g.*, 152 CONG. REC. 14,226-37 (statement of Rep. Westmoreland).

148. *See, e.g., id.*; 127 CONG. REC. 22,924 (1981) (statement of Rep. Collins).

149. *Section 4 of the Voting Rights Act*, DEP'T OF JUST., [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php) (last visited Sept. 21, 2012). "Bailout" refers to a procedure allowing a covered jurisdiction to avoid preclearance by bringing a declaratory judgment action in the U.S. District Court for the District of Columbia and proving that it has not engaged in discrimination for a designated length of time. *See* 42 U.S.C. § 1973b(b) (2006).

150. *See* JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (Atlantic Monthly Press 2006).

151. *See* 127 CONG. REC. 22,923-26 (statement of Rep. Collins).

152. *Id.* at 22,924.

due to any perceived political emergency.<sup>153</sup> Indeed, Representative Collins was not especially willing to concede that the original enactment of section 5 was justified even in 1965.

In their view, covered states no longer acted in bad faith when handling voting policy. Whether or not section 5 was responsible, the declining number of administrative violations in these states under review was not.<sup>154</sup> For these members, the trend indicated the decline of a commitment to subvert the norm of racial fairness in the political process. “The Justice Department between 1965 and 1974 objected to 6 percent of the proposed election law changes and, in 1980, Justice objected to only 1.8 percent of the proposed changes—practically no objections.”<sup>155</sup> In sum, these results were inconsistent with an emergency.

In contrast were the members who regarded section 5 as more of a long-term project than their opponents.<sup>156</sup> Maintaining the provision helped to deter possible state violations; the fact that the administrative record did not reveal sustained evidence of state violations was simply an indication that section 5 was working.<sup>157</sup>

153. *Id.* at 22,925 (quoting *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934)) (“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted.’ We should think long and hard before we conclude that any special conditions justify Congress taking away State power, as has occurred through the Voting Rights Act.”).

154. *See id.* at 22,923.

155. *Id.* at 22,923.

156. *See id.* at 22,909 (statement of Rep. Washington). Among the most provocative characterizations came from another Texas Congressman, Democrat Mickey Leland. Representative Leland was only one of two black House members from the South, making him a pivotal voice in promoting an extension of the bill. His most provocative comment included the reference to the myth of Sisyphus:

Sisyphus, whose endless plight in tortured immortality was to heave and push, tug and tow a huge, rough, rock up the awkward, craggy slopes of a steep mountain—upon reaching the pinnacle—only to see that boulder plummet, crashing, and breaking, down to the ugly bottom. . . .

Our duty . . . is to do our part to eliminate the egregious burden of disenfranchisement that has plagued [minorities] . . . throughout our spotted history.

. . . .

I ask you to shoulder the burden, speaking not only as a fellow colleague, but also as one who has directly benefited from this ever so necessary act.

. . . [W]e must shoulder this formidable burden together and pass this act. I know that together, this heavy, heinous boulder called disenfranchisement can be easily tossed into the liberating sea.

127 CONG. REC. 22,926 (statement of Rep. Leland).

157. *See* Michael J. Pitts, *Section 5 of The Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 244-267 (2003).

Some even invoked imagery from mythology to advance the notion that there was no definite answer for when the emergency conditions would cease or when the preclearance system would become unnecessary.<sup>158</sup>

By 2006, more than forty years into the enforcement of section 5, the clamor against justifying section 5 as an emergency tool grew louder.<sup>159</sup> With fewer signs of the organized resistance that existed in the South of 1965, those who sought an end to section 5 rallied mightily to dismantle the arguments about a crisis.<sup>160</sup> Others urged Congress to let section 5 expire because of the heavy burdens it placed on the exercise of legitimate state authority in the modern era. Representative Lungren of California emphasized that even the Supreme Court had noted that this type of remedy was rarely appropriate, even though it eventually held that section 5 addressed an extraordinary set of problems.<sup>161</sup> Implied in this point was that the same policy might not surpass muster with a different political context in place. In Lungren's view, the current situation was not severe enough to require any special federal oversight: "[T]his extraordinary remedy in section 5 is no longer valid. Why is it extraordinary? Because it is an extraordinary imposition on a jurisdiction to say that they have to have any decision they make precleared by those at the Justice Department."<sup>162</sup>

Still others suggested that the actual motivation for this extension was not an ongoing emergency but more partisan aims. In explaining his decision to oppose the 2006 bill, Representative Bonner of Alabama found the most significant feature of the law was its role in "making our country a 'little more red' or a 'little more blue.'"<sup>163</sup> Absent evidence of an emergency condition, there was no need to bear the excessive partisanship they saw in the bill. Recounting how the party influenced the mid-decade redistricting litigation in his state, Representative Hensarling of Texas concluded that the provision required states to "maximize the number of

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158. See note 156 and accompanying text.

159. See generally Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

160. See 152 CONG. REC. 14,237 (2006) (statement of Rep. Westmoreland).

[W]e are already way past temporary. And the application of section 5 is now arbitrary because this House cannot present evidence of extraordinary continuing State-sponsored discrimination in the covered States . . .

As such, section 5 has served its purpose and is no longer an appropriate remedy in light of today's new voting problems.

*Id.*

161. *Id.* at 14,251 (statement of Rep. Lungren).

162. *Id.*

163. *Id.* at 14,258 (statement of Rep. Bonner).

districts where a certain political party wins,” so that in most cases, section 5 only protects the right to elect a “Democrat minority candidate.”<sup>164</sup>

## 2. The South Has Fundamentally Changed

A related argument in both reenactments was the concern about regional bias. At the original enactment of the VRA, opposing Congressmen decried the fact that Southern states were (unfairly) targeted for special treatment by the federal government.<sup>165</sup> This claim obviously carried less weight in 1965 than in the later years, since the entire nation had observed the blatant refusal by Southern officials to follow the Fifteenth Amendment.<sup>166</sup> Throughout both of the “reenactment” debates, members criticized the preclearance remedy for prolonging the penalty for the originally covered jurisdictions without good cause.<sup>167</sup> The concern was just as salient for members inside the South as outside of the region. Senior Judiciary Committee member Henry Hyde, for example, fought to update the list of covered jurisdictions that were originally targeted by Congress in 1965.<sup>168</sup>

About twenty-five years of implementation later, the battle lines on this issue had changed very little in the House of Representatives. Angered that the 2006 extension kept the rules in place for the states originally targeted in 1965, the opponents launched a flurry of amendments to update the criteria for coverage and to create a more accessible way of obtaining an exemption from administrative

164. *Id.* at 14,269 (statement of Rep. Hensarling).

165. See Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, NAT'L AFF., Spring 2010, at 54.

166. See Special Message to the Congress: The American Promise, 1 PUB. PAPERS 281 (Mar. 15, 1965).

167. Take for example, Representative Collins, who decried the statute's perceived unfairness toward the South:

The problem with the Voting Rights Act is that the originally covered States have had to cope with the most onerous parts of the statute[,] sections 4 and 5, while the rest of the country lives by a less stringent standard. This is true even though the South has made remarkable progress in voter registration. This is an inequitable, nonsensical bill.

127 CONG. REC. 22,923 (1981) (statement of Rep. Collins).

168. Summarizing official findings that detailed participation rates across the country, he argued:

[T]hat Massachusetts, that New York, that New Jersey, and even the District of Columbia, have worse records of minority participation than Mississippi and the South. So if you are going to make the South show levels of participation, I want to be able to show your State's level of nonparticipation so the court has before it all of the evidence

*Id.* at 22,905-06 (statement of Rep. Hyde).

review.<sup>169</sup> For their part, Southern Republicans in the House took particular offense to the selectivity inherent in the statute. One member even proclaimed, “This is not a Voting Rights Act—it is a Voting Discrimination Act!”<sup>170</sup> In sometimes-emotional speeches, they claimed that the most objectionable aspect of the provision was that it unfairly left a badge of dishonor on their home states despite clear progress in complying with federal law.<sup>171</sup>

A bevy of members from the Georgia delegation argued that there was no reason for their state to remain among the targeted section 5 states. Chief among this group of Georgians was Representative Westmoreland, who sponsored one of the first amendments to revise the provision’s coverage formula. He openly invited a comparison of any other state’s record on racial progress with that of Georgia, and he enumerated instances of black political power in that state in great detail.<sup>172</sup> He especially addressed the problems with maintaining the original coverage formula, which excluded states with political dynamics identical to Georgia’s:

There is a lot of paper, but not many facts or statistics to show why Georgia is different from Tennessee or why Texas is different from Oklahoma or why racially polarized voting in Wisconsin shouldn’t be addressed with a remedy such as the VRA. Updating the formula is the answer.<sup>173</sup>

Phil Gingrey of Georgia, who sponsored a separate amendment, argued that a fair approach to this provision should be “equally applied to all States and address[] the world as it is in 2006, rather than 1964.”<sup>174</sup> Echoing Representative Hyde’s thinking from 1982, the proposed alterations would permit a transparent way for states to exit the preclearance system:

If you violate [the VRA standard], you are and you should go to the penalty box, which is the preclearance section. If you are in the penalty box and have not violated [the VRA standards] in the last three Presidential elections, you get to come out of the penalty box. It is that fair, it is that just, and it is just that simple.<sup>175</sup>

Others lampooned the apparent mismatch between the jurisdictions where participation lagged behind the country and those where the preclearance provisions applied.<sup>176</sup> For example,

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169. See 152 CONG. REC. 14,219-21 (2006) (statement of Rep. Hastings).

170. *Id.* at 14,260 (statement of Rep. Price).

171. *Id.* at 14,238 (statement of Rep. Waters).

172. *Id.* at 14,237 (statement of Rep. Westmoreland).

173. *Id.* at 14,275.

174. *Id.* at 14,221 (statement of Rep. Gingrey).

175. *Id.* at 14,226 (statement of Rep. Norwood).

176. See *id.* 14,275 (statement of Rep. Baker).

Many have been incensed even by the thought of this discussion, because

Representative Conaway of Texas noted the clearest evidence of discrimination actually came from jurisdictions that are not covered under section 5.<sup>177</sup>

In response to these claims, supporting members rose to provide a different picture of the very same states, using ongoing voting issues. One of them, Representative Lewis of Georgia, reminded voters of the long historical journey that led to the initial enactment of the VRA and the preclearance provision.<sup>178</sup> His comments provided a powerful answer to the extended attacks from opponents, since he was both a legend of the Civil Rights Movement as well as a black elected official from a Georgia district created through voting rights enforcement.<sup>179</sup> Nonetheless, absent from Representative Lewis's argument, and that of his allies, was any indication of a definite endpoint for the preclearance system or a means to identify and measure the signs of progress offered by his colleagues.<sup>180</sup>

### 3. Constitutional Problems

The most sustained issue debated in both episodes was the constitutionality of a renewed preclearance system. This was the least novel of all three lines of reenactment arguments; at least one constitutionality lawsuit followed each one of the VRA reenactments.<sup>181</sup> Opponents in each reenactment tried (unsuccessfully) to persuade their colleagues to revise section 5 with an eye toward defending the provision in the courtroom.<sup>182</sup>

One basis of the argument in 1982 was that section 5 placed an impermissible emphasis on racial proportionality. According to this thinking, the statute was inconsistent with the Court's effort to take race out of public decision making.<sup>183</sup> Evident in its public law decisions, including questions on employment and education, was an overriding directive that plaintiffs must demonstrate intent-based

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they mistakenly view this legislation as all that stands between them and their right to vote. The 15th Amendment to the Constitution apparently is of no consolation, although it ensures the right to vote to every American across the entire Nation. The bill now pending leaves 43 States on a different legislative landscape.

*Id.*

177. *Id.* at 14,265 (statement of Rep. Conaway).

178. *Id.* at 14,237 (statement of Rep. Lewis).

179. *See id.*

180. *See id.* at 14,237, 14,297-98, 14,300.

181. *See City of Rome v. United States*, 446 U.S. 156 (1980) (testing different theories that the preclearance provisions exceeded congressional authority); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (same).

182. *Id.* at 356-57 (Black, J., dissenting).

183. *See generally Voting Rights Act: Hearing on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the S. Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97<sup>th</sup> Cong. 402-446 (1982).

evidence showing racial discrimination.<sup>184</sup> The *Bolden* decision<sup>185</sup> sparked a conflict about section 5 because it proposed a broad conception of the rights protected under the statute.<sup>186</sup> While the sponsors of the reenactment desired to dismantle the *Bolden* decision, opponents worked to defend it.<sup>187</sup> Renewing section 5 for some meant that Congress endorsed a federal mandate of proportional political representation.

Representative Collins once more led the way in summarizing his problems with the effort to preserve section 5. The VRA, he argued, was rightly aimed at addressing problems of access to the ballot box because it was based on a reasonable expectation that removing barriers to registration and voting would “normalize the participation of minorities.”<sup>188</sup> Collins further claimed that the Act then moved into the realm of regulating political outcomes, which “unfairly assumed that blacks would always be set apart from the rest of the population and that they always vote as a bloc.”<sup>189</sup> The result of this new approach was the establishment of a “right to expect maximum political effectiveness,”<sup>190</sup> which was beyond what the Constitution would allow.<sup>191</sup>

Finally, Collins described “[t]he most serious constitutional problem” of the law’s constitutionality concerns, state equality, which

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184. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

185. *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980) (holding that showing of discriminatory purpose is required to establish racial vote dilution).

186. See Randolph M. Scott-McLaughlin, *The Voting Rights Act and the “New and Improved” Intent Test: Old Wine in New Bottles*, 16 *TOURO L. REV.* 943, 950-55 (2000).

187. See Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 *ALA. L. REV.* 903, 920 (2008).

188. 127 *CONG. REC.* 22,925 (1981) (statement of Rep. Collins).

189. *Id.*

190. *Id.*

191. Representative Collins also summoned an argument that section 5 imposed too heavy a burden on covered jurisdictions. The statute interfered with the traditional functions of state government in a manner that violated the balance of authority inherent in federalism. While it preceded *City of Boerne v. Flores* by more than a decade, the claim fit very nicely into its theoretical framework:

[E]very time we change a little commissioner’s district we have to make application.

. . . We cannot elect a city council, we cannot appoint a school board, we cannot have a commissioners election because everything is going through all of this redtape .

I do believe that if all of you fine gentlemen had this redtape and bureaucracy and delays in your own States, you would submit a more reasonable bill to us today.

*Id.* at 22,923.

he framed as the “equal footing doctrine.”<sup>192</sup> As he understood the principle, “every new State is entitled to exercise all the powers of government which belong to the original States of the Union.”<sup>193</sup> By only imposing restrictions on some states and not others, Congress denied to covered jurisdictions the powers attendant to their admission as equal sovereign entities within the national government.<sup>194</sup> He added, “The idea of equal footing is useless if a State can be denied equality after it has become a permanent member.”<sup>195</sup>

In 2006, the concerns with the *City of Boerne* decision added a new line of attack for those favoring constitutional arguments. Satisfying the proportionality and congruence tests were cited as key reasons for doubting the constitutionality of a renewed preclearance provision.<sup>196</sup> Several landmark federal remedial statutes had fallen in whole or in part as the Court placed more markers on legislative authority to regulate states in defense of constitutional rights.<sup>197</sup> Accordingly, the open question was whether the Court would find a twenty-five-year extension of a temporary provision justifiable in light of the current political circumstances in the South.<sup>198</sup>

Some members suggested that a constitutional inquiry might dwell on matters quite reminiscent of Representative Collins’s meditation on administrative red tape.<sup>199</sup> Focusing on the more quantifiable burdens born by the covered jurisdictions, these members advised their colleagues about the financial costs of

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192. *Id.* at 22,925.

193. *Id.*

194. *See id.*

195. *Id.*

196. *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997).

197. *See, e.g., Alexander Tsesis, A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1775-76 (2006).

198. The most thoughtful consideration of the congruence and proportionality concept came from Representative Lungren of California, who conveyed his doubts that the record evidence would support a full renewal of section 5’s power over states:

[I]t is an extraordinary imposition on a jurisdiction to say that they have to have any decision they make precleared by those at the Justice Department. But the Court has said, as long as you have those two things, congruency and proportionality, they will allow it. That is why I have some question about extending it for a full 25 years.

Back in 1982, I think there was ample reason for us to extend it for 25 years. You would still have a sense of a temporary nature. But to do it now, I think does call into question whether we are following what the courts have told us.

152 CONG. REC. 14,251 (2006) (statement of Rep. Lungren).

199. *See supra* note 191 and accompanying text.

participating in the compliance process over a prolonged period. When these costs for local, county, and state officials were aggregated, they presented a significant problem of tailoring in the statute. “While there is no doubt that the Voting Rights Act was necessary when enacted, some of the bill’s provisions have turned into a costly financial burden for States affected by the law.”<sup>200</sup>

Finally, members suggested that the legislative process itself had tainted the constitutionality of section 5: “I want to make several comments on this [bill]. One is, as a Catholic, I believe in the immaculate conception, but there is only one that I am aware of and that is not this bill.”<sup>201</sup>

This [bill] is here because the 15th amendment has given jurisdiction to Congress to do certain things, and we act on those facts. But the facts are still the facts even though this bill may attempt to say they are something different.

Just because some of our Members prefer to linger in the sins of the past, it is our responsibility to legislate on the facts of the present, and those facts do not justify an extension of section 5.<sup>202</sup>

One important exception to the failure of the legislative process in 2006 to turn any systematic attention to RPV data is the introduction of data by Professor Ellen Katz, who utilized analysis of her section 2 study to help inform the question of whether and how much the politics of the preclearance states had changed.<sup>203</sup> She offered helpful evidence showing that there were fundamental racial differences between covered and noncovered jurisdictions in the period since the last VRA extension. Using averages taken from all elections included in her study, Katz testified that the level of white bloc voting rates were on average twice as high in defendant jurisdictions where the preclearance regime applied compared to those jurisdictions outside the regime. By this reasoning, the contrast seemed to indicate a significant difference in the political climate for nonwhite voters in each region of the country.

While it was surely helpful to the congressional deliberations, the insight from the Katz study on the major question about the continuing need for section 5 is somewhat limited by the selection of the information contained in the research. The RPV information taken from this study only includes actual lawsuits filed under section 2 of the VRA—the traditional “sword” usage of RPV analysis.<sup>204</sup> In this case, the data includes approximately 100 different elections at various level of government over a span of

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200. 152 CONG. REC. 14,253 (statement of Rep. Cubin).

201. *Id.* at 14,251 (statement of Rep. Lungren).

202. *Id.* at 14,277 (statement of Rep. Deal).

203. *See generally* Katz, *supra* note 105.

204. *See id.* at 645.

twenty-five years.<sup>205</sup> Consequently, the share of elections included in the analysis is but a fraction of available data from section 5 jurisdictions (either where no suit might have been filed or where no RPV evidence was cited by the courts) that could possibly reveal broader trends of RPV.

This is not to say that the asserted RPV rate distinction between covered and noncovered jurisdictions is necessarily inaccurate. However, the share of cases that support this finding is not necessarily representative of the entire region.<sup>206</sup> A wider scope of elections taken from each of the regions in the country would be needed to confirm this assertion.

In sum, the legislative record provides no widespread RPV evidence in the section 5 context to show the extent that, over time, RPV trends might have changed in the South. A longitudinal study of RPV rates in all or even most covered jurisdiction elections would have been an ideal way to assess how circumstances might have changed due to federal enforcement. And such a study might have been possible with RPV material already in the possession of the federal government from its preclearance files. DOJ guidelines contemplate that covered jurisdictions can utilize this information as evidence supporting their submissions for approval of their voting changes.<sup>207</sup> However, no such catalogue showing the trends of RPV data over time was ever conducted by the DOJ. And no other entity presented such information to Congress, leaving members to speculate about the fundamental inquiry that both they and the Supreme Court would have to decide.<sup>208</sup>

#### IV. REASONS FOR MISUSE

The previous section shows that these alternative applications of RPV data have not been fully utilized in the present era, yet they hold potential to provide insight into significant questions and possibly also improve voting rights enforcement for a variety of actors. So what are the reasons that this information is so frequently misused or ignored in public life? I attribute this trend to three different factors—(1) local self-interest, (2) ideological stalemates, and (3) judicial misunderstandings.

One obvious causal factor that supports the trend of under-use of RPV data is the role that local self-interest typically plays in the design of election rules and procedures. In any given jurisdiction,

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205. *Id.*

206. *See id.* at 655 n.44 (listing U.S. Census data regarding percentages of minorities living in section 5 covered jurisdictions).

207. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011).

208. *See* 152 CONG. REC. 14,217-14,321 (2006).

there are always political incentives to drive policy decisions in a manner that achieves biased outcomes.<sup>209</sup> This principle is a mainstay in political science literature as well as public choice scholarship.<sup>210</sup>

In this context, the pursuit of personal advantage by local officials may sometimes take a partisan dimension (as in North Carolina) or it may have connections to racial or regional group dynamics (as in Los Angeles).<sup>211</sup> The North Carolina example of misuse demonstrates how partisan actors can underuse RPV information while turning a blind eye to contrary (but readily available) information that would call their preferred account of RPV into question. Likewise, the concerns about complicating the intended case to create additional Latino-majority districts would be undermined by findings that there is not a strong case for RPV in local elections. The desired districting outcome likely motivated the decided indifference by actors in Los Angeles to the possibility of conducting an RPV study.

The selective use of RPV information or the outright refusal to conduct an analysis of RPV data in these cases poses real harms. Most obviously, these decisions essentially “stack the deck” in deliberations about redistricting to favor a particular policy choice. The influence of public discourse in the process is thereby harmed due to the absence of information. But additionally, the ends-oriented thinking by these actors poses grave threats to the maintenance and proliferation of coalition-based districts. These diverse constituencies are the sites of the type of robust cross-racial cooperation that voting rights enforcement intends to encourage; the decisions to eliminate them should only be taken with caution. Finally, local self-interest may lead to a costly misunderstanding of what the federal law requires. To the extent that the decision-makers develop an incorrect view of the law, they are likely to adopt plans that invite legal challenges from actors who are disadvantaged by the result.<sup>212</sup> The strategy, therefore, undermines the presumed interest of the entire jurisdiction in adopting a plan that is likely to withstand a costly legal challenge.

A second reason that the misuse of RPV data is so common is linked to the ongoing stalemate about the relevance of federal

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209. See, e.g., Zahniser, *supra* note 130.

210. See, e.g., Issacharoff, *supra* note 1, at 1885 (“[O]utcomes of the legislative process are corrupted by the ability of those setting the voting agenda to control the outcome of the electoral and political processes.”)

211. See *supra* pp. 991-96 (discussing controversies in North Carolina and Los Angeles).

212. See Issacharoff, *supra* note 1, at 1861 (“The target of voting rights claims . . . is the creation or maintenance of electoral systems that reward [a racially defined majority] faction with superordinate representation.”).

administrative oversight of voting rules. As I have written elsewhere, the question of whether preclearance is an appropriate use of federal authority remains one of the most divisive questions in public life.<sup>213</sup> The warring sides regard this issue as a never-ending zero-sum exercise. Because of the extreme ideology at stake, the discourse quickly leaves little room for compromise. The 2006 debate, like the one that preceded it in 1982, replayed speeches that revealed two untenable positions about the law—(1) that racial bias in elections is a matter of antiquity in the South; and (2) despite its effective application, the preclearance regime remains as necessary as it ever did.<sup>214</sup> Both of these positions strain credulity, yet the reality in the present Congress is that they demand strict adherence by the members articulating each view.

The few actors who proposed reform measures that would gather more comprehensive and objective data on RPV in the future found little traction in the discourse.<sup>215</sup> Both ideological sides viewed such grand compromise schemes with skepticism because of uncertainty about what the results of this research might indicate about these trends.<sup>216</sup> Members instead focused on prolonging a virtually irresolvable dispute about whether the South had changed enough to merit an end to the preclearance regime.<sup>217</sup> The conclusion of this exchange essentially preserved the status quo ante—allowing the preclearance system to remain on the books (subject to pending potential court challenges) but providing no clear means of assessing the effectiveness of this regime over the next two and a half decades.

The final explanation for the rampant misuse and abuse of RPV data lies with the judiciary's mishandling of RPV information in its cases. In its effort to resolve other doctrinal problems, the Supreme Court has itself committed the unforced error of overlooking or misusing relevant RPV data.<sup>218</sup> These mistakes have added to, not reduced, the confusion about the demands of the Voting Rights Act in practice.

One ideal illustration of this problem is the very case that partly aided North Carolina's recent mishandling of the redistricting process. In *Bartlett v. Strickland*, the Court found that a district in

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213. See generally Kareem U. Crayton, *Interactive Pre-clearance Development*, 27 ST. LOUIS U. PUB. L. REV. 319 (2008) (noting the disfavor evident at the 2006 renewal hearing regarding the preclearance provision's use as a method of federal enforcement).

214. See *id.* at 320-22; *supra* pp. 998-1007

215. See generally 152 CONG. REC. 14,253-63 (2006) (debating the use of more current RPV data before renewing the VRA).

216. *Id.*

217. See Carl Huse, *Rebellion Stalls Extension of Voting Rights Act*, N.Y. TIMES, June 22, 2006, at 23.

218. See, e.g., *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

North Carolina's previous legislative map ran afoul of the principles of section 2.<sup>219</sup> Rejecting the state's rationale that its plan complied with federal law, the majority ruled that section 2 did not require drawing any voting rights district in which a nonwhite group was less than a majority of eligible voters.<sup>220</sup>

The challenged district in this case was deemed a racial "crossover district," which allegedly entrenched political opportunity for minorities because of the area's record of black and white political alliances and the fact that blacks in the district controlled a majority of votes in Democratic primary contests.<sup>221</sup> Reviewing the decidedly mixed case law from the trial courts that have addressed issues involving the first prong of *Gingles*, the Supreme Court concluded that developing a bright-line rule that demanded a numerical majority was necessary under the circumstances.<sup>222</sup>

The most remarkable part of this opinion, however, is what the Court fails to address in its decision. With all the concentration on the majority population requirement, the majority and the dissent in *Bartlett* offered no comment at all about a stipulation made by the parties. Both sides in this case conceded that there was sufficient evidence of RPV for this district.<sup>223</sup> However, that factual point is completely at odds with the doctrine as well as the heart of the claim animating this lawsuit.

A district with robust and regularly effective political alliances between black and white voters cannot possibly meet the requirement in *Gingles*. This is because the prima facie test seeks evidence that minority preferred candidates usually suffer defeat due to bloc voting.<sup>224</sup> That outcome cannot occur in any effective crossover district. The entire explication in *Bartlett* adopting bright line population majority rule was unnecessary, since a successful showing of cross-racial alliances in a district would mean that such a proposal would fail the test for legally sufficient bloc voting. Had the Court actually interrogated the inconsistency between the way the state interpreted *Gingles* with the rest of the test, the outcome might have been simpler and direct.

The results of this particular episode of judicial mismanagement of RPV, though, continue to create problems that will lead to further litigation. It was, in fact, the *Bartlett* decision that now animated the mistaken legal rationale of North Carolina Republicans for maximizing the number of majority-black legislative districts

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219. *Id.* at 1239-41.

220. *Id.* at 1241-45.

221. *Id.* at 1242.

222. *See id.* at 1247-50.

223. *See id.* at 1246-49.

224. *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986).

statewide.<sup>225</sup> The import of the strategy is that, notwithstanding the presence of several nonwhite members who usually win with cross-racial coalitions and a dearth of other evidence showing current or widespread division in the electorate, federal law still demands these remedial steps. Without any clear statement about how RPV information ought to figure in the consideration of district maps, the Court has left ample room for this interpretation in practice. And it is likely to see this issue emerge again on its docket.

## V. RECOMMENDATIONS

In this final section, I apply the aforementioned observations about RPV studies to outline specific ways that can turn the law's attention toward the underutilized uses for RPV data. While a few simple adjustments in the legal doctrine can improve the "sword" function of RPV analysis, placing a far greater emphasis on the "shield" and "compass" features of this data can be especially helpful to address ongoing challenges in the voting rights arena. By more explicitly incorporating all three of these RPV uses into the law, policymakers, courts, and stakeholders alike will improve their joint efforts to combat race discrimination.

Below, I provide arguments for specific reforms that various institutional players in the voting rights regime ought to employ. The benefit of each idea is that it does not radically divert decision makers from the work they currently do, and it does not depart from the interests that already motivate their actions. Indeed, adopting these suggestions would further the same goals to which they are already committed. The discussion that follows includes an explanation of how each proposed change is consistent with the interests of the affected institution and how each change pursues these goals. I organize these claims by institution.

### A. *Local Jurisdictions*

The institutions with the greatest potential to gain from refocusing RPV studies are the local jurisdictions. State and local governments, including elected officials and agency bureaucracies, are repeat players in the maintenance and administration of the electoral structure. In managing these systems, jurisdictions frequently need to establish policy decisions that are endorsed by a diverse (and sometimes divided) electorate. As the examples above show, this is especially true with redistricting because it occurs at least once following each Census report. Local jurisdictions therefore are most directly affected by the organization of voting systems, and since they are responsible for affirming these policies, they are the most likely entities to find themselves as defendants in voting rights

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225. See generally July Joint Statement, *supra* note 119.

litigation.<sup>226</sup>

One very simple reform measure that can improve the position of jurisdictions in this context is a policy of organizing an RPV study as a preliminary step before updating or changing aspects of the voting systems. Running an examination of RPV data as a matter of course would only require a relatively small financial investment by the jurisdiction, but it would also promise significant advantages for proponents of the resulting policy change.

The most important advantage of adopting this policy idea is that the background information used for RPV studies is data that is readily available to the jurisdictions. Aside from the analytical software, the only necessary data is precinct-level demographic information and election returns. Since election results are regularly recorded and published by local officials, the only additional challenge would be to expend the time and resources needed to collect that information and then to organize it for analysis.<sup>227</sup>

In fact, conducting such an analysis in the election policymaking arena is not markedly different from the kind of work that officials already do in other contexts. For example, jurisdictions regularly track and distribute demographic data following each Census in order to comply with other federal mandates.<sup>228</sup> For at least five decades, jurisdictions have incorporated the one-person-one-vote legal standard into their operating procedure for redistricting.<sup>229</sup> Just as a jurisdiction's technical staff drafts and publishes background reports to determine compliance needs with the equal population requirement, officials can direct staffers to review the results from recent election cycles in order to determine what evidence, if any, supports a finding of RPV.

In its simplest form, a report contemplated by this reform could provide a general review of the RPV analysis applied in elections spanning a period of up to a decade. Such a report could simply use this period as a benchmark for a summary or average measure of RPV during the ten-year period. Parties could then utilize this data in formulating their own assessments of a policy change. A more

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226. See generally Katz, *supra* note 105 (summarizing various section 2 vote dilution lawsuits); see also *City of Mobile v. Bolden*, 446 U.S. 55 (1981); *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113 (E.D. La. 1986); *Smith v. Brunswick Cnty.*, 984 F.2d 1393, 1397 (4th Cir. 1993); *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999).

227. See, e.g., *NC State Board of Elections Voter Statistics*, N.C. STATE BD. OF ELECTIONS, [http://www.app.sboe.state.nc.us/webapps/voter\\_stats/results.aspx?date=12-25-2010](http://www.app.sboe.state.nc.us/webapps/voter_stats/results.aspx?date=12-25-2010) (last visited Sept. 21, 2012).

228. See, e.g., *2010 City of Los Angeles Population*, CITY OF L.A., [http://ens.lacity.org/cla/importdocument/clacdre319873623\\_10062011.pdf](http://ens.lacity.org/cla/importdocument/clacdre319873623_10062011.pdf) (last visited Sept. 21, 2012).

229. See *Baker v. Carr*, 369 U.S. 186 (1962).

ambitious version of this report could task officials with characterizing this data for legal purposes, and it could include an expert's preliminary recommendation on whether the RPV evidence indicates a significant legal problem, based upon the aforementioned measures of elections.

Particularly where redistricting is concerned, officials would be well served by adopting this "best practice" for several reasons. Foremost, starting the policymaking process with an RPV study would essentially create a single source of information for all stakeholders and officials to review in the discourse about proposals. Having all of the interested parties operating from the same set of initial understandings about the status quo can helpfully narrow the terrain of debate. Divisive and lengthy skirmishes about these procedural matters can often derail an effort to establish new substantive changes in the political system.

At the same time, resolving some of the questions about RPV trends also can establish what role federal law ought to play in selecting the details of any new policy. One significant aspect of current debates on matters like redistricting is whether any of the competing interest groups have a legal entitlement to their most preferred plan.<sup>230</sup> Because the Supremacy Clause requires jurisdictions to prioritize Voting Rights Act compliance before turning to state and local principles, competing groups frequently try to frame their arguments based on federal law.<sup>231</sup> At least for the purposes of dilution claims, the information from an RPV study will establish how pressing the need is for consideration of a community's likely dilution concerns. Where they are not significant, all parties can turn to arguments based on the rules and standards from state and local government.

Perhaps most important for the long term, the move would benefit the jurisdiction's effort to remain free from costly and time-consuming litigation. Where possible, most jurisdictions would rather adopt policies that can be upheld absent a court challenge. Several jurisdictions have registered this concern as perhaps the most significant frustration in complying with the Voting Rights Act.<sup>232</sup> The most significant advantage of making this proposed adjustment is that it helps develop a cooperative working relationship with stakeholders who are potential plaintiffs. This outcome depends upon the ability to preserve amicable dealings with citizen groups—including those who might resort to a lawsuit.

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230. See, e.g., June Joint Statement, *supra* note 120.

231. See U.S. CONST. art. VI, cl. 2; *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) (describing the relationship between federal and state legal requirements).

232. See, e.g., *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012); *Nw. Austin. Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

Racial minority groups and their associated interest organizations would certainly welcome an effort by a jurisdiction to test the existing level of racial division in the political system. An initial step by decision makers to consider the possibility of federal remedies would signal to these groups the commitment to treat groups fairly. The same may also be said for partisan groups; while few political parties will officially endorse a decision driven by their opponents, the effort to conduct an objective analysis of elections establishes the basis for a shared set of facts that can guide the debate about the most desirable policy.

*B. Congress*

A second recommendation for reform addresses the role that federal legislators can play to improve the existing system. Much of the responsibility for the underutilization of RPV evidence traces back to problems of statutory interpretation. In framing the VRA temporary provisions, as the earlier section illustrates, Congress left many unanswered questions about how to identify and measure changes in race discrimination in the political arena. Most people recognize that contemporary politics are vastly improved compared to the 1960's, but the congressional debates about the VRA reveal that few have ever agreed on the proper indicators of a climate where discrimination no longer plays so troubling a role as to obviate the need for special federal oversight.<sup>233</sup>

One part of the answer to this puzzle lies with Congress marshaling the power of RPV studies in a more aggressive manner than it has in the past. Whereas Congress has left the operative VRA provisions on the issue of measurement ambiguous, this proposed reform envisions new statutory language that explicitly embraces RPV as a primary, if not the central, proxy that will be used to assess the prevalence of the kind of discrimination in the election system that merits federal intervention.

When Congress first adopted the VRA in 1965, the statute mandated an official review of its effectiveness during its first five years of enforcement.<sup>234</sup> The goal was to determine how much progress had been made toward securing the right to vote for nonwhite citizens. What was left out of that official analysis was attention to changes in RPV. Similarly, in the 2006 renewal of the VRA, members squabbled over whether progress had been made and what factors should be used to measure future progress.<sup>235</sup> Again, the decision was taken to conduct a study—but without any specific direction to determine the extent to which progress might occur over

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233. See *supra* Section III.B.

234. See S. REP. NO. 97-417, at 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177.

235. See *supra* Section III.B.

the next twenty-five years. Absent such a measure (or an external event), the next Congress that addresses this issue is almost destined to engage in another “reenactment.”

This conundrum is precisely a problem that RPV analysis as “compass” can help to resolve. Congress can embrace RPV as a key indicator of the discrimination that necessitates federal intervention, thereby focusing a future analysis on this factor in a future study. Importantly, the measure could call for a national RPV study that regularly examines the level of division in communities covered under the special preclearance provisions and those elsewhere. After each presidential election, for instance, the federal government could commission a study that provides an assessment of both federal and local campaigns nationwide. The sum total of this data over time can aid our understanding of how this behavior may change.

Taking a broader scope for RPV analysis would improve the understanding of which parts of the country are improving and whether a differential treatment of the current set of “covered jurisdictions” is justified. While they might not fully resolve these questions, the results can pave the way for a fact-based discussion about a question that neither Congress nor the courts have yet answered—when will we fulfill the promise of the Fifteenth Amendment and obviate the need for special federal protections?

Toward this same end, the proposed reforms can also encourage the adoption of more specific directives about the use of RPV in local governance. Jurisdictions, for instance, might be encouraged to run RPV analysis if the language of the VRA explicitly endorses this practice as a favored policy. This change could be accomplished most directly as a basis that a jurisdiction might use to obtain “bailout” from the preclearance system. The language of the VRA currently directs that “constructive efforts” to end discrimination can weigh in favor of a jurisdiction that meets the other requisite elements of bailout,<sup>236</sup> but Congress could specifically state that the jurisdiction’s adoption of a policy to conduct RPV analysis is one such step to be viewed favorably. Thus, a jurisdiction could use the results of RPV analysis as evidence showing a sustained reduction in RPV but also use the existence of several RPV studies themselves as a good-faith showing of their commitment to combat race discrimination in politics.

### *C. The Judiciary*

Beyond what the jurisdictions or Congress might do to further the cause of reform, the judiciary itself can adopt measures to reap more benefit from RPV analysis. The U.S. Supreme Court originally established the *Gingles* framework that brought RPV data into

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236. See 42 U.S.C. 1973b(a)(1)(F)(i)-(iii) (2006).

greater use as a litigation “sword.”<sup>237</sup> Since that time, the trial courts have been responsible for applying this framework to resolve dozens of vote dilution cases across the country. Thus, any comprehensive strategy for changing the ways that RPV data plays a role in the law requires attention to the ways that the federal judiciary handles this information.

The most obvious place where reform might take hold is in the “sword” function for RPV. Courts should adopt a clearer understanding about how to interpret the second and third prongs of *Gingles* in practice. The federal courts have been just as ambiguous as Congress has been about how this data ought to figure into a vote dilution claim. Under the existing application of *Gingles*, one finds surprisingly little consistency in defining the level of bloc voting that must exist in order to satisfy the bloc voting requirement. Importantly, a significant percentage of section 2 cases that involve RPV issues provide a comprehensive review of the evidence that supports a finding of bloc voting.

Courts can correct this deficiency by establishing a straightforward threshold for bloc voting. Following the circumstantial inquiry that *Gingles* has encouraged, trial judges since 1986 have made findings that seem to defy any clear pattern. One cannot identify a specific threshold or interval of bloc voting that would be sufficient for courts to find that legally cognizable RPV exists. While 90% rate of in-race voting by each racial group would certainly meet the standard, courts reviewing some cases with such measures as low as 60% in race voting have found illegal vote dilution.<sup>238</sup> The result is a statistical hodgepodge of a standard that leaves jurisdictions, and even interest groups, on their own to determine precisely what the law requires.

Another way to clarify this part of the *Gingles* test is by establishing a level of bloc voting in which a jurisdiction is presumed to have sufficient RPV. For example, in places that exceed 80% voting for each of the identifiable racial groups in elections, most courts will find agreement that the bloc voting requirement has been met. However, the trends are far more muddled in those cases where voting cohesion is less robust for groups in election contests.

There are additional procedural changes that can encourage more consideration of RPV studies as “shield” and “compass” as well. In support of encouraging local jurisdictions to run preliminary RPV studies, the courts can adopt a legal presumption against finding legally cognizable RPV where a defendant jurisdiction provides sufficient evidence that it conducted a preliminary analysis of bloc

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237. See generally QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994) (cataloguing post-*Gingles* dilution litigation).

238. See Katz, *supra* note 105 at Table 8.5.

voting. The courts have adopted similar policies that demand additional evidentiary showing where there is some basis for believing that a contending variable like partisanship accounts for a pattern of election outcomes.<sup>239</sup> To the extent the jurisdiction can demonstrate that its policy choices are grounded in the RPV analysis contained in its preliminary report, the court could shift an evidentiary burden to the plaintiffs to demonstrate that they are entitled to a full hearing on the merits.

One can just as easily view this burden-shifting framework as reinforcing the incentive for defendant jurisdictions to conduct a preliminary study. Before imposing the significant time pressures on the trial courts to engage in the very murky and time-consuming totality of circumstances analysis related to the defendant's policy, the trial judge can narrow the inquiry to specific evidence of political division before proceeding to a more wide-ranging review of the historical and social background of the jurisdiction that *Gingles* contemplates. In fact, such an incentive could also serve the interests of at least some potential plaintiffs. Since this approach would focus a discussion on a specific topic, any expenditure of resources would be fairly minor unless and until the preliminary review yielded inconclusive or potentially negative evidence.

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This Article has made the case for turning more attention to the various ways that RPV data can be used to promote voting rights enforcement. Aside from its value as an offensive weapon, information on the level of racial division in elections can assist various actors in their effort to develop policy that complies with existing law. Doing so promotes several values including avoiding possible litigation, gaining needed allies in policy decisions, and charting the effectiveness of existing enforcement regimes.

The quest for realizing racial equality in the political sphere turns on an aspiration that, when given the opportunity, voters will consider candidates based on their individual ability to lead as opposed to the racial group to which they belong. Those opportunities can only become commonplace and sustainable where the law promotes their development. This Article has demonstrated that RPV data can be a major aid in that effort. Recognizing that this path toward equality is a long and confusing one, society needs as many tools as possible to aid its progress. With so many uses for RPV studies, judges, officials, and advocates alike should strive to

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239. See, e.g., *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 902 F.2d 293 (5th Cir. 1990) (addressing the possible confounding effects of partisanship as a competing variable that may explain certain polarized election outcomes).

make the most out of the information that is readily available and applicable to many ongoing questions. While we simply cannot know with certainty the pace of progress, RPV can assuredly enhance the view of the terrain that remains ahead.