VOTING RIGHTS IN LOUISIANA 1982-2006

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PREPARED BY DEBO P. ADEGBILE

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INTRODUCTION and EXECUTIVE SUMMARY

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

> Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.[2]

For nearly one hundred years following passage of the Fifteenth and Fourteenth Amendments, entrenched discrimination in voting eroded the promise of equality. Citizen protests brought urgency to the need to reconcile our nation's high constitutional principles with its low anti-democratic practices. Congress took up president Johnson's charge to ensure political equality by overwhelmingly passing the VRA, which was "designed to banish the blight of racial discrimination in voting."[3] On four subsequent occasions, after determining that the goal of purging discrimination from voting had yet to be achieved, Congress and the sitting President have renewed the national commitment to the VRA's expiring enforcement provisions.[4] Section 5 of the Voting Rights Act of 1965, and the other expiring voting enforcement provisions,[5] are set to expire in 2007 unless they are renewed. These provisions have been at the core of voting rights enforcement in the four decades since the passage of the VRA.

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

This report analyzes voting rights enforcement in Louisiana since 1982. The view from Louisiana provides important evidence about the effectiveness and ongoing necessity of VRA protections. Forty years after the passage of the VRA, Louisiana has made demonstrable progress toward the goal of equality in voting but fallen short of accomplishing it. Any careful study of the experience of minority voters in Louisiana reveals that much of the progress that has been achieved in the state is a direct result of the protections of the VRA generally, and the

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[2] President Lyndon Baines Johnson's Speech before a Joint Session of Congress, March 15, 1965.
[3] See *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966) (upholding the constitutionality of Section 5 preclearance).
[4] Expiring provisions of the VRA were renewed in 1970, 1975, 1982, and 1992.
[5] The related provisions include Sections 203 (42 U.S.C. § 1973aa-1a), 4(f)4 (42 U.S.C. § 1973b(f)), and the federal examiner provisions (42 U.S.C. §§ 1973d, 1973f).
[6] See U.S. Dept. of Justice, *Section 5 Covered Jurisdictions*, *available at* http://www.usdoj.gov/crt/voting/sec_5/covered.htm.
[7] Section 203, the language assistance provision of the VRA, was last renewed in 1992.

Section 5 preclearance provision in particular. As this report illustrates, the role of the VRA both as a remedy for, and as a deterrent to, voting discrimination is unmistakable. The record of enhanced African-American voter registration, participation and minority office-holding, of Section 5 objections to retrogressive voting changes, deterrence of others, and of Section 2 litigation resulting in judgments or settlements, collectively paints a picture of a civil rights act that has been effective and whose protections remain vital.

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

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

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

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[8] *See* Section IV. A *infra*.

[9] *Id.; see also* Kristen Clarke-Avery & M. David Gelfand, *Voting Rights Challenges in a Post-Katrina World*, FINDLAW, Oct. 11, 2005, at http://writ.news.findlaw.com/commentary/20051011_gelfand.html

[10] Given the administrative regime established by Section 5, most covered jurisdictions prefer to seek preclearance of voting changes with the DOJ prior to seeking a declaratory judgment from the District Court for the District of Columbia ("D.D.C."). Therefore, DOJ makes the vast majority of substantive determinations of whether any particular voting change will be retrogressive with respect to minority voting rights. As a result, the vast majority of judicial determinations related to Section 5 assess whether a covered jurisdiction has complied with its obligation to seek preclearance for voting changes, rather than whether proposed changes meet the substantive requirements of

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

I. Overview of the History of Racial Discrimination in Louisiana

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

Until 1868, the state constitution simply limited the vote to white males. Following the Civil War, from 1868 to 1896, there were fewer substantial legal impediments to African-American voting, and African-American citizens made up nearly 45 percent of the state's registered voters[11] (as compared to approximately 29 percent at the time of the 2000 census). In 1898, Louisiana pioneered the use of the infamous Grandfather Clause, which imposed complicated education and property requirements only on registrants whose fathers or grandfathers had not been registered to vote before January 1, 1867. As a result, African-American voter registration was reduced to 4 percent of total registration by the end of 1898.[12] The president of the state constitutional convention that enacted the Grandfather Clause explained the purpose of that convention as follows: "What care I whether the test that we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?"[13] This type of bald expression of racial animus has happily become less familiar, but the modern corollaries of the purpose that was expressed are still in evidence in Louisiana.

The U.S. Supreme Court struck down the Grandfather Clause in 1915.[14] In the next few decades, Louisiana was, as the Court said of another jurisdiction, "unremitting and ingenious"[15] in its methods of ensuring that its African-American citizens would have no effect on the political process. Notwithstanding judicial invalidation of the Grandfather Clause, Louisiana developed an "understanding" clause requiring citizens to "give an reasonable interpretation of any section

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Section 5. Judicial findings in Section 2 and constitutional cases, however, do deal more directly with the jurisdictions' substantive obligations.

[11] Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, *Lousiana,* in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 105 (Chandler Davidson & Bernard Grofman eds., 1994).

[12] *Id.*

[13] Ernest B. Kruttschnitt, president, 1898 Louisiana Constitutional Convention, as *Quoted in Introduction to Chapter Six* of REBECCA J. SCOTT, DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY 154 (President and Fellows of Harvard College 2005) (1950).

[14] *Guinn v. United States*, 238 U.S. 347 (1915).

[15] *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

of the federal or state constitution in order to vote."[16] The Supreme Court invalidated this provision in 1965.[17] Another law "prohibited elected officials from helping illiterates."[18] Louisiana also levied poll taxes and purged registration rolls of the few African Americans who were able to surmount these discriminatory hurdles.[19] To complement these devices, Louisiana "authorized an all-white Democratic primary which functioned to deny blacks access to the determinative elections, inasmuch as Republican opposition to the Democratic Party in the general elections was nonexistent."[20] The all-white primary completely excluded African Americans in Louisiana from the political process between its creation in 1923 and the Supreme Court's condemnation of the practice in 1944.[21]

Adding to this notorious collection of "understanding" requirements, poll taxes, and registration purges, in the 1950s, Louisiana developed citizenship tests, as well as bans on single-shot voting that allows the minority community to aggregate their votes behind one candidate in a multi-member election. For elections to party committees, the state employed a majority-vote requirement.[22] Meanwhile, "[f]or a quarter of a century, from 1940 to 1964, the States' Rights Party spearheaded a strong movement against black enfranchisement and judicially-directed desegregation."[23] Every discriminatory, disfranchising technique developed by Louisiana remained in practice, except for the few specifically condemned by the Supreme Court, until Congress banned them expressly or made them subject to meaningful legal review through the passage of the VRA in 1965.[24]

These devices were very effective in achieving their discriminatory objectives. From 1910 until 1948, less than one percent of Louisiana's voting age African-American population was able to register to vote.[25] In 1948, that proportion rose to five percent, and from 1952 until 1964, even with concerted federal attention, the proportion rose only from 20 percent to 32 percent, reaching 32 percent only in October 1964.[26] The consistency of Louisiana, and other states' abilities to develop techniques and devices to maintain white supremacy in the political process, even as the Supreme Court condemned one disfranchising practice after another, led Congress to find that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits," such that "[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, [it should] shift the advantage of time and inertia from the perpetrators of the evil to its victims."[27] Thus, the long history of Louisiana's and other states' disregard of their constitutional obligations to include citizens of all

[16] *Bossier Parish School Board v. Reno*, 907 F.Supp. 434, 455 (D.D.C. 1995) (Kessler, J., dissenting).
[17] *Louisiana v. United States*, 380 U.S. 145 (1965).
[18] *Id.*
[19] *Major v. Treen*, 574 F.Supp. 340.
[20] *Id.*
[21] *Smith v. Allwright*, 321 U.S. 649 (1944).
[22] *Major*, 574 F.Supp. at 340.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 340 n.19.
[26] *Id.*
[27] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

races in the political process led Congress to impose the remedies and protections embodied in the VRA.

Louisiana's coverage under Section 5 began immediately upon enactment of the Voting Rights Act in 1965, triggered by the state's maintenance of a literacy test for voting and its voter registration levels of less than 50 percent in 1964. There was no question that Louisiana merited coverage under the formula set forth in Section 4 of the VRA.[28] The state's voting test — in place from 1921 until the U.S. Supreme Court voided it in 1965 — was a model of racially discriminatory vote denial. Under the test, registrars had complete discretion to decide whether a registrant's interpretation was satisfactory, which they used to reject 64 percent of African-American registrants and only 2 percent of white registrants between 1956 and 1962.[29] As a result, in the 21 parishes involved in the lawsuit that led to the test's demise, only 8.6 percent of voting-age African Americans were registered in 1962.[30]

The pre-VRA tests and devices, however, were not the last variations on the disfranchisement theme. In 1968, after the enactment of the VRA, Louisiana began a new phase of its campaign to minimize the African-American vote by passing state laws that enabled parish councils and school boards to switch to at-large elections that submerged newly-registered African-American voters in white majorities. If the laws had not been immediately nullified by two DOJ objections under Section 5, in Louisiana, the VRA might have represented little more than an occasion for another change in the strategy by which white officials perpetuated barriers to political equality. Since that time, too many in Louisiana have remained steadfast in their efforts to minimize African-American voting power. From that first Section 5 objection until the most recent renewal of Section 5 in 1982, the DOJ objected to 50[31] attempts by state and local authorities to implement voting changes that would have diluted African-American voting strength. Since 1982, DOJ has objected to 96 proposed changes. The gains in political access that are described in the following section have come only with steadfast enforcement of the VRA.

[28] 42 U.S.C. § 1973b.

[29] Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, *Louisiana*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 103, 108 (Chandler Davidson & Bernard Grofman eds., 1994).

[30] *Id.* at 107.

[31] *See* Appendix A. The DOJ listing of objections interposed provided in Appendix A contains summary information about administrative objections. In certain circumstances, as the listing indicates, objections are subsequently withdrawn based upon the receipt of new information or changes in the proposed voting law or practice that cure Section 5 infirmities. The numbers of objections referenced in this report are based upon objections made as indicated on the DOJ listing. This listing of objections is an important but incomplete source of data regarding the effect of Section 5 because it does not capture: requests for more information, which can result in the withdrawal of a proposed change by the submitting authority, the deterrence effects of Section 5, or any judicial denials of preclearance or Section 5 enforcement proceedings. Moreover, a single objection letter can touch a number of voting changes and similarly a number of retrogressive aspects of a single statewide redistricting plan, for example. *See* footnote 56 *infra*. It bears mention that Louisiana has also failed to submit covered voting changes which can have the effect of retrogressive voting laws being implemented without detection.

II. Overview of Louisiana's Demographics and Politics

A. Demographics

The following brief overview of Louisiana's demographic profile is based on the results of the 2000 Census.[32]

The population of Louisiana is 4,468,976, making it the 21st largest state in the country. Only nine cities in Louisiana have populations of more than 50,000.[33] Yet Louisiana has the fifth largest total African-American population in the United States. It is second only to Mississippi in largest African-American population as a percentage of the state's total population.[34] Almost a third of Louisiana's population is African-American (32.5 percent), compared to a national African-American population of 12.3 percent. Whites account for 63.9 percent of Louisiana's population, but 75.1 percent of the national population. Persons of Hispanic or Latin origin represent only 2.4 percent of Louisiana's population, while representing 12.5 percent of the country's overall population.[35]

There are also stark socioeconomic disparities along racial lines in Louisiana. About three quarters (74.8 percent) of Louisiana citizens 25 years of age and older have at least a high school diploma and 18.7 percent of the state's total population aged 25 and older has earned a bachelor's degree or higher. However, among African Americans, the rates of educational attainment are 63.1 percent and 10.9 percent, respectively, whereas for whites, the rates are 80 percent and 21.8 percent, respectively.[36] In 2000, Louisiana's unemployment rate was 7.3 percent, compared to a 5.8 percent national unemployment rate. The African-American unemployment rate in Louisiana was 13.6 percent, compared to 4.7 percent for whites. The per capita income for whites in Louisiana is $20,488, while African-American per capita income is less than half that amount, $10,166.[37] Significant disparities exist in housing as well. According to the census, the percentage of whites in owner-occupied housing is 78.87 percent, and the white population in renter-occupied housing is 21.13 percent.[38] In contrast, the percentage of

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[32] *See* United States Census Bureau, *State & County Quick Facts*, *available at* http://quickfacts.census.gov/qfd/states/22000.html. This section does not consider population adjustments due to Hurricane Katrina/Rita population displacements.

[33] The cities are New Orleans (469,032), Baton Rouge (225,090), Shreveport (198,364), Metairie (146,36?), Lafayette (111,667), Lake Charles (70,735), Kenner (70,202), Bossier City (58,111), and Monroe (52,163).

[34] U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, Table PL1; 1990 Census of Population, General Population Characteristics (1990 CP-1); Jesse McKinnon, *The Black Population 2000*, (August 2001) *available at* http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf. Louisiana's African-American population is 32.5 percent of its total population, and Mississippi's is 36.3 percent of its total.

[35] American Indian and Alaska Native persons account for 0.6 percent and 0.9 percent of Louisiana and United States populations, respectively, while Asians represent 1.2 percent of Louisiana's population and 3.6 percent of the national population.

[36] *See* http://www.doa.state.la.us/censussf3/CFReports/Primary4.cfm?logrecno=0000001&geo=040&name=Louisiana.

[37] *See* ePodunk report, *available at* http://www.epodunk.com/cgi-bin/incomeOverview.php?locIndex=19.

[38] U.S. Census Bureau, 2000 Census of Population and Housing (Decennial Census / Get Data / 2000 Census / 2000 Summary Tape File 3 / Detailed Tables / State / Louisiana / P159A Poverty Status in 1999 by Age (White Alone)), *available at* http://factfinder.census.gov/.

African Americans in owner-occupied housing is only 53.47 percent, and the percentage of African Americans in renter-occupied housing is 46.53 percent.[39]

B. Minority Office Holding

In 2001 (the most recent year for which comprehensive data is available), Louisiana elected a total of 705 black officials: one U.S. representative (of seven total seats, 14.3 percent); nine state senators (of 39 total seats, 23.1 percent); 22 state representatives, each elected from a district with a majority of black voters[40] (of 105 total seats, 20.2 percent); one member of a regional body; 131 members of county governing bodies; 33 mayors; 219 members of municipal governing bodies; four other municipal officials; one justice on the State Supreme Court (of seven total seats, 14.3 percent); 48 magistrates or justices of the peace; four other judicial officials; 24 police chiefs, sheriffs, and marshals; two members of the State Board of Elementary and Secondary Education (of 11 members, 18.2 percent); and 161 local school board members.[41] African Americans made up 29.7 percent of the voting age population in 2000.[42] Therefore, while the number of black elected officials certainly represents gains over the prior decades, it continues to lag behind the voting strength of Louisiana's black voting-age population at every level of government.

Not surprisingly, in the face of persistent racially polarized voting, these electoral gains have come about largely through the existence and protection of majority-minority districts. Indeed, every black representative currently holding office in Congress from Louisiana, or in the Louisiana State Legislature, has been elected from a majority black district.[43] U.S. Representative William Jefferson, for example, won his seat through elections from the 2nd Congressional District, which covers metropolitan New Orleans and has a voting age population that is 62 percent black.[44] This district is the only majority-minority congressional district in Louisiana. Jefferson's election in 1990 represented the first time that the state sent an African American to Congress in the 113 years since Representative Charles E. Nash (1875-1877) left Congress, the last African American to serve since the Civil War.

The racial disparities in voting that exist in Louisiana are also evident in the election patterns for virtually every office in the state. As the sections that follow show, numerous courts and the DOJ in several of its Section 5 objections have documented the phenomenon of Louisiana's racial bloc voting. For example, in the 2000 presidential election, the State voted 53 percent - 45

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[39] U.S. Census Bureau, 2000 Census of Population and Housing (Decennial Census / Get Data / 2000 Census / 2000 Summary Tape File 3 / Detailed Tables / State / Louisiana / P159B Poverty Status in 1999 by Age (Black or African American Alone)), *available at* http://factfinder.census.gov/.

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

[41] David A. Bositis, Black Elected Officials: A Statistical Summary 2001, 14-15 (Joint Center for Political and Economic Studies), *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf.

[42] *Id.* at 16.

[43] David Lublin, *Percent of African-American Legislators Elected in Black-Majority, Black + Latino Majority, and Other Districts*, *available at* http://www.american.edu/dlublin/redistricting/tab3.html.

[44] *Id.* at 22.

percent for George W. Bush over Al Gore, with whites voting 72 percent - 26 percent for Bush and blacks voting 92 percent - 6 percent for Al Gore — evidencing racially polarized voting of the highest order.[45] Intense racial polarization places special importance on majority-minority opportunity districts. For example, Justice Bernette Joshua Johnson — the only African-American member of the Louisiana Supreme Court — won her seat through elections from the 7th Supreme Court District, which covers metropolitan New Orleans.[46] This district is the only majority-minority Supreme Court district in Louisiana. Of the 33 black mayors in Louisiana, only two presently hold office in cities with populations over 50,000, and each won his seat from cities with black majorities. New Orleans, which was 67.3 percent black in 2000, elected Ray Nagin as mayor, and the city of Monroe, which was 61.1 percent black in 2000, elected James Mayo as mayor.[47]

Louisiana has never elected a black governor, although Cleo Fields and William Jefferson ran for that office in 1995 and 1999, respectively.[48] In the Fields/Foster race, exit polls indicated that Fields received 96 percent of the African-American vote while Foster received 84 percent of the white vote. Moreover, the political climate in Louisiana, not only in 1965 but just last decade, was such that the nation's most infamous modern day Klansman, David Duke, ran for the state's highest elected offices. In the 1991 governor's race, Duke — a former grand wizard of the Ku Klux Klan, who celebrated Hitler's birthday and led the National Association for the Advancement of White People — garnered 39 percent of the state's vote, winning 55 percent, a majority, of the white vote, though he eventually lost to Edwin Edwards.[49] Nor was Duke's strong gubernatorial showing a fluke. In the Senate race of 1990, Duke won 44 percent of the vote against a long-time incumbent, and again won the support of the majority of whites.[50]

Significantly, continuing racial bloc voting in Louisiana cannot be explained away as merely a reflection of modern partisan alignments. Not only are the historical underpinnings of these voting patterns readily traceable to the State's history of *de jure* discrimination, but Louisiana also is one of a very small number of states that has an open primary law that permits all candidates, regardless of party affiliation, to run in a single primary with the top vote-getters competing in a run-off if neither exceeds 50 percent of the votes cast.[51] This system permits multiple candidates from a single party to compete at both the primary and run-off stages. Thus, under Louisiana's open primary system, there are consistent examples of electoral contests where novel partisan explanations of intense racial bloc voting patterns are unpersuasive.

Racially polarized voting patterns continue to characterize political life in Louisiana and like Henry Ford's theory of consumer freedom, which allowed customers to choose any color car they preferred so long as it was black, in the absence of VRA protected opportunity to elect

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[45] *See* Voices for Working Families, *Louisiana Voting Facts and General Information*, available at http://www.voicesforworkingfamilies.org/states/louisiana/lastatestats.cfm.
[46] Louisiana Supreme Court, Maps of Judicial Districts, available at http://www.lasc.org/about_the_court/map03.asp.
[47] *Id.* at 21.
[48] Bullock & Gaddie, *supra* note 39, at 21.
[49] James Hodge, *Duke Lost, but America Hasn't Seen the Last of Him*, NATIONAL CATHOLIC REPORTER, Dec. 6, 1991, at 2.
[50] Bullock & Gaddie, *supra* note 39, at 21.
[51] *See* La. Rev. Stat. Ann. Sec. 18:402(B)(1).

districts, "[c]andidates favored by blacks can win [in Louisiana], but only if the candidates are white."[52]

The tables below summarize minority office holding in Louisiana from the 1960s to the present.

[52] *Smith v. Clinton*, 687 F.Supp. 1310, 1318 (E.D. Ark. 1988).

Table 1: Number of African-American Elected Officials in Louisiana 1969-2001[53]

Year	Total	Parish	Municipal	School Board
1969	65	11	23	9
1970	64	5	29	9
1971	74	10	27	13
1972	119	31	28	23
1973	130	29	28	29
1974	149	32	42	41
1975	237	45	69	76
1976	250	51	65	75
1977	276	60	85	78
1978	333	75	113	93
1980	363	86	131	93
1981	367	81	134	94
1984	438	106	149	112
1985	475	116	159	123
1987	505	120	181	121
1989	521	117	190	127
1991	551	116	189	142
1993	636	139	206	151
1997	646	136	226	134
1999	714	138	259	159
2001	705	131	256	161

Table 2: Racial Makeup of the Louisiana Legislature, 1965-2005[54]

Year	LA Senate	LA House	percent Black (Senate)	percent Black (House)
1965	0	0	0	0
1967	0	1	0	1.0
1969	0	1	0	1.0
1971	1	1	2.6	1.0
1973	1	8	2.6	7.6
1975	1	8	2.6	7.6
1977	1	9	2.6	8.6
1979	1	9	2.6	8.6
1981	2	10	5.1	9.5
1983	2	11	5.1	10.5
1985	4	14	10.3	13.3
1987	5	14	12.8	13.3
1989	5	15	12.8	14.3
1991	4	15	10.3	14.3
1993	8	24	20.5	22.9
1995	8	22	20.5	21.0
1997	9	24	23.1	22.9
1999	9	22	23.1	22.9
2001	9	22	23.1	21.0
2003	9	23	23.1	21.9
2005	9	23	23.1	21.9

[53] Bullock & Gaddie, *supra* note 40, at 35 ("Table 6"), *citing* various volumes of the NATIONAL ROSTER OF BLACK ELECTED OFFICIALS (Washington DC: Joint Center for Political Studies).
[54] *Id.* at 37 ("Table 7").

Together, these two tables tell a story. First, African Americans have made measurable progress toward political equality since the enactment of VRA, yet, forty years after the enactment of the VRA, the contemporary political reality is that African Americans in Louisiana have an opportunity to elect their preferred candidates only when those candidates are white or if an African-American candidate runs in a district with a majority of African-American voters. In this context, the gains that African Americans in Louisiana have made in the ability to elect candidates of their choice are largely attributable to the protections afforded by the VRA.

III. Racial Discrimination in Voting In Louisiana Since 1982

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

A. Voting Discrimination in Orleans Parish

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

> Our third commitment is this: When communities are rebuilt, they must be even better and stronger than before the storm. Within the Gulf region are some of the most beautiful and historic places in America. As all of us saw on television, there's also some deep, persistent poverty in this region, as well. That poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America. We have a duty to confront this poverty with bold actions. So let us restore all that we have cherished from yesterday, and let us rise above the legacy of inequality. When the streets are rebuilt, there should be many new businesses, including minority-owned businesses, along those streets. When the houses are rebuilt, more families should own, not rent, those houses. When the regional economy revives, local people should be prepared for the jobs being created.[55]

[55] *President Discusses Hurricane Relief in Address to the Nation* (September 15, 2005) available at http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html.

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

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

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

a. Section 5 in Orleans Parish

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

> Overall the plan has the net effect of reducing the number of House districts with Black majorities. In Orleans Parish, for instance, the number of such districts is reduced from eleven to seven. While this reduction may be justified to some extent by the general loss of parish population in comparison to overall statewide population gain, the loss of so many black majority districts in that parish has not been satisfactorily explained, especially since the black percentage of the population in Orleans Parish has increased from 45 to 55 percent over the past ten years.
>
> Of particular concern in this regard is the Uptown New Orleans area of the parish, where the configuration of the proposed Districts 90 and 91 appears to result in needless dilution of minority voting strength. While we understand that incumbency considerations may explain in part why District 90 spans three parish wards, including noncontiguous portions of ward 12, our analysis shows that there are other means of addressing that concern without adversely impacting minority voting strength in the area.
>
> Another problem in New Orleans involves the Ninth Ward. Under the proposed plan, a black majority district in this ward is eliminated for no apparent justifiable reason, leaving only one majority black House district out of the five emanating from that 61 percent black ward.[56]

[56] Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Charles Emile Bruneau, Jr., Louisiana House of Representatives (June 1, 1982). In the very same objection letter, Reynolds also objected to dilution in East Baton Rouge, East Feliciana, West Feliciana, and St. Helena Parishes, and noted that the legislature had adopted the dilutive plan despite the existence of non-dilutive alternative plans that would have adhered more closely to the State's other redistricting criteria, such as compactness and least change.

The post-1990 round of redistricting was tainted by similar Section 5 violations. In the Section 5 objection letter that was provided to the state, DOJ "examined the 1991 House redistricting choices in light of a pattern of racially polarized voting that appears to characterize elections at all levels in the state."[57] DOJ found that while most of the statewide plan comported with Section 5 requirements, "In seven areas, however, the proposed configuration of district boundary lines appears to minimize black voting strength, given the particular demography in those areas…."[58] Once again Orleans Parish was specifically identified. DOJ observed that:

> In general, it appears that in each of these areas the state does not propose to give effect to overall black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters the opportunity to participate in the political process and to elect candidates of their choice….
>
> In addition, our analysis indicates that the state has not applied its own [redistricting] criteria, but it does appear that the decision to deviate from the criteria in each instance tended to result in the plan's not providing black voters with a district in which they can elect a candidate of their choice.[59]

The pattern of consistent attempts to minimize African-American voting strength in Orleans Parish has been unremitting, as the post-2000 Census, Section 5 redistricting litigation makes plain. The post-2000 Census House of Representatives redistricting plan followed the familiar pattern, except that in this decade, Louisiana opted to file a declaratory judgment action seeking preclearance rather than seek administrative preclearance from the DOJ. In *Louisiana House of Representatives et. al. v. Ashcroft,*[60] DOJ, under John Ashcroft, opposed Louisiana's effort to obtain preclearance. NAACP-LDF, on behalf of a bi-racial coalition of voters, and private counsel on behalf of the Louisiana Legislative Black Caucus, intervened and litigated together with the DOJ and against the State.

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

- The state's theory was contingent upon persuading the court that white voters were entitled to proportional representation in Orleans Parish though proportionality does not exist for African Americans elsewhere in the state, and is not required under the VRA;

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[57] Letter from John Dunne to Jimmy N. Dimos, Speaker of the House of Representatives (July 15, 1991). The Louisiana State Senate also sought to reduce African-American voting strength in its 1991 redistricting plan, cracking apart African-American majorities in the northeastern part of the state and around Lafayette, while preserving majority-white districts for every white incumbent. Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ., to Samuel B. Nunez, President of the Senate of the State of Louisiana (June 28, 1991). Assistant Attorney General John R. Dunne found that the Lafayette-area plan was "intended, at least in part, to suppress the African-American proportion to a level considered acceptable to a white incumbent." *Id.* at 2.

[58] *Id.*

[59] *Id.; See also* IV. (B) (2) (e) *infra.*

[60] D.D.C. 2002. The NAACP Legal Defense and Educational Fund, Inc. served as counsel to the citizen intervenors in this Section 5 action.

- The African-American population of Orleans had increased in real numbers and as a percentage of the Orleans Parish population;

- Strong evidence of retrogressive effect and purpose was uncovered by the DOJ and intervenors, and Louisiana's own admissions provided the most compelling evidence;

- Very high levels of racially polarized voting persisted;[61]

- The court criticized plaintiffs' litigation tactics in unusually strong terms and compelled the production by the state of improperly withheld documents;[62]

Louisiana settled the case on the eve of trial, withdrew the offending plan, and restored the African-American opportunity district in Orleans Parish.[63]

b. Section 2 in Orleans Parish

Section 2 of the VRA has played an important role in protecting African-American voters in Orleans as well. After the 1982 renewal, there was a major Section 2 case filed in federal court in Louisiana, *Major v. Treen,*[64] challenging the 1981 reapportionment of congressional districts. The plaintiffs, on behalf of a class certified as all African-American registered voters in the state, alleged that the reapportionment plan ("Act 20") was designed and had the effect of diluting minority voting strength by dispersing an African-American population majority in a parish into two congressional districts. They filed claims under the Thirteenth, Fourteenth and Fifteenth Amendments to the federal Constitution, as well as Section 2 of VRA.

According to the testimony in that case, based on the results of the 1980 Census, Orleans Parish had a slight decline in overall population, but a marked increase in African-American population from the 1970s to 1980, such that African Americans were 55 percent of the total population, 48.9 percent of voting age population and 44.9 percent of registered voters.[65] Moreover, the African-American population was highly concentrated.

Governor Treen submitted three districting proposals — none of which contemplated a majority African-American district. In fact, Treen publicly expressed his opposition to the concept of a

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[61] *See* Testimony of Richard Engstrom before the Subcommittee on the Constitution of the House Committee on the Judiciary, (October 25, 2005), and related appendices.

[62] After two rounds of summary judgment briefing, once it became clear that the state's theory could not meet the Section 5 standard, the state engaged in what the court characterized as "a radical mid-course revision in their theory of the case[,] . . . blatantly violating important procedural rules" in an attempt to justify its plan. A copy of the court's February 13, 2003 Order is annexed as Appendix E.

[63] Because *Louisiana House of Representatives, et. al. v. Ashcroft* was a Section 5 VRA litigation filed before a three-judge panel and settled without any published opinion by the court, it is an example of some of the important results under the VRA that are not captured in a rote count of DOJ Section 5 objections. *See* n. 31 *supra*. Several important VRA settlements are achieved without published opinions, and the terms and significance of those settlements, known only to the litigators and parties, are difficult to identify and marshal.

[64] *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983)

[65] *Id.* at 330.

majority black district, stating that "districting schemes motivated by racial considerations, however benign, smacked of racism, and in any case were not constitutionally required."[66] However, the state Senate staff prepared more than 50 plans and was directed to formulate a plan containing an Orleans Parish-dominated district, which would necessarily have a black majority population.[67] The State Legislature passed one of the two plans with one African-American majority district in Orleans Parish and seven white majority districts. Governor Treen threatened to veto the plan and a number of legislators changed their position in response to the threatened veto.

The court found that Treen's opposition to the plan initially approved by the legislature was predicated in significant part on its delineation of a majority African-American district centered in Orleans Parish.[68] The governor then proposed another plan, again with all eight white majority districts, which the Senate rejected. African-American legislators were then excluded from subsequent legislative sessions to develop a plan, which ultimately concluded with the participants determining that the African-American minority interest in obtaining a predominantly African-American district would have to be sacrificed in order to satisfy both the governor and the Jefferson Parish legislators. The resulting Act 20, accepted by Governor Treen and signed into law, left African-American population concentrations within Orleans Parish wards disrupted, whereas white concentrations remained intact.

The court accepted the plaintiffs' expert's testimony showing of racially polarized voting and that such voting played a significant role in the electoral process. It also found that "Louisiana's history of racial discrimination, both *de jure* and *de facto*, continue[ed] to have an adverse effect on the ability of its black residents to participate fully in the electoral process."[69]

The court granted the plaintiffs' requested declaratory judgment that Act 20 violated Section 2 of VRA by diluting black voting strength; enjoined the state of Louisiana from conducting elections with Act 20 districts; and gave the legislature the opportunity to redraw the districts. It was the resulting district that led to the election of Louisiana's first African-American congressman since reconstruction.[70]

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

Accordingly, the concerns about the future of Orleans Parish as a center of African-American political power following Hurricane Katrina are very well placed in light of the record of the state's vote denial and dilution. Hurricane Katrina displaced more than one million people from

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[66] *Id.* at 331.

[67] Only two plans out of the 50 made it out of the committee — both with one majority African-American and seven majority white districts. One plan had one majority African-American district with 54 percent African-Americans and 43 percent African-American registered voters. The Louisiana Black Caucus supported this plan. The other plan had one majority African-American district with 50.2 percent African-Americans and 44 percent African-American registered voters.

[68] *Id.* at 334.

[69] *Id.* at 339-40 (emphasis added).

[70] For an additional example of a successful Section 2 litigation regarding the drawing of lines for judicial seats, *see infra*.

southern Louisiana alone.[71] Three hundred thousand of these citizens, the majority of whom are African-American, fled New Orleans,[72] where they formed a mobilized voting bloc in the only majority-minority congressional district in the state at the center of African-American political power.[73] The destruction of polling places, displacement of voters and candidates, and general loss of electoral infrastructure initially forced Louisiana officials to postpone the fall 2005 municipal elections in Orleans and Jefferson Parishes.[74] These circumstances present substantial questions about whether, how, and by whom African-American communities will be rebuilt, when displaced residents may return, and perhaps as importantly, who gets to decide. For example, will displaced voters be able to register, receive absentee ballots, and vote?[75] While there is considerable uncertainty about the future of Louisiana's African-American communities post-Hurricane Katrina, the existence of VRA protections have provided some assurance to displaced African Americans that their interests cannot be ignored with impunity; and that Section 5 preclearance requires that proposed voting changes be scrutinized.

In some respects, the VRA has already had a substantial impact on the state's plans to address electoral challenges caused by the hurricanes in 2005. A recent Section 2 lawsuit *Wallace v. Blanco,*[76] did not result in a finding of vote denial in advance of the election. However, it seems clear that it was the possibility of judicial intervention in the forthcoming Orleans Parish municipal elections that moved the legislature, during a 2006 special legislative session, to relax some of the state's election laws that would have adversely affected displaced voters who are disproportionately African-American. After the Louisiana legislature essentially refused to act to ameliorate the burdens on displaced voters in 2005, Secretary of State Al Ater and Attorney General Charles Foti both testified during committee hearings in the 2006 special session about the pending litigation and risks associated with a second legislative failure to act. The pendency of the litigation resulted in a different and more favorable outcome during the legislative session — a point that the trial judge recognized even as he denied any further relief.

Because the DOJ or the U.S. District Court for the District of Columbia review Louisiana's voting changes under Section 5 to ensure that they do not have the "the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,"[77] voters throughout Louisiana — and citizens throughout the country — also recognize that the host of difficult decisions Louisiana and its political subdivisions face as they reconstruct their democratic institutions will be scrutinized. African-American leaders have met with DOJ officials to discuss these issues in the context of DOJ's Section 5 responsibilities.

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[71] Jeremy Alford, *Population Loss Alters Louisiana Politics*, N.Y. TIMES, Oct. 4, 2005, available at http://www.nytimes.com/2005/10/04/national/nationalspecial/04census.html?ex=1138683600&en=f097af0aa2b4a630&ei=5070.

[72] Center for American Progress and American Constitution Society for Law and Policy: "Voting Rights After Katrina: Ensuring Meaningful Participation," Remarks of Secretary of State Al Ater, (Nov. 1, 2005), at unnumbered p. 20.

[73] Alford, *supra* note 71, Kristen Clarke-Avery & M. David Gelfand, *Voting Rights Challenges in a Post-Katrina World*, FINDLAW, Oct. 11, 2005, at http://writ.news.findlaw.com/commentary/20051011_gelfand.html.

[74] Mark Waller, *Fall Elections in Jefferson, N.O. Postponed*, NOLA.COM, Sept. 14, 2005, at http://www.nola.com/newslogs/tporleans/index.ssf?/mtlogs/nola_tporleans/archives/2005_09_14.html#079542.

[75] LA. REV. STAT. ANN. § 18:562 (West 2005). *See also* Clarke-Avery & Gelfand, *supra* note.

[76] The NAACP Legal Defense and Educational Fund, Inc. served as trial counsel.

[77] 42 U.S.C. § 1973c (2000).

Although Section 5 gives the DOJ a role to play as the Louisiana electoral system in Orleans and elsewhere in the state is reestablished, the DOJ response also illustrates that Section 5 review of voting changes is a flexible tool, which can be adapted to unique circumstances. On September 7, 2005, for example, Acting Assistant Attorney General Bradley J. Schlozman assured Louisiana's Secretary of State Ater that the DOJ "stands ready to expedite the review of any and all submissions of voting changes (especially scheduling and polling place changes) resulting from Hurricane Katrina."[78] Secretary of State Ater has expressed the view that the DOJ has been sensitive to the difficulties the state faces and the need for prompt preclearance where appropriate.[79] The VRA has provided an important framework as the Louisiana State legislature, secretary of state, attorney general and governor, DOJ, and minority voting advocates seek to work through the complex voting challenges following Hurricanes Katrina and Rita. Although the future is unclear, it seems certain that minority voters would be considerably less well off in the absence of Section 5 providing leverage and serving as an important reminder of the State's duty to embrace minority inclusion in its political processes.

B. Voting Discrimination Throughout Louisiana

1. Section 5 Violations Overview

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

The Civil Rights Division of the DOJ has objected to discriminatory voting changes by Louisiana officials 146 times since Section 5 coverage of the state began, and significantly, 96 times since Section 5 was last renewed in 1982.[80] In other words, 65 percent of the objections interposed against Louisiana have occurred since Congress last acted to extend VRA protections to minority voters. In the aggregate, these blocked voting changes would have impacted an exceedingly large, but difficult to quantify, number of African Americans. Every redistricting plan, for example, affects large numbers of citizens throughout the area it covers — sometimes hundreds can be affected; at other times, thousands of citizens are impacted. Viewed from another perspective, voting changes blocked by DOJ would have affected nearly every aspect of voting, including: redistricting, polling place relocations, changes in voting and voter registration

[78] Letter from Bradley J. Schlozman, Acting Assistant Attorney General for Civil Rights, U.S. Department of Justice, to Al Alter, Secretary of State, Louisiana, (Sept. 7, 2005) available at http://www.usdoj.gov/crt/voting/la_katrina.htm.

[79] Center for American Progress and American Constitution Society for Law and Policy: "Voting Rights After Katrina: Ensuring Meaningful Participation," Remarks of Secretary of State Al Ater, (Nov. 1, 2005), at unnumbered p. 6.
available at: http://www.americanprogress.org/atf/cf/ percent7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03 percent7D/VAK.PDF

[80] *See* Appendix A for DOJ listing of administrative Louisiana Section 5 Objections.

procedures, annexations and other alterations of elected bodies, and even the attempted suspension of a presidential primary election. Discriminatory changes were proposed at every level of government, including: the state Legislature, the state court system, the state Board of Education, parish councils, school boards, police juries, city councils, and boards of aldermen. And, objections have been interposed by the DOJ under both Democratic and Republican presidential administrations.

By any measure, attempts to dilute African-American voting strength in Louisiana have been widespread. Thirty-three — more than half — of Louisiana's 64 parishes and 13 of its cities and towns have proposed discriminatory voting changes since 1982, many more than once. Between 1982 and 2003, the DOJ was compelled to object to 33 parish school board redistricting and expansion plans proposed by 23 parishes and one city,[81] 31 parish police jury redistricting and reduction plans proposed by 20 parishes,[82] 7 parish council redistricting and reduction plans proposed by 6 parishes,[83] 11 city and town council redistricting plans proposed by 10 cities and towns,[84] 2 board of alderman redistricting plans proposed by two cities,[85] and 6 annexations proposed by the city of Shreveport alone. The DOJ was also compelled to object 17 times to attempts by the state itself to make changes that would have diminished minority voting rights in congressional, state legislative, state board of education, and state court elections. And, in a stark illustration of the persistence of the hostility to equal African-American participation in Louisiana's political process with statewide consequences, in *every* decade since the VRA was passed in 1965, the proposed Louisiana State House of Representatives redistricting plan was met with a DOJ objection — including three since 1982.[86]

Significantly, beyond the familiar Section 5 objections involving the failure of the State or its sub-jurisdictions to demonstrate the absence of discriminatory effects, assistant attorneys general in each of the past three decades have noted evidence of Louisiana officials' continuing intent to discriminate, including: rejection of readily available non-discriminatory alternatives, inconsistent application of standards, drastic voting changes immediately following attempts by African-American candidates to win public office, and even candid admissions of racism by state and local officials as recently as 2001.[87] As Assistant Attorney General John R. Dunne said of

[81] These included: Madison, West Baton Rouge, Assumption, LaSalle, Winn, St. Helena, St. Martin, Franklin, St. Landry, East Carroll, Webster, Terrebonne, Lafayette, Vermilion, West Carroll, Evangeline, Washington, Iberville, St. Mary, Bossier, DeSoto, Pointe Coupee, Richland, and City of Monroe.

[82] These included: Madison, Assumption, LaSalle, St. Helena, Pointe Coupee, Morehouse, Bienville, Jackson, DeSoto, Catahoula, St. Martin, West Feliciana, Franklin, St. Landry, East Carroll, Concordia, Webster, Richland, Caddo, and Iberville.

[83] These included: East Baton Rouge, Jefferson, Terrebonne, Lafayette, Washington, and Tangipahoa.

[84] These included: East Baton Rouge, City of New Iberia, City of St. Martinsville, City of Jennings, City of Tallulah, City of Lafayette, City of Minden, City of Plaquemine, City of Ville Platte, and Town of Delhi.

[85] These included: City of Ville Platte and City of Winnsboro.

[86] Two of the proposals that received objections were administratively submitted to the DOJ for preclearance. The most recent proposal was submitted for preclearance before a three-judge panel in the D.C. District Court in 2002, *Louisiana House of Representatives, et al. v. Ashcroft*. That litigation, in which the NAACP LDF intervened to protect the interests of African-American voters, resulted in a settlement between the State, the DOJ, and the minority intervenors that, amongst other things, restored a New Orleans African-American opportunity district that the legislature had intentionally sought to eliminate.

[87] Appendix B sets out a table that briefly describes Louisiana's post-1982 renewal objections. Those objections that were based, at least in part, on the state's failure to demonstrate the absence of a discriminatory purpose, or purpose to retrogress, are indicated with asterisks.

the 1991 redistricting plan for the Louisiana House of Representatives, "The departures are explainable, at least in part, by a *purpose* to minimize the voting strength of a minority group." [88] Although Louisiana is not alone in this regard, it is in part the evidence of *purposeful* discrimination in the State that requires the continuing vigilance of Section 5. Although the civil rights movement, judicial enforcement of federal protections, and time have changed the minds and practices of many, some remain unapologetic. Many others in the state who remain committed to perpetrating voting discrimination have only become more sophisticated at concealing their objectives. But whether voting discrimination is ferreted out through recognition of invidious intentions or by its harmful effects, the consistent efforts to diminish African-American voting power in Louisiana are not inconsequential remnants of the distant past that can be ignored.

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

Attempts at discrimination have not disappeared since 1982. Indeed, it was a case involving a Louisiana parish school board that prompted Justice Souter to note in 2000, *35 years after the enactment of the VRA,* that Section 5 must continue to be interpreted to prevent jurisdictions from "pour[ing] old poison into new bottles."[89]

Notwithstanding the history, a sense of optimism, skepticism, or recent Supreme Court decisions[90] cause some to ask whether the Section 4 preclearance coverage formula has grown stale and whether Section 5 protections are still necessary. The original coverage formula, though never a perfect barometer of voting discrimination, was created as a legislative proxy designed to reach jurisdictions with some of the worst traditions of voting discrimination. Section 5, in turn, provided a powerful remedy in recognition of the fact that these traditions were deeply rooted. Although forty years of minority voter protection is a long time when measured against election cycles, it seems like a far more modest interval when measured against a period many times that length of entrenched racial exclusion from virtually every aspect of society, including the political process. In the case of Louisiana, the history has proven to be a strong predictor of the present. A period of forty years of VRA protection has been insufficient to erase the effects and continued practice of voting discrimination. Consequently, the Louisiana experience strongly suggests that what the Section 4 coverage formula reached in 1965, 1970,

[88] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Jimmy N. Dimos, Speaker, Louisiana State House of Representatives (July 15, 1991) (emphasis added).
[89] *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000).
[90] *See generally Id.; City of Boerne v. Flores*, 521 U.S. 507 (1997), *Cedar Rapids Cmty. Sch. Dist.* v. *Garrett F.* 526 U.S. 66 (1999); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004).

1975, and 1982, the contemporary record continues to justify. The post-1982 renewal experience with Section 5 in Louisiana supplies important proof.

2. The Impact of Section 5 Since 1982

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

a. Redistricting

Most of Louisiana's 96 Section 5 objections since 1982 have involved redistricting. Officials have consistently attempted to limit African-American voters' political influence by over-concentrating them into a few districts ("packing"). In the alternative, other officials have favored "cracking" — dispersing African Americans among several majority-white districts to prevent them from achieving a majority that provides the opportunity for communities to elect candidates of their choice — even in the face of extreme racial bloc voting.[91] This form of "second generation" discrimination, known as vote dilution, is designed to cabin minority voting power, and picked up where the more outright forms of vote denial left off. For example, in 1993, the Bossier Parish School Board had cracked African-American population concentrations so effectively that the parish still had no African-American opportunity districts at all, despite an African-American population of 20 percent, a 12-member school board, and the availability of an alternative plan that would have drawn two compact majority African-American districts.[92]

Significantly, in the course of interposing objections, multiple assistant attorneys general have noted the persistence of racially polarized voting in the state, most recently in April, 2005.[93] In its extreme forms, racially polarized voting can block minority electoral success and operate to close off the political process. The state itself acknowledged the persistence of "racial bloc voting" in 1996, the same year that the U.S. District Court for the Western District of Louisiana agreed that "racial bloc voting is a fact of contemporary Louisiana politics."[94]

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[91] Since 1982, the DOJ has repeatedly noted the persistence of racially polarized voting in Louisiana.

[92] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to W.T. Lewis, Superintendent of Bossier Parish Schools (Aug. 30, 1993). Of course, the DOJ's Section 5 objection in this case was the subject of Supreme Court litigation culminating in a decision that drastically, and in the view of LDF inappropriately, narrowed the Section 5 inquiry and vitiated the objection. However, the underlying record makes clear that intentional discrimination drove the creation of the school board redistricting plan at issue, and the Supreme Court's decision in *Bossier Parish*, 528 U.S. 366 (2000), is itself a proper focus of the present renewal. (A critique of the holding is annexed as Appendix D).

[93] Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to David A. Creed, Executive Director, North Delta Regional Planning and Development District (Apr. 25, 2005).

[94] *Hays v. Louisiana*, 936 F. Supp. 360, 365 (W.D. La. 1996); see also, Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. DOJ., to E. Kay Kirkpatrick, Director, Civil Division, Louisiana Department of Justice (Aug. 12, 1996).

The use of the redistricting process continues to be a preferred means of diminishing the effectiveness of minority votes. Because redistricting has historically corresponded with the decennial census, it occurs at a time when the ramifications of demographic shifts are squarely presented. Typically, changes made during redistricting usually have an impact for a decade or even beyond. Based upon contemporary political realities, in certain situations decision-makers of either major political party may be motivated to diminish minority voting power. While one party may see advantage in "packing" or over-concentrating minority voters, the other party may wish to "crack" cohesive populations in ways that eliminate existing opportunities to elect minority preferred candidates. Although Louisiana employs an open primary system, intense partisan competition, when it exists in Louisiana and elsewhere, provides no shelter for minority voters. Section 5's role in ensuring that minority political opportunities do not get trampled during redistricting has protected the rights of untold numbers of minority voters.

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

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

- In 1990, the city of Monroe attempted to annex white suburban wards to its city court jurisdiction. The DOJ noted in its objection that the wards in question had been eligible for annexation since 1970, but that there had been no interest in annexing them until just after the first-ever African-American candidate ran for Monroe city court.[95]

- Annexation of white suburban wards to the Shreveport city court jurisdiction would have changed that at-large jurisdiction from 54 percent African-American to 45 percent African-American. After the DOJ objected to the first attempt at annexation in 1994, the city tried a total of five more times, twice in 1995, in 1996 and twice in 1997. Each time

[95] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Cynthia Young Rougeou, Assistant Attorney General, State of Louisiana (Oct. 23, 1990). At present, LDF is litigating a Section 2 case in Jefferson Parish involving the election of circuit court judges from a multi-member district. That election structure, like at-large plans, has operated together with racial bloc voting to bar African Americans from serving on, and to deter them from even seeking to run for seats on, that court.

the DOJ informed the city that it would have no objection to the annexation if the city changed its method of electing judges from at-large to single-member districts, and each time the city refused to make that change.[96]

- After the Washington Parish School Board finally added a second majority-African-American district in 1993 (bringing the total to two out of eight, representing an African-American population of 32 percent), it immediately created a new at-large seat to ensure that no white incumbent would lose his seat and to reduce the impact of the two African-American members (to 2 out of 9). The DOJ objected.[97]

- In 1992, the year after Franklin Parish added a second majority-African-American district to its police jury, it attempted to cut the size of the jury in half, eliminating the new African-American seat over protests by the African-American community, and inviting a DOJ objection.[98]

- In 1991 the Concordia Parish Police Jury announced that it would reduce its size from nine seats to seven, with the intended consequence of eliminating one African-American district. The parish made the pretextual claim that the reduction was a cost-saving measure, but the DOJ noted in its objection that the parish had seen no need to save money until an influx of African-American residents transformed the district in question — originally drawn as a majority-white district — into a majority African-American district.[99]

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

In another especially noteworthy example of the operation of Section 5 in a non-redistricting context, in 1994, the DOJ objected to Louisiana's attempt to impose a photo identification requirement as a prerequisite for first-time voters who register by mail.[100] The DOJ noted in its objection that a picture identification requirement would have an adverse effect on the state's African-American population, after its review of relevant socio-economic data. DOJ concluded

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[96] Letters from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Sherri Marcus Morris, Assistant Attorney General, State of Louisiana, and Jerald N. Jones, City Attorney, City of Shreveport (Sept. 6, 1994; Dec. 11, 1995; Oct. 24, 1996); Letter from Loretta King, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Jerald N. Jones, City Attorney, City of Shreveport (Sept. 11, 1995); Letters from Isabelle Katz Pinzler, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Jerald N. Jones, City Attorney, City of Shreveport (April 11, 1997; June 9, 1997).

[97] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to G. Wayne Kuhn, Washington Parish School Board (June 21, 1993).

[98] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Kay Cupp, Secretary, Franklin Parish Police Jury (Aug. 10, 1992).

[99] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Robbie Shirley, Secretary-Treasurer, Concordia Parish Police Jury (Dec. 23, 1991).

[100] Appendix F. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Sheri Marcus Morris, Esq., Assistant Attorney General, State of Louisiana (Nov. 21, 1994).

that Louisiana had not satisfied its burden of showing that the submitted change had neither a discriminatory purpose nor a discriminatory effect.[101]

It is exactly this pattern of adaptive discriminatory voting changes that Congress identified and aimed to address when it designed Section 5 to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."[102] As the above-described examples dramatically illustrate, the experience in Louisiana in the last decade shows that voting discrimination continues to take many forms, of which redistricting manipulation is but one.

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

Attempts to submerge minority voters in at-large elections did not disappear with the DOJ's first Section 5 objection on June 26, 1969. In fact, the state has continued to attempt to expand and reinforce at-large voting for boards of aldermen, judges, and school boards throughout the 1980s, 1990s, and even as recently as this decade. In 1988, Louisiana adopted anti-single-shot devices in circuit court elections (drawing a Section 5 objection) and added more at-large judges to the circuit courts (drawing another Section 5 objection).[103] Despite DOJ objections (and requests for more information, which the state ignored), the state attempted to add at-large or multi-member judicial seats again in 1989, twice in 1990, 1991, 1992, and 1994, and again adopted anti-single-shot devices in 1990.[104] In its 1991 objection letter, the DOJ noted blatant noncompliance with Section 5. As the objection letter notes, the state had gone ahead and held at-large elections for unprecleared judgeships from its last two submissions, and that white judges were now sitting in these seats.[105] These facts manifest a willful disregard for the VRA mandates.

Though this hearing is not primarily focused on Section 2 of the VRA, some Section 2 lawsuits in Louisiana serve to further illustrate the determination of state officials to continue employing at-large voting systems, despite the recognition that such systems result in the dilution of minority votes. For example:

- In 1986, the city of Gretna's at-large election scheme for the selection of its Board of Alderman was found to be in violation of Section 2 because it prevented African Americans from participating in the political process in a meaningful way.[106] Gretna was the largest city by population in Louisiana to utilize an at-large election system and the

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[101] *Id.*
[102] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).
[103] Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Kenneth C. Demean, Chief Counsel, State of Louisiana (Sept. 23, 1988).
[104] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Kenneth C. Demean, Chief Counsel, State of Louisiana (May 12, 1989); Letters from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Cynthia Rougeou, Assistant Attorney General, State of Louisiana (Sept. 17, 1990; Oct. 23, 1990; Nov. 20, 1990); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Angie R. LaPlace, Assistant Attorney General, State of Louisiana (Sept. 20, 1991); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Richard P. Ieyoub, Attorney General, State of Louisiana (Mar. 17, 1992); Letter from Kerry Scanlon, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Sheri Marcus Morris, Assistant Attorney General, State of Louisiana (Oct. 5, 1994)
[105] Letter from Dunne to LaPlace of Sept. 20, 1991.
[106] *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1115 (E.D. La. 1986).

court found that it constituted an "unusually large election district for purposes of electing the members of the Board of Aldermen."[107] Despite the fact that African Americans comprised nearly 25 percent of registered voters,[108] because of racially polarized voting no African-American person had ever been elected to municipal office in the city of Gretna under the at-large election system.[109]

- In 2001, the Louisiana State Legislature adopted a plan, which, among other things, made it possible for the electors of St. Bernard Parish to reduce the size of the parish school board from eleven single-member districts to five single-member districts and two at-large seats.[110] Under the eleven single-member district plan, one district constituted a majority African-American voting district,[111] whereas under the proposed new plan there would be no African-American majority district.[112] Not only was the new plan found to dilute the voting strength of the African-American community, but the attitude of the highest ranking public official in St. Bernard Parish, State Senator Lynn Dean, provides a vivid example of the type of racial discrimination that at times is still overtly expressed and continues to hamper the political opportunities of African Americans in Louisiana. While testifying in a Section 2 hearing for the defendant School Board, Senator Dean was asked whether he had heard the word "nigger" used in the parish.[113] *The Senator responded that "he uses the term himself, ha[d] done so recently, that he does not necessarily consider it a 'racial' term and that it is usable in jest, as well."* [114] The composition of the St. Bernard Parish School Board was an important matter to Senator Dean, who had served on that body for 10 years prior to his election to the state Senate. Dean's term in the state Senate concluded in 2004.

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

d. Repeat Offenders

The degree of intransigence of some state and local officials is illustrated by the large number of jurisdictions that proposed objectionable voting changes multiple times since 1982, sometimes across two or more decades. In a typical scenario, Pointe Coupee Parish's school board and

[107] *Id.* at 1124.
[108] *Id.* at 1119.
[109] *Id.* at 1120.
[110] *St. Bernard Citizens for Better Government v. St. Bernard Parish Sch. Bd.*, No. 02-2209, 2002 U.S. Dist. LEXIS 16540, at *1-2 (E.D. La. Aug. 28, 2002). An excerpt of the decision is annexed as Appendix G. *See also* H.B. 180, 2001 La. Reg. Sess. (adopted by both the Louisiana House of Representatives and the Louisiana State Senate and signed by the Governor, this bill provided that where a parish (1) is governed by a home rule charter, (2) consists of a seven member governing authority where five members are elected in single-member districts and two members are elected at-large, and (3) has an eleven-member school board elected by single-member districts, the school board shall reapportion itself when required to do so by the electors of the parish and, if so required, shall adopt the same number and the same election districts as the parish governing authority).
[111] *Id.* at *12.
[112] *Id.* at *13.
[113] *Id.* at *33.
[114] *Id.*

police jury redistricting plans were found to be retrogressive by the DOJ three decades in a row, in 1983, 1992, and 2002.[115] In 1983, the parish attempted to pack as much of the African-American population as it could into a single district, while submerging the remaining African-American voters in ten majority-white districts; the result was that African Americans made up a majority in only one of the eleven police jury districts, despite making up 42 percent of the parish population.[116] In the 1992 redistricting cycle, the parish again attempted to pack African-American voters into a single urban district in the city of New Roads, while fragmenting rural African-American voters to prevent them from amassing a majority in the northern part of the parish.[117] Each of these attempts to minimize African-American voting strength was blocked by a Section 5 objection. Ten years later, in 2002, the DOJ was compelled to object yet again when the parish, without explanation, eliminated one majority African-American district from its school board redistricting plan, despite an increase in the African-American population of the parish.[118] In each of these redistricting cycles, the DOJ noted that local African-American leaders had protested the discriminatory redistricting plans and had proposed alternative plans that were ignored or rejected.[119]

Unfortunately, Pointe Coupee is not an exceptional case. Between 1982 and 2003, 10 other parishes were "repeat offenders," and 13 times the DOJ noted that local authorities were merely resubmitting objected-to proposals with cosmetic or no changes. The tenacity of local resistance to compliance is reflected in these examples:

- White officials in DeSoto Parish attempted to reduce the number of majority African-American police jury districts in 1991, and the number of majority African-American school board districts in 1994 and 2002, each time despite increases in the African-American percentage of the parish population and the availability of alternative plans that preserved African-American districts, were less expensive to implement and were more consistent with prior district lines.[120]

- After a 1991 Section 5 objection to its attempt to pack African-American voters in the city of Bastrop, the Morehouse Parish Police Jury made cosmetic changes and resubmitted the same plan.[121] The DOJ objected again, and the police jury again

[115] Letter from Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to E. Kenneth Selle, President, Tri-S Associates, Inc. (Aug. 22, 1983); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Clement Guidroz, President, Pointe Coupee Parish Police Jury (Feb. 7, 1992); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Gregory B. Grimes, Superintendent, Pointe Coupee Parish School District (Oct. 4, 2002).
[116] Letter from Reynolds to Selle of Aug. 22, 1983.
[117] Letter from Dunne to Guidroz of Feb. 7, 1992.
[118] Letter from Boyd to Grimes of Oct. 4, 2002.
[119] *Id.;* Letter from Reynolds to Selle of Aug. 22, 1983; Letter from Dunne to Guidroz of Feb. 7, 1992.
[120] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to R. U. Johnson, President, DeSoto Parish Police Jury (Oct. 15, 1991); Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Walter Lee, Superintendent of DeSoto Schools (April 25, 1994); Letter from Andrew E. Lelling, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Walter Lee, Superintendent of DeSoto Schools (Dec. 31, 2002).
[121] Letters from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Ray Yarbrough, President, Morehouse Parish Police Jury (Sept. 27, 1991; May 26, 1992).

resubmitted the same plan with only cosmetic changes.[122] Only after the DOJ objected a third time in 1992 did the police jury address the substance of the first objection and draw district lines that did not over-concentrate African-American voters.

- After the DOJ objected to East Carroll Parish's packing of African-American voters into 4 out of 9 school board districts (despite an overall African-American population of 65 percent) in 1991, the Parish resubmitted the same redistricting plan with "minimal changes" in 1992 and 1993.[123] After the white majority on the board watched an African-American candidate run for police jury and fail in 1994, they quickly adopted the same districting plan as the police jury.[124]

Other repeat offenders include the parishes of Madison, East Baton Rouge, West Feliciana, St. Landry, Webster, Richland, Lafayette, and Washington; and the municipalities of Shreveport, Monroe, St. Martinsville, Ville Platte, and Minden.

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

e. Inconsistent Standards

To justify diluting the African-American vote, local officials have often claimed to be fulfilling neutral redistricting or other criteria such as compactness or "least change." But such policies have been applied selectively to serve discriminatory purposes. Local officials have used the policy of "least change" to justify rejecting plans proposed by African-American leaders, only to adopt retrogressive plans that changed district lines more radically than the African-American leaders' proposals would have. For example, in 1989, Jefferson Parish Council officials rejected a proposal by African-American voters to draw the parish's first ever majority African-American district, claiming that the majority-white district they adopted was more compact and followed natural geographic boundaries.[125] The DOJ pointed out in its objection that this majority-white district was the *only* compact district and the *only* district to follow natural geographic

[122] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to David E. Verlander, McLeod, Verlander, Eade & Verlander (Sept. 14, 1992).
[123] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Kenneth R. Selle, President, Tri-S Associates, Inc. (Dec. 20, 1991); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Mary Edna Wilson, Secretary-Treasurer, East Carroll Parish Police Jury (Aug. 21, 1992); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to James David Caldwell, District Attorney, State of Louisiana (Jan 4, 1993).
[124] Letter from Isabelle Katz Pinzler, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Gerald Stanley, Superintendent of Schools, East Carroll Parish (Aug. 19, 1994).
[125] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Harry A. Rosenberg, Phelps, Dunbar, Marks, Claveria & Sims (Nov. 17, 1989).

boundaries in the entire Parish.[126] (In a related Section 2 lawsuit, the U.S. District Court for the Eastern District of Louisiana found that voting in the Parish was so racially polarized that no African-American candidate had ever advanced beyond a primary election.[127])

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

Once again demonstrating that discriminatory voting practices have statewide manifestations, as has been described above, the Louisiana House of Representatives has been consistent in its dilutive objectives, but has been among the most inconsistent electoral bodies when it comes to uniform application of the districting standards in the State. In 1991, the DOJ objected that the House redistricting plan prioritized compactness when that meant fragmenting an African-American population concentration among three districts in the north-central part of the State, but had no problem abandoning compactness to fragment African-American population southward in the Delta Parishes.[128] Assistant Attorney General John R. Dunne wrote in his objection letter that "the decision to apply or deviate from the criteria in each instance tended to result in the plan's not providing African-American voters with a district in which they can elect a candidate of their choice."[129]

The conduct of the Louisiana House of Representatives during its 2002 Section 5 redistricting litigation, also discussed above, further illustrates its pattern of cloaking discrimination with pretextual justification. In that litigation, the State sought judicial preclearance of its House of Representatives redistricting plan. Although there are many aspects of this very recent litigation that bear on the question of the need for renewal of Section 5,[130] the state's attempt to justify its intended elimination of an African-American opportunity district in New Orleans based upon the theory that white voters in Orleans Parish were entitled to proportional representation, though African Americans elsewhere in the state were not, epitomizes the lengths to which some will continue to go to dilute minority votes.

During the course of the litigation, the House, and plaintiff and Speaker Pro Tempore, Charles Emile "Peppi" Bruneau, Jr.,[131] sought to cover the tracks of the legislative intentions by improperly withholding documents that evidenced the House's purpose to retrogress in its redistricting plan through frivolous assertions of attorney-client or work product privilege. LDF secured a court order to require Bruneau and the other plaintiffs to produce versions of the redistricting guidelines that were distributed at the outset of the line drawing process to facilitate their work.[132] These documents revealed that Bruneau had overseen the process that culminated

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[126] *Id.*

[127] *East Jefferson Coalition for Leadership and Development v. The Parish of Jefferson*, 691 F. Supp. 991, 1002 (E.D. La. 1988).

[128] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Jimmy N. Dimos, Speaker, Louisiana House of Representatives (July 15, 1991).

[129] *Id.* at 3.

[130] *See* IV.A. *supra*.

[131] Bruneau had overseen decades of House redistricting in Louisiana.

[132] Excerpts from the transcript reflecting the court's command to the plaintiffs to produce the requested documents are annexed as Appendix H. It is worth mentioning that even after this order, plaintiffs again were prepared to flout the court's ruling. Plaintiffs initially refused to make the witnesses with knowledge of the revisions to the

in the removal of the provision in the guidelines that reminded legislators specifically of their obligation to comply with the VRA. Bruneau and the other witnesses for the Louisiana House explained that they removed the provision — which had been included in the guidelines for decades before the process began — in order to make the guidelines plain and understandable.[133] Accordingly, even before Congress had the opportunity to reevaluate the renewal of Section 5, legislators in Louisiana took it upon themselves to attempt to rewrite the law governing their redistricting activities.

Of course, Bruneau himself understood that the plan that he had ushered through the House eliminated an African-American opportunity district from Orleans Parish, despite growth in the African-American voting-age population percentage there. Faced with a strong Section 5 defense by the DOJ, a coalition of concerned voters (represented by LDF), and the Louisiana Legislative Black Caucus, the court issued an order unusually critical of the State's litigation tactics. The Louisiana plaintiffs settled the case on the eve of trial by agreeing to restore the eliminated Orleans opportunity district, among other concessions favorable to Louisiana's minority voters. The court's order that brought Louisiana to the settlement table in this statewide redistricting case read in part: the Louisiana House of Representatives has "subverted what had been an orderly process of narrowing the issues in this case by making a radical mid-course revision in their theory of the case and by blatantly violating important procedural rules."[134]
It is far more efficient to expose this type of discriminatory manipulation of standards when jurisdictions have the burden of explaining their conduct under Section 5 than it would be to uncover the very same discriminatory motives in more costly and complicated Section 2 litigation.

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

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

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compelled documents available to be deposed up until the time that all of the litigants had joined a conference call and were awaiting the judge's participation in the call. The judge had earlier warned that the losing party would be sanctioned, and it was only in face of this further threat that the State relented and allowed the depositions to go forward.

[133] Appendix I. Excerpt of deposition transcript of Charles Emile Bruneau, Jr., Speaker Pro Tempore of the Louisiana House of Representatives at pp. 33-34 (explaining that the purpose of the guideline revisions was to make them understandable to members of the House of Representatives), 54-56 (conceding that the guideline revisions substituted the direct reference to the VRA and other relevant federal constitutional and statutory provisions by requiring that proposed redistricting plans abide by "all" laws), 62-63 (asserting that the guideline revisions effectuated "minimal" changes). January 7, 2003.

[134] Appendix E. Order Denying Defendants' Motion for Summary Judgment, No. 02-0062, at *1 (D.D.C. Feb. 23, 2003).

In 1994, the St. Landry Parish Police Jury was advised by a white alderman in the town of Sunset that whites were uncomfortable walking into an African-American neighborhood to vote at the Sunset Community Center.[135] Without holding a public hearing, seeking any further public input, or advertising the change in any way, the police jury moved the polling place to the Sunset Town Hall.[136] African-American leaders in Sunset did not hear of the change until informed of it by DOJ officials performing a Section 5 preclearance review, at which time they "expressed vehement opposition" to the change, because the proposed new Town Hall had been the site of historical racial discrimination and many African-American citizens did not feel welcome there.[137] As the DOJ pointed out in its objection letter, "the decision-making process considered the presumed desires of white voters, but made no effort to consider the desires of African-American voters."[138] If not for the light shone by the Section 5 preclearance process, African-American voters might not have known of the change until after they arrived at the wrong polling place on election day in 1994, at which point the retrogressive impact would have already been felt.

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

As the following examples make clear, the St. Landry polling place relocation was only one of many instances in which African-American citizens learned of discriminatory voting changes or practices only because of Section 5 review.

- In 1991, the East Carroll Parish School Board hastily adopted a redistricting plan "without the knowledge of African-American leaders and unsuccessful African-American . . . candidates, who would have spoken in opposition."[139]

- In 1992, the Morehouse Parish Police Jury listened to redistricting proposals by African-American citizens; then, at the end of the process, quickly adopted a different proposal that had not been debated, but drew a Section 5 objection for diluting the African-

[135] Letter from Kerry Scanlon, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Kathy Moreau, Secretary, St. Landry Parish Police Jury (Sept. 12, 1994).
[136] *Id.* at 1.
[137] *Id.* at 2.
[138] *Id.*
[139] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to E. Kenneth Selle, President, Tri-S Associates, Inc. (Dec. 20, 1991).

American vote in the rural part of the Parish.[140] (At another point in the redistricting process, the police jury adopted a plan that gerrymandered an African-American incumbent into a majority-white district in retaliation for his championing of an alternative plan; the DOJ again objected.)[141]

- In 1994, the DOJ found that the DeSoto Parish School Board held sham public debates before adopting, without discussion, a redistricting plan that the board members had privately agreed upon a month earlier.[142]

One of the often-overlooked aspects of the preclearance process is that Section 5 coverage is not simply limited by external factors, such as the congressionally established effective dates. Eligibility for bailout under Section 4 is also determined by factors that jurisdictions can control, like compliance with Section 5 submission rules.[143] Many Louisiana officials still stubbornly resist DOJ requests for even the most basic information about voting changes. For example, in 1993, when Morehouse Parish attempted to reduce the number of its elected justices of the peace, the DOJ noted that the parish's initial submission "contained virtually none of the information required;" that the parish ignored a request for more information for over a year; and that the response, when finally received, still contained no population data by race, and included maps of such poor quality that "we cannot determine the dividing lines between existing and proposed districts."[144] The DOJ noted similar efforts by Louisiana officials to withhold information in the city of Cottonport in 1987,[145] Jackson Parish in 1991,[146] Evangeline Parish in 1993,[147] and Richland Parish in 2003.[148] Objections followed in each instance.

h. The Relationship Between State and Local Governments

Voting discrimination in Louisiana has operated on many levels, with state government actions enabling or reinforcing local government actions. In 1998 the Louisiana State Legislature provided local governments with an excuse for not drawing additional majority-minority districts when it passed a law absolutely freezing local voting precinct lines through 2003 (including the three crucial redistricting years following the 2000 census).[149] In its objection letter, the DOJ

[140] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to David E. Verlander, McLeod, Verlander, Eade & Verlander (Sept. 14, 1992).
[141] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Ray Yarbrough, President, Morehouse Parish Police Jury (May 26, 1992).
[142] Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Walter Lee, Superintendent of DeSoto Schools (Apr. 25, 1994).
[143] 42 U.S.C. § 1973b(a)(1)(D); *See also* IV.B.2.j. *infra*.
[144] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Angie Rogers LaPlace, Louisiana Assistant Attorney General (Mar. 26, 1993).
[145] Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to M. E. Kenneth Selle, President, Tri-S Associates, Inc. (Apr. 10, 1987).
[146] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Troy L. Smith, President, Jackson Parish Police Jury (Oct. 8, 1991).
[147] Letter from James P. Turner, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Dale Reed, Secretary-Treasurer, Evangeline Parish Police Jury (Sept. 17, 1993).
[148] Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. DOJ, to John R. Sartin, Superintendent, Richland Parish School Board (May 13, 2003).
[149] Letter from Bill Lann Lee, Assistant Attorney General, Civil Rights Division, U.S. DOJ, to Angie Rogers LaPlace, Louisiana Assistant Attorney General (May 13, 2003).

noted that during the 1990s, many local governments claimed to be unable to redraw districts to accommodate minority voting interests because state law forbade the drawing of district lines that crossed precinct lines (districts are areas that correspond with a particular seat at issue in an election; precincts are smaller areas served by a particular polling place).[150] But for another DOJ objection that nullified the 1998 law,[151] local officials would have been able to rely on state law, thrown up their hands, and claimed that they simply did not have the ability to draw districts that provided electoral opportunities for African Americans. It is precisely this kind of nexus between state and local governments united in discriminatory purpose and practice that requires the outside intervention provided for by Section 5.

i. More Information Letters

Under Section 5, the burden of showing that a proposed change is not retrogressive is on the jurisdiction proposing the change; if officials refuse to provide enough information to evaluate the change, review is delayed because of the jurisdiction's own acts, and the change cannot be precleared. By sending "more information" letters to submitting jurisdictions, which point out deficiencies in a submission and require jurisdictions to provide supplementary information, the DOJ has deterred and/or effectively blocked additional discriminatory voting changes in Louisiana. No fewer than 17 Louisiana parishes chose to withdraw 22 submissions, most of them redistricting proposals, since the 1982 renewal after additional information was requested. It stands to reason that the DOJ's request for more information put the jurisdictions on notice of the deficiencies of their submissions. Accordingly, in these situations, the jurisdictions withdrew the submissions rather than face a likely objection.

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

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

With an effective Section 5 administrative process in place, federal courts are only rarely called upon to decide Section 5 issues — primarily when the government completely avoids its obligations to seek preclearance of voting changes, or when it seeks judicial review of administrative determinations. Despite the limited need for judicial involvement in Section 5 determinations, the federal courts have taken Louisiana and its subdivisions to task on multiple occasions since 1982 for Section 5 violations.

At the statewide level, courts have enforced Section 5 by preventing Louisiana from diluting the voting strength of African Americans in elections for state judges through discriminatory annexations. Under Louisiana's Constitution of 1973, citizens elect judges to the various state courts, including the Louisiana Supreme Court, its courts of appeal, district courts, family courts,

[150] *Id.* at 3.
[151] *Id.*

and other courts.[152] The delegates to the 1973 Constitutional Convention voted overwhelmingly to maintain the method of electing state judges that had been in place prior to VRA, which provided for at-large election of district judges, by district, as well as both division and at-large election of circuit judges.[153] Since the enactment of the VRA, the Louisiana legislature has often sought preclearance when adding new judgeships for the various district courts, family courts, and courts of appeal.[154] However, "the state failed to obtain the requisite preclearance" for eleven districts for State district court (sometimes with multiple divisions each) and two districts for circuit court.[155] At the time of the litigation, there were a total of forty district courts and five circuit courts of appeals.[156] Therefore, for 27.5 percent of the districts created for district court judges and 40 percent of the districts for circuit court judges the State ignored its preclearance obligations. Given Louisiana's African-American population of about 1,299,281 following the 1990 Census,[157] the failure to obtain preclearance as required for district court election districts potentially affected the voting rights of hundreds of thousands of African Americans, while the failure to obtain preclearance for circuit court election districts potentially adversely affected several hundred thousand African-American citizens of the state.

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

> The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act of 1965. If this were the first time a three-judge court in the Middle District of Louisiana was confronted with the problem of hearing suit seeking to enjoin an election because of the state's failure to obtain preclearance, the Court might avoid commenting on the matter. It appears to this Court that those in charge of the election process in Louisiana should undertake a very careful and detailed inventory of all legislation which relates to the election of officials in Louisiana and determine once and for all whether preclearance has been obtained from the Attorney General if such is required under the Voting Rights Act of 1965. The people of the State of Louisiana, the candidates and incumbents, and the federal courts deserve nothing less.[158]

In order to balance the Section 5 rights of plaintiffs, the interests of state and local authorities, and public confidence in criminal convictions and civil judgments issued by judges from unprecleared election districts, the district court allowed the elections to proceed and the elected judges to take office on a provisional basis while the State sought preclearance from the attorney general or the District Court of the District of Columbia; should the state have failed to obtain preclearance, the court would have set aside the elections.[159] On appeal, underscoring the

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[152] *Clark v. Roemer*, 751 F.Supp. 586, 588 (M.D. La. 1990).
[153] *Id.*
[154] *Id.* at 589.
[155] *Id*. at 600.
[156] Brief for Appellees at 1, *Clark v. Roemer*, 1991 WL 11007874 (1991), *opinion*, 500 U.S. 646 (1991).
[157] U.S. Census Bureau, 1990 Census of Population and Housing (Decennial Census / Get Data / 1990 Census / 1990 Summary Tape File 1 / Detailed Tables / State / Louisiana / P006 Race), *available at* http://factfinder.census.gov/.
[158] *Id.* at 589 n. 10.
[159] *Id.* at 594-596.

seriousness of the Section 5 violation, the U.S. Supreme Court unanimously found this remedy inadequate, instead requiring the district court to enjoin all such elections immediately until the State received the requisite judicial or administrative preclearance.[160] Had the Supreme Court not intervened to enforce vigorous remedies for Section 5 violations, a substantial proportion of Louisiana's African Americans would have continued to face discriminatory elections for district court judgeships and approximately 520,000 African-American Louisianans would have continued to face discriminatory elections for circuit court judgeships.

Louisiana's record of complying with Section 5 for local elections is even worse than its record for state elections, which is precisely why Section 5 arguably plays its most important role in Louisiana in preventing voting discrimination at the local level. The Western District Court of Louisiana has enjoined multiple elections in jurisdictions that failed to preclear voting changes. In 1991, it enjoined the city of Monroe from holding elections in Wards 1, 2, and 4 until obtaining preclearance for elections to the City Court,[161] in a jurisdiction of approximately 18,000 African Americans.[162] In 1994, the same district court enjoined elections under the Vernon Parish School Board's post-1990 reapportionment, since the school board failed to submit its 1994 modified reapportionment resolution.[163] The school board's reapportionment also violated the one-person, one-vote standard.[164] At that time, Vernon Parish's African-American population was approximately 13,000.[165]

Redistricting in Bossier Parish[166] and annexations in Shreveport,[167] though, proved more controversial than the Monroe and Vernon Parish violations. Following the 1990 Census, Bossier Parish drew the districts for its school board elections with the discriminatory, though allegedly nonretrogressive, purpose of diluting black voting strength.[168] The 1990 Census required the Bossier Parish School District to redraw districts for electing its members. Like the police jury, which governs the parish generally, the school board is composed of twelve

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[160] *Clark v. Roemer*, 500 U.S. 646 (1991).
[161] *Hunter v. City of Monroe*, 1991 WL 12799 (W.D. La. 1991).
[162] The city of Monroe has five districts. See http://www.monroela.us/citycouncil.php. After the 1990 Census, it had a black population of 30,504. U.S. Bureau of the Census, 1990 Census of Population and Housing (Decennial Census / Get Data / 1990 Census / 1990 Summary Tape File 1 / Detailed Tables / Place / Louisiana / Monroe City / P006 Race), *available at* http://factfinder.census.gov.
[163] *Dye v. McKeithen*, 856 F.Supp. 303, 308-09 (W.D. La. 1994).
[164] *Id.* at 312.
[165] U.S. Bureau of the Census, 1990 Census of Population and Housing (Decennial Census / Get Data / 1990 Census / 1990 Summary Tape File 1 / Detailed Tables / County / Louisiana / Vernon Parish / P006 Race), *available at* http://factfinder.census.gov.
[166] *Bossier Parish School Board. v. Reno* ("*Bossier Parish I*"), 907 F.Supp. 434 (D.D.C. 1995); *Reno v. Bossier Parish School Board* ("*Bossier Parish II*"), 520 U.S. 471 (1997); *Bossier Parish School Board v. Reno* ("*Bossier Parish III*"), 7 F. Supp. 2d 29 (D.D.C. 1998); *Reno v. Bossier Parish School Board* ("*Bossier Parish IV*"), 528 U.S. 320 (2000).
[167] *United States v. Louisiana*, 952 F. Supp. 1151, 1154 (W.D. La. 1997).
[168] *Bossier Parish III*, 7 F. Supp. 2d. at 39 (Kessler, J., dissenting); *see also Bossier Parish IV*, 528 U.S. at 356-357 (Souter, J., dissenting) ("There is no reasonable doubt on this record that the Board chose the Policy Jury plan for no other reason than to squelch requests to adopt the NAACP plan or any other plan reflecting minority voting strength, and it would be incredible to suggest that the resulting submergence of the minority voters was unintended by the Board whose own expert testified that it understood the illegality of dilution. If, as I conclude below . . . dilutive but nonretrogressive intent behind a redistricting plan disqualifies it from Section 5 preclearance, then preclearance is impossible on this record.").

members elected from single-member districts. As of 1995, no black candidate had been elected to membership on the board,[169] although by 2000 three blacks won office on the board.[170] Candidates for the board face "majority voting requirements: a candidate must receive a majority of the votes cast, not merely a plurality, to win an election."[171] Initially, the school board sought to redraw its districts together with the police jury; because the incumbents of those two bodies had divergent interests, however, such cooperation proved impossible.[172] Facing the prospect of redistricting on its own, the school board hired a consultant to prepare a plan.[173] Shortly after the process had begun, the president of the local chapter of the NAACP wrote to the school board asking to be involved in the process, and indicating that the NAACP would oppose plans that lacked majority-black districts.[174] In 1992, the NAACP prepared a redistricting plan that included two majority-black districts, and presented them to the school board which in turn dismissed the plan because it "required splitting a number of voting precincts."[175]

When the board members met with the consultant preparing the redistricting plan, many of them made statements evidencing a discriminatory intent in their redistricting plans.[176] On October 1, 1992, the board adopted the police jury redistricting plan, rather than the NAACP plan.[177] The police jury plan pitted incumbent school board members against each other, and did not distribute school districts evenly.[178] On August 30, 1993, the attorney general interposed an objection to the plan, based on information acquired since preclearing the same plan for the police jury itself, on the grounds that it "unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice."[179] The school board then sought judicial preclearance from the U.S. District Court for the District of Columbia.

In analyzing whether judicial preclearance was proper, the D.C. District Court and the Supreme Court both considered the case twice.[180] In so doing, they accepted many stipulations of the parties, such as: (1) the plan had no retrogressive *effect*;[181] (2) voting is racially polarized in Bossier Parish;[182] (3) one or two majority-black districts could have been drawn while respecting

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[169] *Bossier Parish I*, 907 F. Supp. at 437-438.
[170] *Bossier Parish IV*, at 341 (Thomas, J., concurring).
[171] *Bossier Parish I*, at 437.
[172] *Bossier Parish I*, at 438.
[173] *Id.*
[174] *Id*.
[175] *Id.* Louisiana law requires school board districts to contain whole precincts, but also allows School Boards to request precinct changes from the Police Jury in order to accommodate new plans. The Board never approached the Policy Jury to make such requests. *Id.*
[176] *Id.* at 438 n. 4. Such statements included testimony that while some favor "having black representation on the board, other school board members oppose the idea," that "the Board was 'hostile' toward the idea of a black majority district," and that one of the white members had "worked too hard to get his seat and that he would not stand by and 'let us take his seat away from him.'" *Id.*
[177] *Id.* at 439.
[178] *Id.*
[179] *Id.*
[180] *Bossier Parish School Board v. Reno* ("*Bossier Parish I*"), 907 F. Supp. 434 (D.D.C. 1995); *Reno v. Bossier Parish School Board* ("*Bossier Parish II*"), 520 U.S. 471 (1997); *Bossier Parish School Board v. Reno* ("*Bossier Parish III*"), 7 F. Supp. 2d 29 (D.D.C. 1998); *Reno v. Bossier Parish School Board* ("*Bossier Parish IV*"), 528 U.S. 320 (2000).
[181] *Id.* at 440.
[182] *Id.* at 454 (Kessler, J., dissenting).

traditional districting principles;[183] (4) when the police jury plan was opened for public comment it was widely criticized for diluting minority voting strength, and garnered no public support;[184] and (5) the police jury plan had a discriminatory impact "in falling 'more heavily on blacks than on whites . . . and in diluting 'black voting strength.'"[185]

Indeed, the judges on the D.C. District Court and the justices on the Supreme Court nearly agreed that Bossier Parish adopted the police jury plan with a discriminatory purpose. In granting judicial preclearance, the district court note[d] that "[e]vidence in the record tending to establish that the board departed from its normal practices . . . establishe[d] rather clearly that the board did not welcome improvement in the position of racial minorities with respect to their effective exercise of the electoral franchise, but [wa]s not evidence of retrogressive intent."[186] Rather, the evidence prove[d] a "tenacious" intent "to maintain the status quo,"[187] in this case the exclusion of African Americans from opportunities to elect candidates of choice resulting in an all-white school board. The dissent characterized Bossier Parish's adoption of the police jury plan as motivated by a "nonretrogressive but nevertheless discriminatory intent" to "maintain th[e] discriminatory status quo by unconstitutionally diluting black voting strength."[188] In affirming the district court, the Supreme Court did not disturb the lower court's factual findings since it reasoned that Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.[189]

In short, the Bossier Parish School Board adopted an admittedly dilutive redistricting plan, which the courts judicially precleared on the grounds that while the school board may have acted with intent to discriminate it did not act with intent to retrogress or worsen the position of the Parish's African-American citizens. The Supreme Court and the D.C. District Court allowed this plan, adopted with discriminatory purpose, in a parish without any minority-preferred representation on the elected body that was responsible for the policy decisions about the education of all of the children in the Parish.[190] This result seems particularly troubling in a state with such a well-documented and protracted history of discrimination in education and voting. Indeed, the practical impact of the Supreme Court's holding in *Bossier II* is that the Court has effectively created a "discrimination dividend" standard whereby jurisdictions that have effectively maintained adherence to exclusion of African Americans remain free to *intentionally* do so in the future, consistent with Section 5 of the VRA.

While Bossier Parish purposefully drew dilutive districts, Louisiana, acting on behalf of Shreveport, resisted its Section 5 obligations for hundreds of annexations, which diluted the African-American vote in Shreveport for nearly two decades. In 1976 and 1978, the city of

[183] *Id.* at 454 (Kessler, J., dissenting).
[184] *Id.* at 457 (Kessler, J., dissenting).
[185] *Bossier Parish IV*, 528 U.S. at 349 (Souter, J., dissenting).
[186] *Bossier Parish III*, 7 F. Supp. 2d. at 32. The court did, however, conclude that though it could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose, . . . those imagined facts are not present here." *Id.* at 31.
[187] *Id.*
[188] *Id.* at 39 (Kessler, J., dissenting). *Bossier Parish IV*, 528 U.S. at 356-357, *supra* note 168.
[189] *Bossier Parish IV*, 528 U.S. 320.
[190] *Bossier Parish I*, 907 F. Supp. at 437 (17.6 percent of Bossier Parish's 86,088 residents, after the 1990 Census, are black and of sufficient age to vote).

Shreveport submitted its city charter and various annexations, as they affected the city council, to the attorney general for preclearance.[191] Shreveport failed to identify any effect these annexations would have on the city court, a political body distinct from the city council.[192] In 1978, the Attorney General precleared "(1) the annexations as they affected the City Council elections and (2) the City Charter."[193] In 1989, the city submitted additional annexations for preclearance, which the Attorney General denied.[194] In 1992, Louisiana, acting on behalf of the city, submitted for preclearance legislation that created a fourth city court judicial position and changed the method of electing its court judges from at-large to a combination of multimember and single-member districts; again, the Attorney General denied preclearance.[195] In 1993, the city submitted for preclearance "*321 annexations to the boundaries and jurisdiction of the City Court that had been implemented between 1967 and 1992*," and in 1994 it submitted six more annexations.[196] Yet again, the attorney general interposed an objection, explaining that "the proposed changes effectuated an eleven percentage-point decrease in black voting strength."[197]

Following this objection and in direct response to it, Louisiana "did an about-face." In a September 16, 1994 letter from the assistant attorney general of Louisiana, the state, *for the first time*, argued that Section 5 preclearance of the annexations to the city court was unnecessary because the attorney general had previously precleared annexations for the city council elections."[198] The state remained intransigent in this position,[199] which the court viewed as patently unreasonable.[200] Remarkably, despite "the City's and State's failure to obtain administrative or judicial preclearance for the annexations affecting the Shreveport City Court elections, the City" moved ahead with these elections.[201] Finding separate preclearance necessary for the Shreveport City Court,[202] but concluding that the annexations never received preclearance as they affected the city court elections,[203] the court crafted an appropriate injunction that balanced the gravity of complying with Section 5's obligations with the need not to upset the city's judiciary which elected judges for decades through districts not properly precleared.[204] The court ordered the city and state "to seek judicial preclearance" and enjoined Louisiana's "Secretary of State from issuing the 'elected' City Court judges their commissions for a new six-year term," but it also permitted the incumbent city court judges "to holdover in

[191] *United States v. Louisiana*, 952 F. Supp. 1151, 1154 (W.D. La. 1997).
[192] *Id.*
[193] *Id.* at 1154-1155.
[194] *Id.*
[195] *Id.* at 1155.
[196] *Id.* (emphasis added).
[197] *Id.*
[198] *Id.* at 1155 (emphasis in the original).
[199] *Id.* at 1156.
[200] *Id.* at 1173.
[201] *Id.* at 1156. As it turned out, the judges seeking office ran unopposed and were, thus, statutorily deemed elected without having actually to contest the election and win votes. After the United States modified its complaint to reflect the relief that would be proper absent a contested election, the district court heard the case on the merits. *Id.*
[202] *Id.* at 1167. The court identified three primary grounds for the reasonableness of this position. First, the City Court and City Council were established under different legislation. Second, they enjoy separate electorates. Third, they employ differing methods of election—the City Court holds elections at-large while the City Council has used single-member districts since the 1970s. *Id.* The court also sought to give Section 5 a broad interpretation and to maintain the specificity requirement for administrative preclearance. *Id.* at 1168.
[203] *Id.* at 1169-72.
[204] *Id.* at 1173.

their offices until the merits of the [judicial preclearance action] have been conclusively determined."[205] In the relevant time period, the actions of Shreveport and the state affected the voting rights of approximately 89,000 African Americans.[206]

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

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

k. Federal Observers

The federal observer provisions are another useful aspect of the VRA's minority protection statutory goal. Upon a threshold showing of credible complaints of election related irregularities, DOJ can dispatch observers to monitor elections and record their observations. The observer provisions serve two useful purposes. First, the presence of federal election monitors has a deterrent effect on would-be violators. Second, where deterrence does not work, the observer reports provide a firsthand factual predicate for additional DOJ enforcement efforts. DOJ has dispatched observers to parish's in Louisiana more than a dozen times since 1982.[207] DOJ maintains records relating to the federal observer reports.

3. Section 2 Violations

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[205] *Id.* at 1174.

[206] U.S. Bureau of the Census, 1990 Census of Population and Housing (Decennial Census / Get Data / 1990 Census / 1990 Summary Tape File 1 / Detailed Tables / Place / Louisiana / Shreveport City / P006 Race), *available at* http://factfinder.census.gov.

[207] DOJ response to the FOIA request of Jon Greenbaum, Director of the Lawyers' Committee for Civil Rights Under Law's Voting Rights Project (February 4, 2005).

The protections of one of the permanent enforcement provision of the VRA, Section 2, have worked in combination with Section 5 preclearance to enhance political opportunities for African Americans in Louisiana. At the heart of a Section 2 vote dilution claim lies the issue of whether racial or language minorities' right to have an equal opportunity to elect their candidates of choice has been undermined by a voting practices or procedures.[208] The cases reviewed in this section demonstrate why courts have consistently determined since 1986, and as recently as 2002, that African Americans in Louisiana have been denied this most fundamental opportunity. The violations which affect various public offices, including judicial, aldermanic, councilmanic and school boards, have unjustly burdened many thousands of African-American citizens in Louisiana.

a. Judicial Offices Section 2 Violations

Beginning in 1986, Louisiana's system for the election of judges was alleged to violate VRA. In the *Clark v. Roemer*[209] line of cases, African-American voters and African-American attorneys qualified to be elected judges to various courts throughout the state's court system finally decided that enough vote dilution was enough. In a case alleging that the use of multimember districts to elect judges operated to dilute African-American voting strength in violation of Section 2 of VRA, the parties stipulated to facts that provided the most compelling evidence of African Americans' inability to effectively participate in the political process in Louisiana. For example, of 156 district court judgeships in Louisiana outside of Orleans Parish, only two African Americans had *ever* been elected in the State's history.[210] During the whole twentieth century, in Orleans Parish — where there has been a consistently high concentration of African Americans as high as two-thirds of the population — only one African-American attorney had ever served on the criminal district court and only three had been elected to serve on the civil district court.[211] Of the 48 Court of Appeal judgeships in the State, only one judge was African-American.[212] No African-American citizen had ever been elected to any statewide office, to the U.S. Congress, or to the Louisiana Supreme Court.[213]

The vote dilution claims involved all of the Louisiana courts of appeal and most of the state's 41 judicial district courts. The federal district court initially found that the state's entire at-large scheme for judicial elections violated Section 2.[214] Initially, although minority vote dilution had not been proven in every district, the court enjoined elections for all family, district, and appellate courts until the state system could be revised. The Louisiana legislature proposed a package of constitutional and statutory changes to address the court's ruling, but the voters rejected them.

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[208] *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496,497 (5th Cir. 1987).
[209] *Clark v. Roemer* ("*Clark-2 III*"), 750 F. Supp. 200 (M.D. La. 1990); *Clark v. Roemer* ("*Clark-2 II*"), 777 F. Supp. 445 (M.D. La. 1990); *Clark v. Edwards* ("*Clark-2 I*"), 725 F. Supp. 285 (M.D. La. 1988).
[210] *Clark v. Roemer*, 725 F. Supp. 285, 288 (MD La. 1988).
[211] *Id.*
[212] *Id.*
[213] *Id.* at 290. Jesse Stone, an African-American attorney, was appointed to a vacancy on the Louisiana Supreme Court for 17 days, from November 2, 1979 through November 19, 1979.
[214] *Clark v. Edwards*, 725 F. Supp. 285, 302 (M.D. La. 1988).

The district court subsequently vacated the statewide injunction because it determined that *Thornburg v. Gingles*[215] requires district-by-district findings; thus it issued revised findings that eleven districts, excluding the 23rd Judicial District Court ("JDC"), violated Section 2 of the VRA. For those eleven districts, the court concluded that sub-districts must be created to enhance minority judicial candidates' chances.[216] Both parties appealed, placing at issue the findings of Section 2 violations in some districts and the refusal to enter such findings in others, including the 23rd JDC. The imperative to end the struggle eventually yielded a settlement calling for revisions of 15 judicial districts, including the 11 that had been covered by the district court's remedial order for sub-districting and the 23rd JDC. The plaintiffs dropped their challenges to the other districts. Preclearance of the plan was granted and Act 780 was the end result of the settlement agreement.

Act 780 of the 1993 Regular Session of the Louisiana Legislature increased the number of district judges for the 23rd JDC from four to five. In the process, the Act created two electoral sub-districts within the district. In the whole district, the population ratio is about 70 percent white to 30 percent African-American. Sub-district one, however, is 75 percent African-American, contains roughly 20 percent of the total population, and elects one of the five district judges for the 23rd JDC; sub-district two is 80 percent white, contains roughly 80 percent of the total population, and elects four of the district judges.[217]

But before the decade could end, in *Prejean v. Foster,*[218] plaintiffs — residents and voters in the district of the 23rd JDC — alleged the *Clark v. Roemer* settlement itself intentionally discriminated among voters and thus violated the 14th and 15th Amendments and Section 2 of VRA because it effected an impermissible racial gerrymander.[219] Following a grant of summary judgment in the district court (itself "no doubt frustrated by the recent vicissitudes of voting rights law")[220] for the defendants (the parties to the original *Clark* settlement), the matter proceeded to the U.S. Court of Appeals for the Fifth Circuit.

As described above, the challenged settlement plan divided the 23rd judicial district into two sub-districts, with one majority African-American sub-district containing 20 percent of the population and electing only one of five judges. The other majority white sub-district contained 80 percent of the population and elected the other four judges. Because of sub-districting, voters in the majority African-American sub-district could only elect one of the five judges and had no right to vote on the other four. Conversely, voters in the white sub-district could vote for four of the trial judges but not for the fifth one. But since jurisdiction of the judges elected under Act 780 covered all three parishes in the 23rd JDC, any citizen could be a party in the court of a judge, or judges, in whose selection he or she had no role.

After a couple more rounds of remands and appeals, the Fifth Circuit ultimately held that Section 2 of VRA was satisfied and that the trial court had not clearly erred in finding that race was not

[215] *Thornburg v. Gingles*, 478 U.S. 30 (1986).
[216] *Clark v. Roemer*, 777 F. Supp. 445, 450 (M.D. La. 1990).
[217] Alvin Turner became the first African-American judge in the 23rd JDC when he was elected in subdistrict one.
[218] 227 F.3d 504, (5th Cir. 2000).
[219] *Prejean v. Foster*, 227 F.3d 504, 508 (5th Cir. 2000).
[220] *Id.* at 507.

the predominant factor in the creation of the sub-district. The court found substantial evidence that the districts were drawn according to traditional districting factors and while race played a role, it was not the predominant factor.

In one other line of cases dealing with the election of state judges, captioned *Chisom v. Roemer,*[221] five African-American registered voters in Orleans Parish, along with the Louisiana Voter Registration Education Crusade, filed a class action suit on behalf of all African-American registered voters in the Parish. These plaintiffs, like those in *Clark v. Edwards*[222], alleged that the system of electing two at-large Supreme Court justices from the Parishes of Orleans, St. Bernard, Plaquemines and Jefferson violated the VRA, the Fourteenth and Fifteenth Amendments to the United States Federal Constitution and, 42 U.S.C. § 1983 by impermissibly diluting, minimizing and canceling the voting strength of African-American registered voters in Orleans Parish.

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

The plaintiffs produced data showing that the First Supreme Court District of Louisiana contained approximately 1,102,253 residents of whom 63.4 percent were white, and 34.4 percent were African-American. The First Supreme Court District had 515,103 registered voters, 68 percent of whom were white, and 31.6 percent of whom were black. Plaintiffs contended that the First Supreme Court District of Louisiana should have been divided into two single districts. Plaintiffs suggested that because Orleans Parish's population was 555,515 persons, roughly half the present First Supreme Court District, the most logical division was to have Orleans Parish elect one Supreme Court justice and the Parishes of Jefferson, St. Bernard and Plaquemine together elect the other Supreme Court justice. Under the plaintiffs' proposed plan, the First Supreme Court District encompassing only Orleans Parish would then have an African-American population and voter registration comprising a majority of the district's population. The other district comprised of Jefferson, Plaquemines and St. Bernard Parishes would be majority white.

Plaintiffs sought: (1) a preliminary and permanent injunction against the defendants restraining the further election of justices for the First Supreme Court District until the Court made a determination on the merits of their challenge; (2) an order requiring defendants to reapportion the First Louisiana Supreme Court in a manner which "fairly recognize[d] the voting strengths of minorities in the New Orleans area and completely remedie[d] the present dilution of minority voting strength;"[223](3) an order requiring compliance with the VRA; and (4) a declaration from

[221] *Chisom v. Roemer* ("*Chisom V*"), 501 U.S. 380 (1991); *Chisom v. Roemer* ("*Chisom IV*"), 1989 WL 106485 (E.D. La. 1989); *Chisom v. Edwards* ("*Chisom III*"), 839 F.2d 1056 (5th Cir. 1988); *Chisom v. Edwards* ("*Chisom II*"), 690 F. Supp. 1524 (E.D. La. 1988); *Chisom v. Edwards* ("*Chisom I*"), 659 F. Supp. 183 (E.D. La. 1987).
[222] *Clark v. Roemer* ("*Clark-2 III*"), 750 F. Supp. 200 (M.D. La. 1990); *Clark v. Roemer* ("*Clark-2 II*"), 777 F. Supp. 445 (M.D. La. 1990); *Clark v. Edwards* ("*Clark-2 I*"), 725 F. Supp. 285 (M.D. La. 1988).
[223] *Chisom v. Edwards*, 659 F. Supp. 183, 184 (E.D. La. 1987).

the Court that the Louisiana Supreme Court election system violated the VRA and the Fourteenth and Fifteenth Amendments to the Federal Constitution.

The district court held, erroneously, that Section 2 of the VRA was not applicable to state judicial elections and that plaintiffs had failed to state a claim of intentional discrimination for which relief could be granted under the Fourteenth and Fifteenth Amendments. The Fifth Circuit reversed and remanded, holding that Section 2 applied to every election in which registered voters were permitted to vote. In so holding, the court rejected the argument that the VRA did not apply to the election of judges because judges were not representatives within the meaning of Section 2 of the VRA.[224] But the Fifth Circuit's decision was short-lived, as it was overruled by its subsequent decision in *LULAC v. Clements*,[225] where the court held that the results test in the VRA only applied to elections for representative, political offices but not to vote dilution claims to judicial elections. The Supreme Court ultimately resolved the matter, determining that vote dilution claims for state judicial elections were included within the ambit of the VRA. The case was later settled.

b. Aldermanic Section 2 Violations

Resistance to opportunities for African Americans to elect candidates of choice in Louisiana is by no means limited to judgeships or candidates for other state or national offices; it is also evident at the municipal level. If "all politics is local," VRA protections remain vital to ensuring a level playing field where key decisions about people's lives are being made everyday. No African American had ever been elected to municipal office in the city of Gretna since its incorporation in 1913, despite equivalent African-American and white voter registration rates.[226] This was in large part due to an informal slating process, known as the "Miller-White Ticket," which generally ensured a white candidate for every office. The political environment in Gretna "was characterized by a constant reference to the 'Miller-White Ticket,'" comprised of a father and son combination (the Millers) that were serving as Chief of Police for 60 consecutive years and a mayor (White) who was serving for 34 years at the time of the litigation.[227]

In *Citizens for a Better Gretna v. Gretna*, African-American voters of Gretna brought action under Section 2 of the VRA challenging the city's at-large aldermanic elections. Plaintiffs presented evidence, which the court found "cogent and convincing," that African Americans were excluded from the Miller-White Ticket, and by extension meaningful participation in the political process in Gretna.[228]

The district court found that African-American citizens of Gretna "historically suffered disadvantages relative to white citizens in public and private employment. . . ."[229] In detailing what it considered the relevant facts of the case, the court noted that "Blacks generally suffer higher incidences of unemployment and hold lower paying jobs than do whites."[230] The median

[224] *Chisom v. Edwards*, 839 F.2d 1056, 1064 (5th Cir. 1988).
[225] *League of United Latin Am. Citizens Council*, v. *Clements*, 914 F.2d 620 (5th Cir. 1990).
[226] *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1117-1120 (E.D. La. 1986).
[227] *Id* at. 1122.
[228] *Id.* at 1123.
[229] *Citizens for a Better Gretna v. Gretna*, 636 F. Supp. 1113, 1118 (E.D. La. 1986).
[230] *Id.*

income "[f]or blacks . . . [is] only 52 percent of [that] . . . for whites."[231] Less than ten percent of "whites in Gretna lived below the poverty line" compared to "34.1 percent of blacks."[232] Moreover, while defendants urged that any official discrimination in Gretna prior to the adoption of the VRA did not impede contemporary African-American political participation, the court held that "[t]he record fails to support this conclusion."[233]

The city had an at-large voting system for its Board of Aldermen, as well as a majority vote requirement. As noted above, no African American had ever been elected to the Board, despite a population of 28 percent. The district court found the election system violated the VRA and the city appealed. The Fifth Circuit upheld the lower court decision, finding that at-large aldermanic elections violated Section 2 of VRA.[234] The court also observed that

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

Similarly, in *Westwego Citizens for Better Government v. Westwego,*[235] another case involving aldermanic elections, African-American citizens sued to challenge the city's method of at-large elections, claiming it diluted African-American voting strength. The city is governed by a mayor and board of five alderman, who exercise considerable authority in the city, ranging from issuing permits, approval of zoning changes and land use requests, to grants of licenses to operate a business or sell alcoholic beverages.[236] Once again in this small town, no African-American candidate had ever been elected to the board of alderman or any other municipal office in Westwego.[237] Following a series of district court findings for the city and Fifth Circuit remands, the Court of Appeals finally held that the at-large system effectively barred black citizens from any meaningful role in the city's government in contravention of Section 2. The city was given 120 days to come up with an appropriate remedy that could be precleared.

c. School Board Section 2 Violations

In *St. Bernard Citizens for Better Government v. St. Bernard Parish School Board,*[238] the 2000 census revealed that eleven districts, which had been in existence since the school board's

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[231] *Id.*
[232] *Id.*
[233] *Citizens for a Better Gretna v. Gretna*, 636 F. Supp. 1113, 1119 (E.D. La. 1986).
[234] 834 F.2d 496 (5th Cir. 1987).
[235] 946 F.2d 1109 (5th Cir. 1991).
[236] *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1113 (5th Cir. 1991).
[237] *Id.*
[238] 2002 U.S. Dist. LEXIS 16540 (E.D. La. Aug. 28, 2002).

inception, were impermissibly unequal in population, with a deviation of 33.7 percent.[239] A demographer determined that the districts could be redrawn with one majority African-American district in compliance with the Equal Protection Clause and VRA.[240] Such a plan was developed and presented to ten of the eleven board members, all of whom were "acceptive" of the plan.[241] However, the board never voted on the plan. As was the case in Jefferson Parish (detailed below), no African-American candidate had ever been elected to the St. Bernard Parish School Board. Further, to ensure that African Americans would not have any representatives in the future, the parish voters approved a plan to reduce the size of the parish school board from eleven members elected from single-member districts to seven members, including five elected from single-member districts and two elected at large.

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

In *Fifth Ward Precinct v. Jefferson Parish School Board,*[242] several coalitions of registered voters and residents of Jefferson Parish sought declaratory and injunctive relief against the district boundaries for election of members to the Jefferson Parish School Board. The parties entered into a consent judgment providing for the creation of an African-American majority district.

d. Councilmanic Section 2 Violations

In *East Jefferson Coalition v. Parish of Jefferson,*[243] the parish's seven council members were elected through a combination of single-member, floaterial, and at-large districts, utilizing a majority vote requirement.[244] The parish was apportioned into four districts. Each district elected one councilman: one was elected at-large from Districts 1 and 2; another was elected at-large from Districts 3 and 4; and the last was elected from the parish at-large.[245] Under these electoral arrangements, no African-American candidate had ever been elected to Jefferson Parish council.

Plaintiffs, associations and a number of African-American registered voters in Jefferson Parish, brought suit against the parish alleging that the plan for apportioning the seats on the Jefferson Parish council violated Section 2 of the VRA. The district court, after finding a Section 2

[239] *Id.* at *11.
[240] *Id.*
[241] *Id.*
[242] 1989 U.S. Dist. LEXIS 467 (E.D. La Jan. 18, 1989).
[243] 926 F.2d 487 (5th Cir. 1991).
[244] It is worth noting that Jefferson Parish was the only parish in Louisiana that used a combination of three types of districts to elect its council.
[245] *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 926 F.2d 487, 489 (5th Cir. 1991).

violation, accepted a new restricting plan submitted by the parish. However, the DOJ refused to preclear it, suggesting that the plan "may well have been motivated by an invidious purpose to minimize black voting strength . . . ."[246] After the parish submitted yet another plan, this time with a majority-minority district, the DOJ cleared the plan and filed a memorandum with the district court requesting that the court amend its prior finding that African Americans were widely dispersed throughout the parish. After the court amended its prior finding as the DOJ recommended, the parish appealed yet again. The Fifth Circuit, again affirming a lower court opinion in favor of plaintiffs under Section 2, held that the district court's finding that the *Gingles* factors were satisfied was not clearly erroneous. The court upheld the finding that African Americans were geographically compact and politically cohesive, there was racial polarization in council elections, and a white bloc vote consistently defeated the minority's preferred candidate. This case is one example of the important nexus between Section 2 and Section 5.

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

4. Constitutional Voting Rights Cases

An important redistricting case following the 1990 census simultaneously illustrates political realities in Louisiana that justify renewal of Section 5 at the same time that it points to constitutional limits on VRA enforcement that have been established by the Supreme Court. During the post-1990 Census round of redistricting, DOJ conveyed to Louisiana its view that a second majority-minority congressional district would be necessary to obtain preclearance. The federal courts limited DOJ's ability to leverage Section 5 as a tool for requiring the drawing of additional districts in a series of cases captioned *Hays v. Louisiana*.[247]

Following the 1990 census, Louisiana's apportionment of representatives in the U.S. House of Representatives fell from eight to seven members.[248] The state, therefore, had to redraw its

[246] *Id.* at 490.
[247] *Hays v. Louisiana* ("*Hays I*"), 839 F. Supp. 1188 (W.D. La. 1993); *Hays v. Louisiana* ("*Hays II*"), 862 F. Supp. 119 (W.D. La. 1994); *United States v. Hays* ("*Hays III*"), 515 U.S. 737 (1995); *Hays v. Louisiana* ("*Hays IV*"), 936 F. Supp. 360 (W.D. La. 1996); the NAACP LDF, the Lawyers' Committee for Civil Rights Under Law and A. Leon Higginbotham, Jr. intervened in *Hays IV* on behalf of African-American citizens, the Louisiana Legislative Black Caucus, and then-Congressman Cleo Fields.
[248] *Hays II*, 862 F. Supp. at 122.

districts for electing representatives to federal congressional office.[249] Prior to 1990, African Americans comprised a majority of voters in only one of Louisiana's eight congressional districts.[250] This district, covering metropolitan New Orleans, had been itself created in response to a 1983 court order finding a violation of Section 2 of VRA,[251] and "in 1990 that district elected Louisiana's first black representative since Reconstruction."[252]

In drawing the new congressional districts, the Louisiana legislature had to comply with the constitutional command to reapportion its congressional delegation, one-person, one-vote, and the preclearance requirements of Section 5 of VRA.[253] Because the legislature failed to adopt a redistricting plan in 1991, it was under severe pressure to develop a lawful plan in 1992 in time for the congressional elections.[254] This pressure required the legislature to be reasonably certain that any redistricting plan it adopted would "receive immediate preclearance."[255] In its communications with the DOJ, the "legislators received unmistakable advisories from the Attorney General's office that only redistricting legislation containing two majority-minority districts would be approved ('precleared'), so the Legislature directed its energies toward crafting such a plan."[256] The DOJ demanded a second majority-minority district in order to mitigate the dilution that black voters would otherwise suffer due to the continued presence of racially polarized voting.[257] Indeed, DOJ recognized that, at the time of the *Hays* litigation, Louisiana's population was

> 30 percent black, [but] no black candidate ha[d] been elected to any statewide office in this century, and no black candidate in this century ha[d] won election either to Congress or to the Louisiana Legislature from a district where whites comprise a majority of the registered voters. . . . Statistical analyses of voting patterns demonstrate[d] indisputably that voting in Louisiana elections, including congressional elections, is severely polarized along racial lines; black voters cohesively support black candidates, but are consistently unable to elect them to office in white-majority districts because of white bloc voting for white candidates. . . . It is difficult to imagine a stronger record supporting the conclusion that a majority-black district is necessary 'to ensure equal political and electoral opportunity' for black voters. . . .[258]

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

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[249] U.S. Const. art. I, § 2 cl. 3.
[250] *Hays I*, 839 F. Supp. at 1190.
[251] *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983).
[252] *Hays III*, 515 U.S. 737, 740 n. *.
[253] *Hays I*, 839 F. Supp. at 1195-1196.
[254] *Hays I*, 839 F. Supp. at 1196.
[255] *Id.*
[256] *Hays IV*, 936 F. Supp. At 363. *See also*, *Hays I*, 839 F. Supp. at 1196 n. 21 ("the Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* 'safe' black districts").
[257] The district court later identified this racial polarization, finding "an average, *net* white cross-over vote in non-judicial elections of between 10 percent and 25 percent." *Hays I*, 839 F. Supp. at 1208.
[258] Brief for United States, et al., at 30-32, *United States v. Hays*, 1995 WL 58555, *opinion reported at* 515 U.S. 737 (1995) (internal citations omitted).

> For example, from 1986 through 1990, black candidates ran on five occasions in old District 8, the white-majority congressional district having the greatest concentration of black voters (35 percent black). Black voters in these elections strongly supported black candidates, but each time the black candidate was defeated by the white bloc vote for white candidates. On average, the black candidates in these elections received 87.5 percent of the black vote but only 9.3 percent of the white vote. . . . The racial breakdown in these election results is as follows:[259]

	percent of Black Voters Voting for Black Candidates	**percent of White Voters Voting for Black Candidates**
1990 Primary	84.7	3.2
1990 Primary	91.0	3.3
1998 Runoff	96.7	14.9
1986 Primary	68.3	3.3
1986 Runoff	97.0	21.6

Therefore, in order to comply with DOJ's suggestion that a second majority-minority district would be necessary to avoid diluting minority voting strength, the Louisiana legislature made sure to include African-American majorities in two of the seven congressional districts. The attorney general precleared this plan.[260] The district court held this plan, Act 42, and its later revision in Act 1, to be unconstitutional racial gerrymanders, violating Equal Protection under *Shaw v. Reno*[261] and its progeny. The court found that the legislators relied primarily on race, rather than traditional districting concerns, such as uniting communities of interest, in drawing the districts and did not narrowly tailor the districts to address any compelling governmental interest.[262,263]

The four *Hays* opinions explain in detail how the Louisiana legislature's adoption of its redistricting plans with a second majority-minority congressional district came exclusively in response to DOJ's demand, rather than from any desire in Louisiana to enhance the political

[259] *Id.* at 31 n. 37.
[260] *Hays IV*, 936 F. Supp. at 363.
[261] 509 U.S. 630 (1993).
[262] *Hays I*, 839 F.Supp. 1188; *Hays II*, 862 F. Supp. 119; *Hays IV*, 936 F. Supp. 360. The Supreme Court, in the meantime, dismissed the challenge to Act 1, as originally complained of, for lack of standing. *Hays III*, 515 U.S. 737. Plaintiffs cured this infirmity to the district court's satisfaction in their amended complaint in *Hays IV*.
[263] The district court found the plan insufficiently tailored to satisfy the prerequisites of Section 2 because the second majority-minority district was not compact. *Hays I*, 839 F. Supp at 1196 n. 21; *Hays II*, 862 F. Supp. at 124; *Hays IV*, 936 F. Supp. at 370. It similarly found that the plan was not justified by Section 5 concerns because a plan with one majority-minority district out of seven would have been a non-retrogressive change as compared with the prior apportionment of one majority-minority district out of eight. *Hays IV*, 936 F. Supp. at 370.

voice of African Americans.[264] The fact that DOJ's analysis compelled a second majority-minority district to avoid racial vote dilution, while the district court's analysis found that DOJ lacked the power to impose such a requirement, should not overshadow the role that Section 5 had on Louisiana's actions. By all accounts, the state of Louisiana would not have acted on its own to mitigate the dilutive effects of continued racially polarized voting at all had DOJ not pressured them to do so. Indeed, the pattern before and after *Hays v. Louisiana,* and most recently in the post-2000 Census redistricting case of *Louisiana House of Representatives et. al. v Ashcroft,* makes clear that efforts to minimize African-American voter strength persists. So even in this case where the federal courts essentially held that DOJ had overreached in its zealous enforcement of the VRA as to the remedy for vote dilution, the underlying facts and record evidence presented are relevant to the assessment of contemporary barriers for minority voters and candidates. Additionally, it bears emphasis that David Duke described the court-ordered redistricting plan that followed, once the plan with a second majority-minority congressional district was invalidated, as "tailor made" for his candidacy.[265]

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

CONCLUSION

Prior to the enactment of the VRA, Louisiana stood out among the Southern states by having one of the most severe, adaptive, and violent histories of discrimination in voting. While African-American voters and candidates have made demonstrable progress since 1965 in Louisiana and elsewhere, the progress is not simply attributable to a change of heart or practice on the part of white elected officials and decision-makers. Rather, it is, in large part, the result of the determination and hard work of African-American communities, their advocates, and the involvement of and oversight by the federal government under the VRA in general, and Section 5 in particular. If Section 5 had not been renewed in 1982, nearly 100 attempts to dilute African-American voting strength would have had the force of law in Louisiana, leading to deprivations of our most fundamental right to tens of thousands of African Americans. The record shows that the need for Section 5 coverage of Louisiana has not declined since the last reauthorization in 1982. In fact, the average number of objections per year actually increased after 1982.

Examination of Louisiana's conduct in connection with line-drawing in Orleans Parish in general, and with respect to its state House of Representative redistricting plans from 1965 through the present, permits one to trace an unbroken pattern of voting discrimination. The record shows that President Johnson's 1965 challenge — to change the attitudes and structures from which voting discrimination arises — has not been fully met. Intransigent officials throughout the state, and at its highest levels of power, are commonplace and have persisted in

[264] *Hays I*, 839 F. Supp. at 1196 n. 21 (documenting how Louisiana's desire to maintain its traditional districts with their "historical, cultural, political, economic, and religious significance" was eventually overcome by DOJ's "insistence" on a second majority-minority district even at the expense of those concerns).
[265] *See* Cleo Fields and A. Leon Higginbotham, Jr., *Why the Anxiety When Blacks Seek Political Power?,* The Times-Picayune, July 23, 1996, at B5.

discriminatory behavior through the decades in order to dilute the African-American vote. The post-1982 renewal experience in Louisiana reveals that some officials cling tenaciously to old strategies of dilution even while they develop new ones, resist transparency, conceal public information, and attempt to shut African-American citizens out of decision-making processes. With the roots of discrimination still so firmly in place in Louisiana, Section 5 is as necessary now as it was in 1965, 1970, 1975, and in 1982 to avoid dramatic, unnecessary and, unfortunately, inevitable retrogression in African-American political opportunity in Louisiana.