

# QUICK AND DIRTY: THE NEW MISREADING OF THE VOTING RIGHTS ACT

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## ABSTRACT

*The role of race in the apportionment of political power is one of the thorniest problems at the heart of American democracy, and reappears with dogged consistency on the docket of the Supreme Court. Most recently, the Court resolved a case from Alabama involving the Voting Rights Act and the appropriate use of race in redistricting. But though the Court correctly decided the narrow issue before it, the litigation posture of the case hid the fact that Alabama is part of a disturbing pattern. Jurisdictions like Alabama have been applying not the Voting Rights Act, but a ham-handed cartoon of the Voting Rights Act—substituting blunt numerical demographic targets for the searching examination of local political conditions that the statute actually demands.*

*This short and timely Article is the first to survey the ways in which multiple jurisdictions in this redistricting cycle have substituted a rough sketch of the Voting Rights Act for the real thing. It argues that while the actual statute is tailored and nuanced, appropriately calibrated for a millennial approach to race relations, the demographic shorthand has at its heart a profound and pernicious racial essentialism. Replacing the real statute with the imagined one has a detrimental policy impact—but perhaps more sinister, it also creates unnecessary constitutional danger for the Voting Rights Act as a whole. Courts must see the cartoon for what it is.*

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## I. INTRODUCTION

The Voting Rights Act is often hailed as the most successful civil rights statute in American history. It helped provide meaningful access to the ballot for tens of millions of minority citizens who had previously been entirely shut out of the process. Through its application to redistricting, it then helped translate those ballots into mean-

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ingful allocations of political power. Last year, fifty-year retrospectives were in full bloom. The fire hoses and church bombings of 1960s Birmingham were inevitably juxtaposed with the successful passage of the Voting Rights Act. With respect to race relations in the United States, these are evocative referents for some of our collective worst and some of our collective best.

At the same time, the sepia images of film and print and collective memory do a serious disservice to the continuing vitality of the statute. Yes, the Voting Rights Act was designed to be a powerful tool to combat the most ham-handed Bull Connor racism. But it was also designed to be, and has become, so much more than that.

In reality, the Voting Rights Act is profoundly millennial in its sophisticated approach to race relations, with rich layers of multifaceted and anti-essentialist nuance. Decades of congressional and judicial tinkering have refined the law,<sup>1</sup> particularly as applied to the drawing of electoral districts and the resulting apportionment of political power. And now, when properly applied, the statute threads a narrow needle: it demands race-conscious remedies for race-based harm, but refuses to indulge racial presumptions along the way. That is, the statute recognizes the reality that people of similar racial or ethnic background sometimes have common political interests and that they sometimes face common political threats based on that background—but it steadfastly refuses to *assume* that they do.

Liability under the Voting Rights Act is rigorously responsive to pragmatic local context, political culture, and electoral cleavages among both minority and majority populations; the presence or absence of vote dilution is relentlessly subject to proof or refutation with real data.<sup>2</sup> Any remedies that the Act may require are similarly grounded in the facts on the ground. Under some local conditions, the Voting Rights Act has a profound impact on electoral decisions; under others, it demands only a little; under still others, it demands nothing at all. And the obligations imposed by the Voting Rights Act may be substantively different from town to town in central Texas, south

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1. Cf. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 404-17 (2012) (arguing that section 2 of the Voting Rights Act is a common law statute, to be interpreted and refined in partnership between Congress and the courts).

2. Sometimes, voting patterns are vigorously polarized by race in areas with troubling signs of past or present discrimination, and the Act asks that districts be drawn to preserve or establish real political opportunity for minority communities. Sometimes, patterns of polarization break down, and minority citizens do not have common objectives—or have common objectives but find success achieving those objectives in the regular tussle of politics, without specifically designed districts. In the latter scenarios, the Act allows those politics to flourish as is.

Texas, and west Texas<sup>3</sup>—or in Florida or Arizona or North Carolina or Wisconsin—because the statutory scheme understands that minority citizens are different, and inhabit different political environments, from town to town. The Voting Rights Act acknowledges attention to race and at the same time defiantly fights racial essentialism. This is the very model of a statutory scheme built for a 21st-century conception of race, ethnicity, and political voice.

And yet, there has emerged a troublesome tendency to understand the Voting Rights Act through the lens of a revisionist retrograde stereotype, treating the Act as if it demanded “safe” “black districts” and “Latino districts” wherever there are substantial minority populations.<sup>4</sup> This approach, particularly notable in the redistricting of this decennial cycle, is as blunt and blunderbuss as the real statute is subtle and tailored. It inheres in the perception that the Act is a blunt mandate to tally and bundle minority voters into districts pegged at talismanic target percentages. That is, it treats the Act as a demographic imperative—a “*racial* entitlement[]”<sup>5</sup>—deaf to local political conditions. It turns the Act from a refined and sophisticated piece of federal legislation into a cartoon.

In several jurisdictions this cycle, entities drawing district lines—often but not always state legislators, and often but not always in regions with the most troublesome history of race relations—have substituted this shorthand version of the Voting Rights Act for the real thing. In some circumstances, the jurisdictions’ reliance on crude demographic targets over-concentrates real minority political power;

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3. Cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 432-35 (2006) (recognizing potential differences in these communities and refusing to construe the Voting Rights Act in a manner permitting Texas to ignore that potential).

4. See, e.g., Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, NAT’L AFF. (2010), [http://www.nationalaffairs.com/doclib/20100317\\_Thernstrom.pdf](http://www.nationalaffairs.com/doclib/20100317_Thernstrom.pdf).

5. Justice Scalia used the phrase at oral argument in *Shelby County v. Holder* to explain the reauthorization of a portion of the Voting Rights Act. See Transcript of Oral Argument at 47, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (statement of Scalia, J.) (emphasis added). But cf. Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151, 165-66 & n.52 (2013), [http://www.yalelawjournal.org/pdf/1173\\_org3camy.pdf](http://www.yalelawjournal.org/pdf/1173_org3camy.pdf) (critiquing the use of the phrase to describe the passage of race-conscious legislation, as opposed to a substantive policy set-aside).

Previously, Justice Scalia had used the phrase to critique substantive government benefits allocated based solely on membership in a racial group. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment). The mistaken conclusion that the Voting Rights Act allocates political districts in similar fashion has a stubbornly robust pedigree. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1282 (2015) (Thomas, J., dissenting) (claiming that the Court’s interpretation of the Voting Rights Act has “created a system that forces States to segregate voters into districts based on the color of their skin”); S. REP. NO. 97-417, at 100-01 (1982) (additional views of Sen. Hatch) (describing section 2 of the Act as creating, in effect, “the right to have established racially homogenous districts to ensure proportional representation through the election of specific numbers of Black, Hispanic, Indian, Aleutian, and Asian-American officeholders”).

in other circumstances, it under-concentrates real minority political power.<sup>6</sup> In still other circumstances, the real political effects are unclear, because the lure of the demographic assumption means that nobody has bothered to examine the real political effects. But in every circumstance, the notion that it is possible to rely on a few census statistics to guarantee compliance with the obligations of the Voting Rights Act betrays the central statutory insight. By assuming that functional political cleavages can be measured purely by percentage of citizen voting-age population, the troublesome approach imposes racial stereotypes on a statute designed to combat them.

The misreading has severe constitutional overtones. Though many of the current Justices have serious misgivings about government attention to race, the Court has also repeatedly acknowledged that we are not yet “post-racial,” and that holistic and nuanced consideration of race may still be an appropriate means to confront real racial injustice.<sup>7</sup> In stark contrast to that vision, the simplistic demographic cartoon of the Voting Rights Act represents a conception of race consciousness that has repeatedly earned the Court’s most emphatic ire.<sup>8</sup>

Legislative action in the most recent redistricting cycle has now squarely presented the suspect misreading of the Voting Rights Act for judicial review. Several states purportedly sought to comply with the Act when they redrew legislative district lines in 2011. Yet their version of compliance appears premised purely on demographic percentages—and thus, on demographic stereotype. In several of these states, the legislative action was challenged in litigation. Redistricting cases like these are often procedural oddities: when brought in federal court, they are normally heard by a specially designated trial

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6. Sometimes these effects appear intentional, and sometimes they represent collateral damage.

7. See, e.g., *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality opinion) (“Still, racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions; and §2 must be interpreted to ensure that continued progress.”); cf. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515, 2521-22, 2525 (2015) (recognizing the persistence of both “vestiges” of residential segregation and current discriminatory practices, and recognizing a role for appropriately nuanced race-conscious decision-making in the housing context); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (recognizing a role for appropriately nuanced race-conscious decision-making in the educational context); Marcia Coyle, *Justice Ginsburg Laments ‘Real Racial Problem’ in U.S.*, NAT’L L.J. (Aug. 22, 2014), <http://www.nationallawjournal.com/id=1202667692557/Justice-Ginsburg-Laments-Real-Racial-Problem-in-US> (recognizing persistence of racial discrimination and government power to take appropriate countermeasures).

8. See *Parents Involved*, 551 U.S. at 726-28 (plurality opinion) (critiquing a school district’s attempt to mirror its district’s demographic composition, purely for demographics’ sake); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-503 (1989) (critiquing a city’s attempt to grant contracts to minority-owned businesses based on blunt numerical targets stemming from demographic assumptions).

panel—and if appealed, they proceed directly to the Supreme Court.<sup>9</sup> Moreover, in contrast to the Court's discretion to hear or (far more frequently) reject petitions for writs of certiorari, the Supreme Court has an obligation to rule on each of these direct appeals.<sup>10</sup> One has already been before the Court.<sup>11</sup> Others are coming.<sup>12</sup> And the litigation posture of the cases does not render obvious the shared misreading of the Act that connects them.

The cases' journey to the Court is both a threat and an opportunity. Two years ago, when the Court confronted reality and cartoon with respect to the Voting Rights Act, it chose cartoon. In 2013, in *Shelby County v. Holder*,<sup>13</sup> the Court purported to address a portion of the Act placing particular jurisdictions under a special preclearance regime requiring federal review of electoral changes.<sup>14</sup> Ostensibly, the Court reviewed Congress's judgment about which jurisdictions should be subject to the special preclearance procedure, and which should not. But in reality, the Court ruled on the validity of a simulacrum of the statutory provision, a popular image of the law rather than the actual law on the books.<sup>15</sup>

The new cases involve more of the substantive content of the Act, and a blunt approach to compliance with more pervasive consequences. If the Court again buys the ham-handed stereotype, the Act as a whole might be in jeopardy.

Early indications are refreshingly promising. Last Term, the Court's decision in *Alabama Legislative Black Caucus v. Alabama* seemed to cast cartoon aside.<sup>16</sup> The case involved a portion of the Voting Rights Act prohibiting practices in certain areas that decrease racial and language minorities' ability to elect their preferred candidates of choice.<sup>17</sup> Alabama defended its district lines by claiming that the maintenance of specific existing demographic percentages was

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9. The procedure calls for a three-judge trial court, composed of two federal trial judges and one federal appellate judge; decisions are then appealed directly to the Supreme Court, without an intermediate appeal or a petition for certiorari. 28 U.S.C. §§ 1253, 2284 (2012).

10. Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 433 (2011).

11. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

12. See, e.g., Jurisdictional Statement at 1, *Wittman v. Personhuballah*, No. 14-1504 (U.S. June 22, 2015), 2015 WL 3862735; *Wittman v. Personhuballah*, 136 S. Ct. 499 (2015) (mem.) (setting the case for hearing and postponing consideration of jurisdiction).

13. 133 S. Ct. 2612 (2013).

14. See *infra* text accompanying notes 27-37.

15. See Levitt, *supra* note 5, at 152, 155-60; Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>.

16. 135 S. Ct. 1257 (2015).

17. *Id.* at 1262-63.

necessary to satisfy the Act.<sup>18</sup> The Court, reflecting the Act's nuanced distinction between demographic aggregation and political efficacy, disagreed.<sup>19</sup> Justice Kennedy, the lone Justice in the majority of both 2013 and 2015 cases, appears to have refocused on reality.

Yet the path forward is not yet secure. The case above concerned a portion of the Voting Rights Act that is no longer in place.<sup>20</sup> That is, the 2015 Alabama case involved the means by which 2011 Alabama legislators complied with a statutory provision invalidated in 2013 by a different case out of Alabama. Plaintiffs chose to litigate their case as confined to one now-defunct statutory provision in one state, and it may be similarly tempting for the Court to cabin its ruling in the cases to come. It is not clear whether the Court believed it was confronting an anomaly of primarily historical significance. On the other hand, the Court may recognize that the approach of the Alabama legislators is connected to an ongoing approach in several other states, and connected specifically by the common reliance on a Voting Rights Act that does not exist. If the Court focuses on the actual legislation at hand, it should be able to distinguish the real statute's approach from that of its fictionalized retrograde cousin. Proper focus on local nuance and meaningful political power—as precedent demands—can restore the Voting Rights Act to a vehicle for fighting *both* racial discrimination and racial essentialism.

This Article proceeds in three sections. Part II explains the Voting Rights Act and its constitutional context: the way that the real statute is designed to function. Part III then investigates the strange prominence in recent redistricting of a cartoon version of the Act that ignores the tailored nuance built into the statute. Part IV explains why the simulacrum is not merely wrong, but also dangerous: it may yield guidance for decision-makers that is more administrable, but it does so only at the cost of constitutionally impermissible essentialist assumptions. These shortcuts are both unlawful and unnecessary.

## II. THE CONSTITUTION AND THE VOTING RIGHTS ACT

The Supreme Court has interpreted the Constitution's Fourteenth Amendment to prevent government from treating people differently primarily based on their race without an especially good reason.<sup>21</sup> In

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18. *Id.* at 1267, 1271; see also Brief for Appellees at 7, *Ala. Legislative Black Caucus*, 135 S. Ct. 1257 (Nos. 13-895, 13-1138), 2014 WL 5202058, at \*7 (“As a strategy to comply with Section 5, the drafters [of the 2011 district plan] decided to avoid reducing the black population of preexisting majority-black districts where possible.”).

19. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1272-74.

20. See *infra* Part II, for a more complete description of the different portions of the Voting Rights Act, including section 5 of the Act, which was at issue in both *Alabama Legislative Black Caucus* and *Shelby County*.

21. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

1993, the Court made clear that this approach applied to certain forms of redistricting as well.<sup>22</sup> More specifically, when race is the predominant and overriding reason for drawing either a plan as a whole or a particular district within that plan, that use of race must be narrowly tailored to a compelling government interest.<sup>23</sup> The final caveat is important, but too often forgotten: a predominant focus on race in the drawing of districts is constitutionally suspect, not constitutionally invalid. The difference between the two depends on a state's good reason and nuanced execution: on ensuring that, as with other suspect classifications, a state is proceeding based on real need and not overbroad generalization or stereotype.<sup>24</sup>

In that precise space sits the Voting Rights Act.<sup>25</sup> The Voting Rights Act of 1965, long lauded as perhaps the most successful example of American civil rights legislation, is the signature product of Congress's enumerated power to enforce the Fourteenth and Fifteenth Amendments.<sup>26</sup> Though the Court has never directly held that compliance with the VRA is a sufficient reason for a state to take direct action on the basis of race, a parade of Justices have opined or presumed that it suffices.<sup>27</sup>

The privileged position of the Voting Rights Act is sensible. In two different provisions with substantial impact on redistricting, the VRA seeks to remedy past intentional discrimination and prevent present subordination where the risks of new or continued intentional discrimination are greatest.

### A. Section 5

The higher-profile provision is based on section 5 of the Act. It established a regime of preclearance, under which jurisdictions of particular concern may not enforce any election-related change unless permitted to do so either by a federal court or by the U.S.

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22. *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

23. *Miller v. Johnson*, 515 U.S. 900, 916, 920 (1995).

24. *Cf. United States v. Virginia*, 518 U.S. 515, 549-50 (1996) (recounting some of the stereotypes at the heart of Virginia's imposition of single-sex education at the Virginia Military Institute).

25. For a more thorough explanation of the Voting Rights Act's substantive provisions and its interaction with the Constitution, see Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1047-69 (2013); Levitt, *supra* note 5, at 170-73.

26. U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

27. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 n.12 (2006) (Stevens, J., concurring in part and dissenting in part, joined by Breyer, J.); *id.* at 518-19 (Scalia, J., concurring in part and dissenting in part, joined by Thomas, J., Alito, J., and Roberts, C.J.); *Bush v. Vera*, 517 U.S. 952, 990, 994 (1996) (O'Connor, J., concurring); *Shaw*, 509 U.S. at 653-54; *King v. State Bd. of Elections*, 979 F. Supp. 619, 621-22 (N.D. Ill. 1997), *aff'd*, *King v. Ill. Bd. of Elections*, 522 U.S. 1087 (1998).

Department of Justice.<sup>28</sup> In the 2011 cycle of redistricting, this regime primarily applied to those jurisdictions where racial discrimination caused radically low democratic participation in the 1960s and 1970s and which had failed in the intervening years to demonstrate a record of minority engagement sufficiently improved to “bail out” of coverage.<sup>29</sup> Preclearance also governed jurisdictions that had been “bailed in” to coverage by a federal court, after a specific finding of intentional discrimination.<sup>30</sup> That is, the hallmark of the preclearance regime is that it applied only to jurisdictions with an insufficiently attenuated connection to intentional discrimination.

The primary means by which jurisdictions were covered was a statutory provision with a sunset provision.<sup>31</sup> Congress renewed coverage most recently in 2006,<sup>32</sup> but in 2013, the Supreme Court

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28. Technically, a jurisdiction subject to a preclearance requirement may seek a declaratory judgment from the federal court or may seek administrative preclearance from the Department of Justice. For jurisdictions choosing the administrative path, a decision is considered to be precleared if the Department of Justice fails to object within sixty days from the date of a complete submission. 52 U.S.C. § 10304(a) (Supp. II 2014). Any jurisdiction may seek a judicial declaratory judgment, whether the Department of Justice has objected or not. *Id.*

29. *Id.* § 10303.

30. *Id.* § 10302(c). Relatively few jurisdictions had ever been “bailed in” under this provision, in part because of the comparatively expansive primary coverage of the preclearance regime. During the last redistricting cycle, only the Village of Port Chester, New York; Charles Mix County, South Dakota; and Buffalo County, South Dakota were subject to preclearance requirements through bail-in. See Consent Decree, *United States v. Vill. of Port Chester*, No. 1:06-CV-15173 (S.D.N.Y. Dec. 22, 2009); Consent Decree, *Blackmoon v. Charles Mix Cty.*, No. 4:05-CV-04017 (D.S.D. Dec. 4, 2007); Consent Decree, *Kirkie v. Buffalo Cty.*, No. 3:03-CV-03011, 2004 U.S. Dist. LEXIS 30960 (D.S.D. Feb. 10, 2004). Since then, courts have been asked to issue bail-in orders against several other jurisdictions, including Hawaii, North Carolina, and Texas; most such cases are still pending. See Complaint at 32, *Akina v. Hawaii*, No. 1:15-CV-00322 (D. Hawaii Aug. 13, 2015), <https://www.judicialwatch.org/wp-content/uploads/2015/08/08-13-15-Akina-v-Hawaii-race-based-voter-rolls-00322.pdf> (Hawaii); Fourth Amended Complaint of Plaintiffs Texas Latino Redistricting Task Force, et al., at 20, *Perez v. Perry*, No. 5:11-CV-00360 (W.D. Tex. Sept. 9, 2013), <http://redistricting.lls.edu/files/TX/20130909%20TXLRTF%20complaint.pdf> (Texas); Complaint at 31, N.C. State Conference of the NAACP v. McCrory, No. 1:13-CV-00658 (M.D.N.C. Aug. 12, 2013), 2013 WL 4053231 (North Carolina); Complaint at 49, Ga. State Conference of the NAACP v. Hancock Cty. Bd. of Elections & Registration, No. 5:15-CV-00414 (M.D. Ga. Nov. 3, 2015), <https://lawyerscommittee.org/wp-content/uploads/2016/01/Hancock-Co-Complaint.pdf> (Hancock County, Ga.); Complaint at 11, *Patino v. Pasadena*, No. 4:14-CV-03241 (S.D. Tex. Nov. 12, 2014) (*Pasadena v. Tex.*); Complaint at 22-23, *Terrebonne Parish NAACP v. Jindal*, No. 3:14-CV-00069 (M.D. La. Feb. 3, 2014), <http://redistricting.lls.edu/files/20140203%20Terrebonne%20Parish%20Complaint.PDF> (Terrebonne Parish, La.); Complaint at 17, *Petteway v. Galveston Cty.*, No. 3:13-CV-00308 (S.D. Tex. Aug. 26, 2013), <http://redistricting.lls.edu/files/20130826%20petteway%20v%20galveston%20cnty%20complaint.pdf> (Galveston County, Tex.).

31. 52 U.S.C. § 10303(a)(8) (Supp. II 2014).

32. Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006), *amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008).



struck down the 2006 coverage renewal, finding it to be insufficiently attuned to current conditions.<sup>33</sup> Yet even without congressional action establishing a new coverage formula, the nature of the preclearance standard remains of continuing interest and relevance for three reasons. First, districts that were drawn in 2011 pursuant to preclearance are only lawful, today, if they did not unduly depend on race—and that assessment is predicated on a proper interpretation of what the Voting Rights Act then required. Second, the potential for judicial bail-in—with several cases pending, for states and for municipalities<sup>34</sup>—means that future districts may well be held to the standard of the preclearance regime once again. And third, the nuanced and non-essentialist nature of the substantive criteria for preclearance reflects the nuanced and non-essentialist nature of the Voting Rights Act as a whole.

Preclearance rests on two substantive standards.<sup>35</sup> First, jurisdictions have to prove that an electoral change was not motivated by the intent to discriminate.<sup>36</sup> Second, jurisdictions have to prove that an electoral change would not have the effect of denying or abridging the right to vote on account of race or language minority status.<sup>37</sup> This latter effects-based standard has been interpreted by the Supreme Court to mean that a proposed election-related change may not be precleared if it leaves a community of minority voters worse off with respect to their “effective exercise of the electoral franchise” than they had been under the prior policy.<sup>38</sup> The standard is known as “retrogression.”<sup>39</sup>

At the start of the 2011 redistricting cycle, there were several ambiguities in the retrogression standard. They persisted in part because redistricting is generally decennial, judicial preclearance is a rarity, and the combination gives courts few opportunities to

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33. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2630-31 (2013).

34. *See supra* note 30.

35. The current standards are also those that governed the 2011 redistricting cycle.

36. 52 U.S.C. § 10304(a), (c) (Supp. II 2014).

37. *Id.* § 10304(a).

38. *Beer v. United States*, 425 U.S. 130, 141 (1976). In truth, it is a misnomer to refer to this prong of the retrogression inquiry as a standard that is purely effects-based. The preclearance requirement is only imposed in jurisdictions with a lingering, un rebutted connection to intentional discrimination. So the “effects” prong of section 5 is really an inquiry into the effect of an electoral change only in the context of a history of intentional discrimination that continues to impact the present.

39. *Id.*

construe the governing statute.<sup>40</sup> For purposes of this Article, two ambiguities are most significant. Both relate to a statutory “clarification” made by Congress in 2006.

Three years earlier, in a case known as *Georgia v. Ashcroft*,<sup>41</sup> the Supreme Court had construed section 5 in a way permitting covered jurisdictions to trade minority voters’ control of a few districts for minority influence over, but not control of, a larger area.<sup>42</sup> Congress responded by amending the statute to specify that any change diminishing—on account of race or language minority status—the ability of a community to elect their preferred candidates of choice would amount to an unlawful abridgement.<sup>43</sup> The amendment made it clear that a covered jurisdiction could not take a district in which a minority community had the demonstrated ability to elect their preferred candidates of choice and reconfigure the district in such a way as to remove that ability. Under the 2006 amendment, a minority community in a polarized region with the ability to elect candidates of choice in three districts would be the victim of retrogression if redistricting left that community with the ability to elect candidates in only two districts thereafter.

That statutory clarification left (at least) two ambiguities.<sup>44</sup> First, the statute does not expressly state whether a diminution in the ability to elect is to be measured *within* a particular district, as well as in the total number of districts yielding reliable minority electoral power. If a minority community in a covered jurisdiction has the reliable ability to elect candidates of choice within a given district by overwhelming margins, might the statute bar any plan reducing the likely margin of victory in that district, even if the plan leaves the minority community still reliably in control of the election outcome?

On its face, the statute does not appear to provide a clear answer. But understanding the text as a reaction to *Georgia v. Ashcroft* provides a clue. In that case, the Court discussed two different ways of preserving a minority community’s ability to *elect* candidates of choice. One involves a “certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice,” and one involves “a greater number of districts in

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40. See Levitt, *supra* note 25, at 1063. Indeed, thirty-eight years after the enactment of a provision prohibiting diminishment of the effective exercise of the electoral franchise, the Court explained that “we have never determined the meaning of ‘effective exercise of the electoral franchise.’” *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).

41. 539 U.S. at 461.

42. *Id.* at 481-84.

43. 52 U.S.C. § 10304(b) (Supp. II 2014).

44. For a thorough treatment of the many ambiguities in the retrogression standard, see Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 216-51 (2007).

which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.”<sup>45</sup> The Court distinguished both of those options from two other indicia of electoral success: drawing influence districts, “where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process,”<sup>46</sup> and maintaining leadership positions within the legislature for representatives of districts with large minority communities, without an opportunity for the minority voters to exercise meaningful electoral control.<sup>47</sup> The Court characterized these influence districts and positions of legislative leadership as alternative means of assessing electoral power, factors “*in addition to* the comparative ability of a minority group to elect a candidate of its choice.”<sup>48</sup>

By focusing its 2006 statutory amendment on a community’s ability to elect, Congress manifested its intent to prevent these third and fourth options from supplanting the first two: drawing influence districts or maintaining leadership positions for particular representatives is not a permissible *substitute* for districts in which the minority community could reliably elect candidates of choice.<sup>49</sup> But because either of the Court’s first two options preserve the community’s ability to elect candidates of choice, it appears that either would satisfy the retrogression inquiry Congress established—and that jurisdictions might plausibly choose between them without retrogressing. As long as a minority community with a reliable ability to elect candidates of choice in a district retains that reliable ability, the better reading of the statute is that there is no retrogression, even if the community’s precise electoral strength within the district varies.<sup>50</sup> In guidance published for the 2011 redistricting cycle, the Department of Justice agreed.<sup>51</sup> And in 2015, the Supreme Court concurred.<sup>52</sup>

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45. *Ashcroft*, 539 U.S. at 480. The Court made clear that “[s]ection 5 does not dictate that a State must pick one of these methods of redistricting over another.” *Id.*

46. *Id.* at 482.

47. *Id.* at 483-84.

48. *Id.* at 482 (emphasis added).

49. See Persily, *supra* note 44, at 236.

50. This result, further, is in keeping with the Act’s contextual approach to electoral power. The alternative conceives of retrogression as requiring the maintenance of a specific margin of victory within a given district. Such a standard could lead perversely both to reduced minority electoral power and reduced opportunities to break down historical polarization patterns, as overpacked “safe” districts locked in by the statute leach minority voters from surrounding areas.

51. See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (“In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect

A second ambiguity has not been clarified either by the Department of Justice or the Court. The statute is written in one direction: as noted above, in direct response to *Georgia v. Ashcroft*, it specifies that diminishing a minority community's ability to elect candidates of choice in a covered jurisdiction is to be considered unlawful retrogression.<sup>53</sup> The statute does not state, however, that this is the *only* conduct that may constitute retrogression. It may well be that a diminution in the effective exercise of the franchise even without an impairment of a pre-existing ability to elect is also retrogressive.<sup>54</sup>

Even with unresolved issues like those above, what is not ambiguous is the relentlessly pragmatic approach of a proper retrogression inquiry. The 2006 amendments to the Voting Rights Act did not overturn the Supreme Court's understanding that assessing the effective exercise of the electoral franchise—and those policies that could diminish it—is an exercise focused on real political power and not merely simplistic math. That is true whether the inquiry depends on an ability to elect candidates of choice, or the effective exercise of the franchise absent that ability. Retrogression is highly dependent on local circumstances and context, including comparative levels of voter registration, turnout, and polarization.<sup>55</sup> “‘No single statistic provides courts with a shortcut to determine whether’ a voting change retrogresses from the benchmark.”<sup>56</sup> The tally of voting-age citizens within a district by race or language minority status does not alone reveal whether the community has suffered a meaningful diminution in the effective exercise of the franchise.<sup>57</sup>

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their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.”).

52. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1273 (2015).

53. 52 U.S.C. § 10304(b) (Supp. II 2014).

54. See Levitt, *supra* note 25, at 1062; cf. Persily, *supra* note 44, at 243-45 (discussing this possibility, but imagining it as a diminution in a partial “ability to elect,” or a relative “ability to elect” that does not amount to the realistic ability to elect a candidate in a district). The Department of Justice’s position on this ambiguity is itself ambiguous. The Department has said that, given a pre-existing ability to elect, it “will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.” See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7471. This affirmation does not indicate whether the Department believes that there may be a statutorily cognizable diminution in the effective exercise of the franchise even when a district had not previously allowed racial or language minorities the ability to elect candidates of choice.

55. See Persily, *supra* note 44, at 242.

56. *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994)); cf. *infra* text accompanying note 79.

57. Cf. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 626-27 (Fla. 2012) (construing the Florida state constitution’s retrogression provision and concluding that “[b]ecause a minority group’s ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number

The courts' focus on the pragmatic impact of a change on the ground in assessing retrogression is entirely consistent with the long-time approach of the Department of Justice.<sup>58</sup> DOJ Guidance on retrogression in the redistricting context had consistently emphasized the nuanced, contextual assessment of changes to the functional exercise of the franchise:

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact . . . the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.<sup>59</sup>

A federal court noted that this guidance, promulgated in 2011, is in this respect "consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades."<sup>60</sup>

This is all in keeping with the preclearance regime's careful avoidance of racial essentialism and stereotype. In establishing the jurisdictions to be covered by the preclearance requirement, the statute provided a mechanism for bailout and bail-in, so that jurisdictions that no longer warranted especially close review could be dropped from the regime and those where a closer look was justified could be added.<sup>61</sup> And in establishing the conditions for retrogression—the conditions warranting a substantive objection if there is no indication that a given change was enacted with impermissible intent—the statute demands review of whether and how minority communities actually effectuate electoral power, locality by locality. Relying on census data to determine retrogression would require as-

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under Florida's minority protection provision. To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment.").

58. The vast majority of changes in covered jurisdictions were reviewed by the DOJ and not the courts, and so for the life of the Voting Rights Act, the DOJ had been primarily responsible for evaluating retrogression.

59. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7471; *see also id.* at 7471-72 (reviewing additional factors).

The DOJ guidance, itself based upon a judicial demand for nuance and context, has in turn been cited approvingly by the courts. *See, e.g., Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015).

60. *Texas v. United States*, 831 F. Supp. 2d 244, 265 (D.D.C. 2011), *vacated on other grounds by* 133 S. Ct. 2885 (2013) (mem.); *see also id.* at 265 n.26.

61. 52 U.S.C. §§ 10302(c), 10303(a) (Supp. II 2014).

sumptions about the voting patterns of racial or ethnic groups based on nothing other than those voters' race or ethnicity. The courts and the administrative agency tasked with preventing retrogression make no such assumptions, and do not indulge them when made by jurisdictions drawing the lines.

### B. Section 2

The other provision of the Voting Rights Act with primary impact on redistricting is commonly known as "section 2," and it shares the same nuanced, functional approach and aversion to essentialism. Section 2 applies nationwide, preventing the inequitable dilution of minority communities' voting power where alternative districts might otherwise allow minorities to maintain an effective opportunity to elect candidates of choice.<sup>62</sup> That is, where section 5 measures dilution by looking to changes from past practice, section 2 measures dilution against hypothetical alternatives.

Section 2 establishes a threshold to test where district lines might be responsible for depriving a minority community of the equal opportunity for electoral success. To invoke the statute, minority communities must be sufficiently large and sufficiently cohesive to provide a meaningful opportunity to elect candidates, and the remainder of the surrounding electorate must be sufficiently polarized to consistently defeat minority voters in the area.<sup>63</sup> The first component tests whether minorities would have meaningful opportunity if the lines were appropriately drawn;<sup>64</sup> the second tests whether minorities would be deprived of that opportunity if the lines were drawn without solicitude.<sup>65</sup>

Still, not every lost opportunity amounts to a violation of section 2: the statute further instructs that dilution is to be tested in "the totality of circumstances."<sup>66</sup> Courts have consistently analyzed this totality through the lens of the "Senate factors": factors listed in the Senate Judiciary report accompanying the amendment of the Voting Rights Act in 1982.<sup>67</sup> These Senate factors include elements like a history of official discrimination in voting or in other areas that affect the voting process, or troublesome signs of current discriminatory

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62. 52 U.S.C. § 10301(b).

63. Collectively, these threshold elements are known as "*Gingles* conditions," after the case establishing them. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

64. *Id.* at 50.

65. *See id.* at 51.

66. 52 U.S.C. § 10301(b).

67. S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205-06; accord *Gingles*, 478 U.S. at 44-45.

attitudes.<sup>68</sup> In general, they amount to “danger signs” of enhanced risk that either intentional discrimination on the basis of race or language minority status, or the legacy of such discrimination, is interacting with the placement of districts to fuel the deprivation of minority opportunity.<sup>69</sup>

This test for liability is designed to render equitable opportunity for minority communities without indulging in essentialism. A racial or ethnic minority’s electoral (and geographic or sociocultural)<sup>70</sup> cohe-

68. *Gingles*, 478 U.S. at 44-45. In addition to the Senate factors, courts will also consider in the totality of circumstances the degree to which minority communities have achieved rough proportionality of control jurisdiction-wide. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006); *Johnson v. De Grandy*, 512 U.S. 997, 1013-15 (1994); *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.). While lack of proportionality is not generally a reason to find liability, proportionality may be a reason to deny it: courts have been reluctant to find that minority voters are denied equal electoral opportunity when those voters reliably control districts “in substantial proportion to the minority’s share of voting-age population.” *De Grandy*, 512 U.S. at 1013.

69. Section 2, as we know it, is also the product of a disagreement between Congress and the Supreme Court. In 1980, the Court construed then-existing text of section 2 to precisely mirror constitutional prohibitions on racial discrimination, preventing the drawing of district lines only upon sufficient proof of discriminatory intent. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality opinion). This set a rather high evidentiary bar, and when Congress amended the Voting Rights Act in 1982, it clearly intended to afford relief from dilutive practices without requiring plaintiffs to offer the same degree of proof present in a constitutional claim of discriminatory intent. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982) (changing “No . . . procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color” to “No . . . procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color,*” and defining the violation in terms of the totality of circumstances) (emphasis added); see also S. REP. NO. 97-417, at 27 (“The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation.”).

As a consequence, section 2 as amended has often been referred to as an “effects test” or a “results test.” See *Gingles*, 478 U.S. at 35. Like the identification of section 5 retrogression as an “effects test,” see *supra* note 38, the section 2 shorthand is an unfortunate misnomer, see *United States v. Blaine Cty.*, 363 F.3d 897, 909 (9th Cir. 2004), because it may imply that section 2 prohibits practices with merely a disparate impact on minority voters. Section 2 has not been construed in such a manner. See *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Instead, and based largely on the demand for an examination of the totality of the circumstances in order to find dilution, courts have generally insisted on some sort of tie to intentional discrimination, past or present, or the enhanced risk of such discrimination. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2163-68 (2015) (reviewing courts’ varying interpretations of the totality of circumstances and concluding that though courts may differ in the particulars, all seem to require some sort of tie to intentional discrimination).

70. See *League of United Latin Am. Citizens*, 548 U.S. at 435 (“We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact.”).

sion must be proven, not assumed.<sup>71</sup> A racial or ethnic majority's cohesion must be proven, not assumed.<sup>72</sup> The consistent tendency of the majority to defeat candidates preferred by the minority in the absence of appropriate race-conscious relief must be proven, not assumed.<sup>73</sup> The presence of enhanced risk that intentional discrimination has played a role in rendering opportunity unequal must be proven, not assumed.<sup>74</sup> All of these factors must be proven in the context of local politics, without importing assumptions from national trends.<sup>75</sup> Demographics alone—numerical tallies of voting-age citizens of a particular race or ethnicity—are insufficient to establish any one of these elements, much less the conditions for overall liability. As with section 5, section 2 resists back-of-the-envelope demographic simplification.<sup>76</sup> The establishment of a violation depends

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71. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (emphasizing that a jurisdiction may not “assume[] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls’ . . . .” (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993))).

72. See *id.*

73. See, e.g., Kareem U. Crayton, *Sword, Shield, and Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement*, 64 RUTGERS L. REV. 973, 989 (2012) (noting that the threshold *Gingles* conditions “call for evidence that race largely drives election choices and outcomes in the challenged jurisdiction”) (emphasis added); see also *Gingles*, 478 U.S. at 50-51 (listing the *Gingles* conditions).

74. See *Gingles*, 478 U.S. at 79.

75. See *Grove v. Emison*, 507 U.S. 25, 41-42 (1993).

76. The final clause of section 2—which I call the “proportionality proviso”—represents yet another way in which the statute stands against racial essentialism. The final sentence states that in establishing vote dilution based on the totality of the circumstances,

[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301(b) (Supp. II 2014).

This clause is apparently much misunderstood. Some Justices have apparently believed it to mean that section 2 of the Voting Rights Act does not establish a right of minority citizens to proportional representation of their interests. See, e.g., *Holder v. Hall*, 512 U.S. 874, 927 (1994) (Thomas, J., concurring in the judgment); *id.* at 956 (Ginsburg, J., dissenting); *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). But,

[b]y its terms, this language addresses the number of minorities elected to office, not the number of districts in which minorities constitute a voting majority. These two things are not synonymous, and it would be an affront to our constitutional traditions to treat them as such. The assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter.

*Johnson v. De Grandy*, 512 U.S. 997, 1027 (Kennedy, J., concurring in part and concurring in the judgment).

That is, the actual text of the proportionality proviso is less a strike against proportionality than a strike against essentialism. Congress did not wish to indulge the



“upon a searching practical evaluation of the ‘past and present reality,’ ”<sup>77</sup> connected to “ ‘an intensely local appraisal of the design and impact’ of the contested electoral mechanisms.”<sup>78</sup> “No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.”<sup>79</sup>

Indeed, demographic shortcuts are authorized in only one aspect of section 2: the requirement, as a condition of proving dilution under an unfavorable districting scheme, that plaintiffs show that cohesive minorities form a sufficiently large portion of a district-sized population to exercise control if the lines were favorably drawn.<sup>80</sup> For years, groups of minority citizens had argued that they had functional political control of a district-sized population even without comprising at least 50% of that population, and the Court had repeatedly assumed without deciding that such control might suffice in meeting the threshold condition.<sup>81</sup> In 2009, the Court confronted the issue directly, and a plurality determined in *Bartlett v. Strickland* that section 2 is unavailable to a minority community comprising less than 50% of a district-sized electorate.<sup>82</sup>

The decision was premised in part on one theoretical approach to dilution. The plurality reasoned that dilution of a minority community’s opportunity to elect candidates on account of race or language minority status had to be assessed based on the potential power of the minority community alone.<sup>83</sup> It was premised in part on a desire to improve the judicial administration of cases,<sup>84</sup> and in part on a perceived need to limit the potential circumstances in which jurisdictions devoted primary attention to considerations of race.<sup>85</sup>

It is crucial to recognize, however, that *Bartlett*’s 50.1% threshold affects only the predicate conditions for plaintiffs seeking section 2

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unwarranted assumption that an equal opportunity for cohesive groups of minority citizens would yield a proportional number of minority legislators, or that the lack of the former could be proven by the lack of the latter, when minority voters might well prefer candidates of different races.

77. *Gingles*, 478 U.S. at 79 (quoting S. REP. NO. 97-417, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 208).

78. *Id.* (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)).

79. *De Grandy*, 512 U.S. at 1020-21.

80. This is generally known as a piece of the first “*Gingles* condition.” See *Gingles*, 478 U.S. at 50-51.

81. See cases cited in *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009) (plurality opinion).

82. *Id.* at 18-19.

83. *Id.* at 15.

84. *Id.* at 17-18.

85. *Id.* at 21-22 (noting that a contrary interpretation “would result in a substantial increase in the number of mandatory districts drawn with race as the ‘predominant factor motivating the legislature’s decision.’ ” (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995))).

relief and attempting to establish *liability*. The Court did not determine that the same demographic shorthand was appropriate for constructing a remedy once vote dilution is established, or for a state to use as an automatic rule in drawing districts to preempt section 2 concerns.

A remedial rule pegging districts drawn to satisfy section 2 at a 50.1% minority electorate may seem a mirror image of *Bartlett*—but it is actually *not* an equivalent. That is because the strict demographic threshold in *Bartlett* adopts a preference for administrability, but only when doing so entails no essentialism by the state. Put differently, a rule requiring 50.1% for liability purposes does not depend on assuming that minority or majority community members all have the same political interests. From the government jurisdiction's perspective, the 50.1% demographic threshold merely alerts decision-makers that they should inquire further into the need to consider race: it signals a potential issue. And from the perspective of minority communities, the 50.1% threshold cuts off some otherwise valid claims that minority communities have been deprived of control. A 50.1% threshold, as one component of an initial screen for viable cases, serves a signaling and gatekeeping function. But after *Bartlett*, liability under the Voting Rights Act still depends on the local electoral nuances of minority engagement, just as it did before.<sup>86</sup> There remains no tolerance for essentialist assumptions in establishing a valid claim.

The same cannot be said for a presumptive 50.1% majority-minority remedy (or worse, drawing districts at 50.1% to preempt section 2 concerns, without any attention to whether liability is plausible). Section 2 liability depends on evidence that a minority community has been inequitably deprived of an effective opportunity to elect candidates of choice. Consequently, a remedy must ensure that the electoral laws give that minority community a meaningfully effective opportunity to elect its preferred representatives. Creating such an opportunity, by drawing districts or otherwise, may involve state action based primarily on race, which demands contextualized nuance and precision: real facts about real political patterns. The Court has recognized this need, acknowledging that "it may be possible for a citizen voting-age majority to lack real electoral opportunity."<sup>87</sup> Conversely, it may be possible for a demographic minority in a jurisdiction with modest crossover voting to *have* real electoral opportunity. Assuming that a 50% minority district provides an effective remedy—or, from a preemptive point of view, assuming that a 50% minority district is necessary to do the job—involves state action engaging essentialist assumptions about how minority and majority

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86. See *id.* at 39-40 (Souter, J., dissenting).

87. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006).

electors will vote based on race or language minority status alone.<sup>88</sup> The Voting Rights Act is designed to avoid, not impose, such shorthand.

### III. DEMOGRAPHIC DETERMINISM AND RACIAL ESSENTIALISM IN THIS REDISTRICTING CYCLE

The analysis above reveals that the Voting Rights Act sets a performance standard, not a design standard.<sup>89</sup> Under certain conditions (and only under those conditions), it demands districts that actually function to grant or protect political power, and not merely districts that evidence a rigid set of features ticked off of a checklist. This focus on actual function is what makes the statute not only constitutionally viable but appropriately malleable for different contexts in different spaces and times.

In this redistricting cycle, several jurisdictions seem to have cast aside the Voting Rights Act's careful tailoring to local political conditions and aversion to racial essentialism. Instead, these jurisdictions seem to have relied on ham-handed demographic targets—a belief, real or professed, that the Voting Rights Act simply requires hitting a predetermined percentage of minorities in a predetermined number of districts. These jurisdictions deliberately sought to maintain supermajority quotas of minority voting-age or citizen voting-age population ostensibly to avoid retrogression, or to peg districts at a 50% minority-voter threshold ostensibly to satisfy section 2, without the searching local electoral analysis required to determine if those targets were statutorily necessary or sufficient. According to this cartoon version of compliance, all a redistricting entity needed to know was that District A had to be 72% black in 2011 because it was 72% black in 2010 or 2001, or that District B needed to be 50% Latino because a lot of Latinos lived in the area.<sup>90</sup> That shorthand gloss on the Voting Rights Act's obligations may represent a view pervasive in the social circles of legislators and their consultants, but it does not do justice to the design of the statute on the books.

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88. Indeed, a district pegged at 50% based on demographics alone assumes either that the minority and majority electorates are perfectly cohesive—that, for example, black or Latino citizens universally vote for one type of candidate, whites for another—or that they are not cohesive to exactly the same degree. Real analysis of electoral patterns may confirm or refute these suppositions: the point is only that the suppositions cannot stand on their own.

89. See generally, e.g., Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 709 (2003) (clarifying the difference).

90. See, e.g., *Holder v. Hall*, 512 U.S. 874, 903-06 (1994) (Thomas, J., concurring in the judgment) (articulating the approach of the simulacrum).

### A. Alabama

In Alabama, the state's wooden reliance on demographics when purportedly attempting to satisfy its obligations under the Voting Rights Act was most visible in the context of preclearance and section 5. As the federal court that reviewed the state's most recent redistricting noted, those drawing the lines did so with the design to ensure, as a preclearance strategy, that "the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census."<sup>91</sup> That is, when redrawing the lines, the state attempted to "maintain roughly the same black population percentage in existing majority-minority districts."<sup>92</sup> Simple percentages—which the Supreme Court framed as "mechanical racial targets"<sup>93</sup> and which the trial court's dissenting judge characterized as a "district-specific racial quota"<sup>94</sup>—were repeatedly equated with the population's ability to elect.<sup>95</sup>

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91. *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1247 (M.D. Ala. 2013) (three-judge court); *see also id.* at 1276 ("[T]he Committee tried to match the percentages of the total black population in majority-black districts to the percentages in the 2001 districts based on the 2010 Census numbers."); *id.* at 1297 ("To avoid a potential violation of section 5 of the Voting Rights Act, [the map-drawing consultant] also added enough contiguous black populations to maintain the same relative percentages of black populations in the majority-black districts."); *id.* at 1310 ("The Legislature preserved, where feasible, the existing majority-black districts and maintained the relative percentages of black voters in those majority-black districts. . . . Using the 2010 Census data, the percentages of the black voting-age populations in the majority-black districts under the Acts remain relatively constant when compared to the 2001 plans.").

92. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015); *see also id.* at 1271.

93. *Id.* at 1267.

94. *Ala. Legislative Black Caucus*, 989 F. Supp. 2d at 1314 (Thompson, J., dissenting).

95. The trial court's dissent quotes the deposition of one of the co-chairs of the Redistricting Committee, focusing rigidly on total population as the (sole) measure of retrogression within a district:

Q. So you did not want the total population of African-Americans to drop in [SD 23]?

A. That's correct.

Q. Okay. And if that population dropped a percentage, in your opinion that would have been retrogression?

A. Yes, sir.

Q. So if—And I'm not saying these are the numbers, but I'm just saying if Senator Sanders' district had been 65 percent African-American, if it dropped to 62 percent African-American in total population, then that would have been retrogression to you?

A. In my opinion, yes.

Q. And so that's what you were trying to prevent?

It is therefore no surprise that lines were moved (and precincts split) accordingly, to capture minority voters that could meet the targets. There was no mention of any legislative investigation of cohesion or political efficacy to conclude that the percentages targeted were in fact necessary to abide by Voting Rights Act requirements. There was no attempt, that is, to discern whether maintaining demographic consistency was necessary to maintain political efficacy.<sup>96</sup>

This appears to be consistent with past practice, if not legal obligation: the federal trial court reviewing Alabama's 2012 redistricting noted that "[i]n 2001, the Democrat-controlled Legislature repopulated the majority-black districts by shifting thousands of black people into those districts *to maintain the same relative percentages of the black population in those districts*."<sup>97</sup> Indeed, the court's frequent and prominent citation of allegedly similar behavior welcomed by the litigation plaintiffs ten years earlier, in a different partisan direction, implies that two legal wrongs can make a right.<sup>98</sup> In truth, the presence of unjustified dependence on demographics in an earlier cycle does not provide a legal safe harbor for unjustified dependence on demographics now.

The Supreme Court thought the redistricting controversy in Alabama to be one of the rare direct appeals worth oral argument time.<sup>99</sup> Its ruling, issued in March 2015, sharply corrected the court below—and, by extension, the state's essentialist practice.<sup>100</sup> The Court distinguished the Act's nuanced consideration of race from its cartoon counterpart, though without describing the alternatives as such:

In our view, however, [a holding permitting the redrawing based on consideration of percentages alone] rests upon a misperception of the law. Section 5, which covered particular States and certain

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A. Yes.

*Id.* at 1324 (Thompson, J., dissenting).

The trial court majority, it appears, made the same mistake. *See id.* at 1310 ("[T]he Alabama Legislature correctly concluded . . . that it could not significantly reduce the percentages of black voters in the majority-black districts because to do so would be to diminish black voters' ability to elect their preferred candidates.").

96. There was some evidence that two African-American incumbents requested, during the redistricting process, that their districts be drawn with at least 62% African-American population. *Id.* at 1246. But there is little indication that the requests were made because a 62% African-American population threshold is necessary in those areas, in light of local mobilization and political cleavages, to afford an equal ability for the minority community to elect candidates of choice—rather than because a 62% African-American population would amount to comfortable political safety for the incumbents.

97. *Id.* at 1242 (emphasis added).

98. *See, e.g., id.* at 1301-02; *id.* at 1302 ("We refuse to apply a double standard that requires the Legislature to follow one set of rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it.").

99. *Ala. Legislative Black Caucus v. Alabama*, 134 S. Ct. 2695 (2014).

100. *See Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015).

other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice.<sup>101</sup>

Though the Court's result was entirely consistent with the account of the Voting Rights Act developed above, it offered little theory explaining the outcome. The Court rested instead on section 5's textual touchstone of the "ability to elect" and Department of Justice guidelines interpreting this text in a similar fashion.<sup>102</sup> The text alone makes the Court's decision correct, but not inevitable. A deeper theory is needed to explain why the Court's approach is superior to the alternatives. As the analysis above reveals, the Court's choice to construe section 5 as it did is faithful not only to the statutory text but also to the non-essentialist thrust of section 5 as a whole—and to the constitutional commands that give it life.

Indeed, though the Court made no mention of jurisdictions beyond Alabama or statutory provisions beyond section 5, its firm ratification of a retrogression standard embracing a nuanced view of the Voting Rights Act has implications for other states and other battles still working their way through the courts. The remainder of this Part briefly reviews some of the other states replicating, in different contexts, the same mistaken dependence on simple demographics that afflicted Alabama's misreading of the Voting Rights Act.

### B. California

In some states, those drawing the lines relied exclusively on demographics to assess Voting Rights Act compliance despite the contrary warnings of counsel.<sup>103</sup> In California, however, where a new independent citizens' commission was tasked with drawing congressional and state legislative lines, *counsel* seems to have provoked the exclusive emphasis on demographics.<sup>104</sup> This position of legal advisor was so important that initiative proponents embedded in the governing statute a requirement that at least one counsel to the commission be chosen based on "demonstrated extensive experience and expertise

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101. *Id.* at 1272.

102. See *supra* text accompanying notes 59-60; see also *Ala. Legislative Black Caucus*, 135 S. Ct. at 1272-73. The Court ominously mentioned that "Alabama's mechanical interpretation of § 5 can raise serious constitutional concerns," but did so without any further elaboration. *Id.* at 1273.

103. See, e.g., *infra* text accompanying notes 133-42 (discussing the redrawing of district lines in Texas in spite of contrary legal advice).

104. Some commissioners apparently sought to consider more pragmatic indicators of minority communities' voting power, but it is unclear whether those commissioners ever received the data necessary to make relevant informed decisions. Levitt, *supra* note 25, at 1091.

in implementation and enforcement of the federal Voting Rights Act of 1965.”<sup>105</sup> And yet, at least in meetings open to the public, the counsel selected consistently assessed minority populations’ electoral opportunities in purely demographic terms, against the prevailing interpretation of the Department of Justice.<sup>106</sup>

### C. Florida

Florida’s state constitution contains provisions, newly enacted in 2010, that mirror the substantive protections of the Voting Rights Act: “[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice[.]”<sup>107</sup> The Florida Supreme Court has construed these provisions to provide the same functional protections for electoral power—dependent not merely on demographics, but on real political circumstances on the ground—as their federal counterparts.<sup>108</sup>

In practice, part of Florida’s process appeared to live up to this standard, and part did not. The Florida Supreme Court praised the state House for its attention to factors beyond demographics alone in designing districts to preserve minority political opportunities.<sup>109</sup> The

105. CAL. GOV’T CODE § 8253(a)(5) (West, Westlaw through Ch. 291 of 2015 Reg. Sess.).

106. See, e.g., Transcript at 21, Full Comm’n Line-Drawing Meeting (Cal. Citizens Redistricting Comm’n, June 1, 2011), [http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts\\_20110601\\_sacto\\_voll.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts_20110601_sacto_voll.pdf) (“If I understand the question correctly, it is -- better to restate it, it would be is there a percentage population that is lower than what is needed to have an ability to elect, so that effectively you don’t need to worry about a reduction in that percentage in a new district? So, first, I want to clarify that the term ‘ability to elect’ is a term of art in Voting Rights Act cases, and it really references a 50 percent plus majority.”); *id.* at 26 (“So, the easy choice is always maintain the percentages of the benchmark district because then, essentially, your job has been done.”); Transcript at 12-14, Citizens Redistricting Comm’n (Cal. Citizens Redistricting Comm’n, May 27, 2011), [http://wedrawthelines.ca.gov/downloads/transcripts/201105/transcripts\\_20110527\\_nridge.pdf](http://wedrawthelines.ca.gov/downloads/transcripts/201105/transcripts_20110527_nridge.pdf) (“Now, you need to know that the phrase ‘ability to elect’ is a term of art. And it essentially refers to the condition where you have a majority, so 50 plus percent that can elect. Because if you do, then at least theoretically you can elect candidates of your choice. . . . And then in particular, if there’s a situation where the C.V.A.P., the citizen voting age population, exceeds 50 percent or might exceed 50 percent, then I think we need to take extra care to make sure that whatever the new district is meets that same level, the -- of the ability to elect.”).

107. FLA. CONST. art. III, §§ 20(a), 21(a).

108. See *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 625-26 (Fla. 2012).

109. *Id.* at 645. At least, the Florida Supreme Court offered this praise in the context of the limited record before it; the court’s review was limited to a thirty-day period. *Id.* at 598. In particular, the court placed more emphasis on the sufficiency of the record to evaluate claims of retrogression—and of the state House’s attention to factors beyond demographics alone in the context of retrogression—than in the context of the state’s provision mirroring section 2 of the federal Voting Rights Act. See *id.* at 645.

Senate did not fare as well. The court specifically noted that the Senate appeared to rely on demographics and disclaimed any interest in further information, despite DOJ guidance to the contrary; it approached the drawing of state Senate districts ostensibly to ensure that new districts did not diminish the ability of minorities to elect representatives of their choice, “without reference to election results or voter-registration and political party data.”<sup>110</sup> That is, the state Senate ostensibly drew districts to preserve minority political power with information about headcount, but without information about the real components of minority political power.<sup>111</sup>

The court rejected the state Senate’s efforts, finding that the legislature could have drawn several districts in a manner more consistent with other constitutional requirements, where so doing would have retained the same *functional* minority political efficacy despite a different demographic composition.<sup>112</sup> Looking past the legislature’s essentialist shorthand, the court found opportunities for better legal compliance.<sup>113</sup>

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110. *Id.* at 656.

111. It appears that the legislature also adopted the flawed demographic approach when drawing congressional districts. For example, the state’s submission seeking preclearance for its congressional districts asserted that the new districts produced no retrogression, but the state cited only demographic information for this conclusion. See FLA. SENATE, SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT 9-11 (2012), <http://www.flsenate.gov/UserContent/Session/Redistricting/20120312Preclearance/Request%20for%20Preclearance/Submission%20Memorandum%20-%20Congress.pdf>. Moreover, courts later determined that legislators made the decision to “push” the black voting-age population of at least one district over 50%, ostensibly to comply with the Voting Rights Act, even though no increase was necessary to afford black voters a reasonable opportunity to elect candidates of choice. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 384-85, 403-05 (Fla. 2015); see also *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 282-83, 285 (Fla. 2015) (noting the persistent absence of functional evaluation of minority political power in the legislature’s proposed remedial plan after initial congressional districts were invalidated).

112. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d at 666-79.

113. That said, the Florida Supreme Court appeared to use a shorthand of its own that may be equally impermissible. The court seemed to equate districts granting an African-American community the ability to elect its candidates of choice with districts that appeared to provide a reliable opportunity for Democratic candidates to win an election after a Democratic primary in which the majority of registered Democrats were black. See *id.* at 666-69; cf. *League of Women Voters of Fla.*, 179 So. 3d at 272 (similarly analyzing the performance of congressional districts using demographics and party registration); *League of Women Voters of Fla.*, 172 So. 3d at 404-05 (same). Political data in the affected regions of Florida may demonstrate that the African-American communities in question are politically cohesive and that such districts in fact provide the relevant African-American communities with the ability to elect their candidates of choice—but the federal Voting Rights Act does not permit the *assumption* that they do, and it is likely that Florida’s constitutional provisions would similarly not permit such assumptions.

After the court’s decision, Florida redrew its state Senate districts, which were later struck based on partisanship exceeding state constitutional limits; a separate action invalidated several of the state’s congressional districts for the same reason. See *Stipulation and Consent Judgment at 1*, *League of Women Voters of Fla. v. Detzner*,



### D. North Carolina<sup>114</sup>

North Carolina is certainly no stranger to undue racial stereotyping in the redistricting context: it gave rise to the *Shaw v. Reno*<sup>115</sup> line of cases establishing the constitutional cause of action for the unjustified predominant use of race in drawing district lines,<sup>116</sup> and a decade of litigation that followed. The Supreme Court firmly instructed the legislators of North Carolina—and legislators elsewhere around the country—that the Equal Protection Clause did not permit districts built predominantly in order to achieve racial targets, if such districts were not actually necessary to achieve a sufficiently compelling state interest.<sup>117</sup>

This cycle's redistricting seems to indicate that North Carolina needs a reminder. Despite the *Shaw* Court's emphatic statement that the conditions for section 2 liability "never can be assumed,"<sup>118</sup> the 2011 North Carolina legislature appears to have built majority-minority districts once again on demographics with embedded assumptions about how they translate to political alignment. Per a state court reviewing the legislature's plan: "[T]he General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a 'roughly proportionate' number of Senate, House, and Congressional districts as compared to the Black population in North Carolina," and that "it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population."<sup>119</sup> Indeed, additional evidence indicated that the consultant

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No. 2012-CA-002842 (Fla. 2d Cir. Ct. July 28, 2015), <http://redistricting.ills.edu/files/FL%20lwr%2020150728%20stipulation.pdf> (state Senate districts); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 416 (Fla. 2015) (congressional districts).

114. Full disclosure: I joined an amicus brief of election law professors at the North Carolina Supreme Court, and another later brief in support of certiorari at the U.S. Supreme Court, on this issue. See Brief of Election Law Professors as Amici Curiae Supporting Petitioners, *Dickson v. Rucho*, No. 14-839, 2015 WL 678181 (U.S. Feb. 17, 2015), <http://redistricting.ills.edu/files/NC%20dickson%2020150217%20law%20profs.pdf>; Brief of Amici Curiae Election Law Professors Guy-Uriel Charles et al., *Dickson v. Rucho*, No. 201PA12-2, 2013 WL 9047309 (N.C. Oct. 11, 2013), <http://redistricting.ills.edu/files/NC%20dickson%2020131011%20amicus%20election.pdf>.

115. 509 U.S. 630 (1993).

116. *Id.* at 642.

117. *Id.* at 653-57.

118. *Id.* at 653.

119. Judgment and Memorandum of Decision, *Dickson v. Rucho*, Nos. 11 CVS 16896, 11 CVS 16940, 2013 WL 3376658, at \*6 (N.C. Super. Ct. July 8, 2013); see also *Dickson v. Rucho*, 766 S.E.2d 238, 245-46, 247-48, 251 (N.C. 2014) (acknowledging this unchallenged and unanimous finding, and calling attention to it as a "significant conclusion[]"), *vacated by* 135 S. Ct. 1843 (2015) (mem.).

serving as the “chief architect” of the redistricting plans was told to “draw a 50% plus one district wherever in the state there is a sufficiently compact black population to do so.”<sup>120</sup>

It is true that evidence at trial revealed that the legislature had considered electoral patterns to some degree in its conclusion that polarized voting persisted in North Carolina.<sup>121</sup> But there was no evidence that the legislature attempted to discern whether hitting a 50% demographic target would be necessary (in any district, much less each of them) to provide an equitable opportunity for minority voters to elect candidates of choice. That is, there was no evidence that existing district structures were failing to allow minority voters an equal opportunity to elect candidates of choice, and that it was therefore necessary to move minority voters into districts to meet a 50% magic number. The legislature, with permission from the state Supreme Court,<sup>122</sup> seemed to conflate the blunt demographic threshold required for private plaintiffs to lodge a claim under section 2 of the Voting Rights Act with the nuanced functional inquiry required by the Act for *state* action predicated on race.<sup>123</sup> That is, the legislature set a target number of districts based on the state’s proportion of African-American population and determined that it would pack each of those target districts at least half-full of African-American adults, without ever determining for each district if local electoral patterns created the statutory responsibility to hit the predetermined racial target. Demographics, and demographics alone, apparently drove the placement of the lines.<sup>124</sup>

### *E. South Carolina*

The evidence of pervasive demographic determinism is less clear in South Carolina than in some of the other states evaluated in this Article, but there are nevertheless disturbing indications of an overly blunt approach to the Voting Rights Act. Before redistricting, Afri-

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120. *Dickson*, 766 S.E.2d at 263 (Beasley, J., concurring in part and dissenting in part) (internal quotation marks omitted); see also Crayton, *supra* note 73, at 992.

121. *Dickson*, 766 S.E.2d at 250-52 (majority opinion).

122. *Id.* at 253-54.

123. See *supra* text accompanying notes 80-87.

124. On April 20, 2015, the United States Supreme Court granted plaintiffs’ petition for certiorari in the case, summarily vacated the North Carolina Supreme Court’s decision in light of its opinion in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), and remanded for further consideration. *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (mem.). On remand, the North Carolina Supreme Court again upheld the districting plan, repeating the same error of its earlier decision. See *Dickson v. Rucho*, 781 S.E.2d 404, 416-17, 421-22, 431-35 (N.C. 2015).

can-American Representative Mia McLeod<sup>125</sup> represented a district in which about 35% of the electorate was African American.<sup>126</sup> In the course of the redistricting process, and without any pertinent request from her (or, presumably, from constituents of whom she was aware), she was apparently told that the chairman of the relevant legislative subcommittee was “working to get your BVAP (black voting age population) up in your District, but we’ve got to tweak it some more to get it just right.”<sup>127</sup> She was apparently later told that “the lawyers” were advising legislators that increasing the BVAP of the district was required.<sup>128</sup> The district was eventually drawn with a 52% African-American voting age population, without any political or electoral analysis indicating that minority candidates of choice would regularly be defeated in a district that was less packed.<sup>129</sup>

This lawyers’ advice was clarified in South Carolina’s legal filings, responding to an assertion of impermissible racial gerrymandering. The Speaker of the South Carolina House of Representatives claimed that it was “legally necessary for the General Assembly to create majority-minority districts” in areas “when the *Gingles* conditions were present”<sup>130</sup>—that “anything less” than a “numerical majority of the protected racial group . . . will not satisfy the mandate of *Gingles*.”<sup>131</sup> And the lawyers apparently believed that these conditions involved “whether a minority group can form a majority in a single-member district; whether the minority group is politically cohesive; and whether there is racial bloc voting.”<sup>132</sup> That is, wherever there were large pockets of African-American voters, if there was any degree of racial polarization, the state sought to pack voters into districts that were at least 50% minority—without any attention to whether the candidates of choice of the minority community already had an equal

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125. Representative McLeod was then known by her married name: Mia Butler Garrick. See Dawn Hinshaw, *Richland Lawmaker Not Afraid to Stir the Pot*, STATE (Dec. 16, 2012).

126. Affidavit of the Hon. Mia Butler Garrick at ¶ 2, *Backus v. South Carolina*, No. 3:11-CV-03120 (D.S.C. Feb. 22, 2012), Doc. 147. I am not aware of a specific finding presented in the case that Rep. McLeod either has been or has not been the candidate of choice of her African-American electorate.

127. *Id.* ¶ 8.

128. *Id.* ¶ 9.

129. *Id.* ¶ 10. Additional testimony claimed that the legislative committee refused to draw any district that had a black voting-age population reduced from its benchmark, no matter whether the functional ability to elect remained constant. See Ex. B, Rep. Bakari Sellers Trial Transcript at 26, 29-32, Motion for Relief from a Judgment and Order, *Backus v. South Carolina*, No. 3:11-CV-03120 (D.S.C. Aug. 29, 2013), Doc. 223-3.

130. Post-Trial Memorandum of Defendant Robert W. Harrell, Jr. at 4, *Backus v. South Carolina*, No. 3:11-CV-03120 (D.S.C. Mar. 5, 2012), Doc. 210, <http://redistricting.ils.edu/files/sc%20backus%2020120305%20spkr.pdf>.

131. *Id.* at 7.

132. *Id.* at 9.

opportunity to win elections. Accordingly, demographic thresholds prevailed without any analysis of the political conditions indicating either dilution or its absence.

### *F. Texas*

Texas drew districts in 2011 that are still the subject of litigation five years later,<sup>133</sup> despite intervening 2012 plans governing elections going forward.<sup>134</sup> The 2011 plans present vivid examples of demographic determinism. Despite contrary legal advice that map drawers had received from nonpartisan staff,<sup>135</sup> the architects of the Texas plans apparently considered their legal responsibilities complete, for purposes of preclearance under the Voting Rights Act, if they merely maintained “demographic numbers of protected districts at their benchmark levels.”<sup>136</sup>

In 2011, Texas went to court seeking an order of preclearance, contending that its district plans were neither retrogressive nor constructed with discriminatory intent.<sup>137</sup> In the litigation, the State maintained the demographically deterministic position. Given a benchmark plan with a certain number of “districts in which Blacks make up forty percent of the voting-age population” or a certain number of districts in which “Hispanics make up fifty percent of the citizen voting-age population,” Texas claimed that a new plan maintaining the same number of districts with the same demographic criteria would necessarily be non-retrogressive, without any need to

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133. See *Perez v. Texas*, No. 5:11-CV-00360 (W.D. Tex.).

134. In 2012, with preclearance tied up in litigation, a federal court in Texas issued interim maps governing the 2012 elections. *Perez v. Texas*, 970 F. Supp. 2d 593, 597 (W.D. Tex. 2013) (three-judge court). In 2013, the legislature then passed new plans largely following these interim lines drawn by the court. *Id.* at 598.

Yet the 2011 plans remain relevant. For example, if they were predicated upon discriminatory intent, in violation of the Fourteenth Amendment, a federal court may order Texas “bailed in” to a renewed preclearance requirement under the Voting Rights Act. 52 U.S.C. § 10302(c) (Supp. II 2014); see also *Perez*, 970 F. Supp. 2d at 601-03 (explaining the relevance of evidence with respect to the intent behind maps passed in 2011, for claims pending after new maps had been put in place).

135. See *Texas v. United States*, 887 F. Supp. 2d 133, 203-04 (D.D.C. 2012) (three-judge court), *vacated on other grounds by* 133 S. Ct. 2885 (2013) (mem.).

136. See *id.* (quotation omitted); see also *id.* at 232. It appears that the Texas map drawers considered as “demographic factors” not merely race and ethnicity, citizenship, and age, but also registration status. *Id.* at 203-04, 207, 232 (noting the consideration of the proportion of registered voters with Hispanic surnames). The drawers did not apparently consider other political history—including turnout, levels of cohesion and polarization, the size of districts and access to funds, or other factors—to be relevant to any responsibilities under the Voting Rights Act.

137. *Texas*, 887 F. Supp. 2d at 138-39.

know more about the affected population.<sup>138</sup> That is, Texas claimed that the only necessary measurement of an effect on minority voters' ability to elect candidates of choice is a basic headcount.

While Texas's legal claim was that the Voting Rights Act requires only cursory maintenance of a demographic plateau, the actions of those in charge of the redistricting effort show that they were amply aware that factors other than demographics are integral to a minority community's "ability . . . to elect their preferred candidates of choice."<sup>139</sup> The three-judge D.C. district court adjudicating the State's preclearance submission found that

[t]he mapdrawers consciously replaced many of the district's active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD 23's Anglo citizens. In other words, they sought to reduce Hispanic voters' ability to elect without making it look like anything in CD 23 had changed. *See, e.g.*, Defs.' Ex. 304 (email from Eric Opiela, counsel to Texas House Speaker Joe Straus, to mapdrawer Gerardo Interiano in November 2010 urging Interiano to find a metric to "help pull the district's Total Hispanic Pop[ulation] and Hispanic CVAPs up to majority status, but leave the Spanish Surname [Registered Voter] and [turnout numbers] the lowest," which would be "especially valuable in shoring up [CD 23 incumbent] Canseco," [who was not the preferred candidate of the Hispanic voters in the area] . . . . We also received an abundance of evidence that Texas, in fact, followed this course by using various techniques to maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness. . . . Texas's protestations that the district has remained functionally identical are weakened first by the mapdrawers' admissions that they tried to reduce the effectiveness of the Hispanic vote and then, more powerfully, by evidence that they did.<sup>140</sup>

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138. *Texas v. United States*, 831 F. Supp. 2d 244, 253, 260 (D.D.C. 2011) (three-judge court), *vacated on other grounds* by 133 S. Ct. 2885 (2013) (mem.).

139. 52 U.S.C. § 10304(d) (Supp. II 2014).

140. *Texas*, 887 F. Supp. 2d at 155-56 (second, third, fourth, and fifth alteration in original).

This tactic recalls one of the most notorious maps of the 1981 redistricting cycle: the Georgia plan that mildly increased the African-American voting-age population of Georgia's lone majority-minority congressional district, while ensuring that the district retained a substantial Anglo majority of registered voters so that it would be unlikely to perform as a meaningful opportunity district for the African-American electorate. *See Busbee v. Smith*, 549 F. Supp. 494, 498-99 (D.D.C. 1982). The purported architect of the plan, the chair of Georgia's House redistricting committee, explained his decisions in part by proclaiming, "I don't want to draw nigger districts." *Id.* at 501.

The D.C. court rejected the Texas methodology, starkly critiquing the reliance on demographic data alone.<sup>141</sup> Indeed, the court emphasized that

[s]everal districts in the proposed plans show that population statistics alone rarely gauge the strength of minority voting power with accuracy. For example, . . . Congressional District 23 and House District 117 were selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas. Such districts might pass a retrogression analysis under Texas's population demographics test . . . even though they were engineered to decrease minority voting power.<sup>142</sup>

After the Supreme Court invalidated the coverage formula driving the Voting Rights Act's preclearance regime, the D.C. court's preclearance findings above were formally vacated.<sup>143</sup> Yet even if it is no longer legally binding, the court's discussion remains a valuable explanation of the pragmatic impact of the divide between a nuanced examination of political performance and a blunt focus on demographics.<sup>144</sup>

### G. Virginia

Virginia seems to have adopted the same approach to preclearance seen in Alabama and several other states above: the state apparently viewed as definitional retrogression any decrease in the percentage of minority voters within a district that had, as a benchmark, the ability to elect candidates of choice—whether electoral realities on the ground actually contributed to a diminished ability to elect or not. Virginia designated the Third Congressional District as a district in which minorities had the ability to elect candidates of choice. And in legal filings defending District 3 against a claim of racial gerrymandering, the state claimed that it had “more than ‘a strong basis in

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141. *Texas*, 831 F. Supp. 2d at 260 (“We find that a simple voting-age population analysis cannot accurately measure minorities’ ability to elect and, therefore, that Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans.”); *id.* at 262 (“[P]opulation demographics alone will not fully reveal whether minority citizens’ ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.”).

142. *Texas*, 887 F. Supp. 2d at 140 n.5.

143. *Texas v. United States*, 133 S. Ct. 2885 (2013) (mem.); *see also* Memorandum and Order at 1, *Texas v. United States*, No. 1:11-CV-01303 (D.D.C. Dec. 3, 2013), Doc. 255, <http://redistricting.lls.edu/files/TX/20131203%20preclear%20dismiss.pdf>.

144. As described *supra* note 134, the legislature’s approach in 2011 remains a live issue in litigation ongoing at the time of this Article’s publication; the intent to discriminate on the basis of race by hiding behind a pretextual demographic “obligation” could serve as the predicate for a return to a preclearance regime.

evidence' to conclude that Section 5 prohibited *any* reduction in District 3's BVAP, which could diminish minority voters' ability to elect their 'candidates of choice' by making a safe black district less safe."<sup>145</sup> Indeed, it appears that the legislature acted on this belief: the author of the plan allegedly stated that he drew the challenged Third District by looking

at the census data as to the current percentage of voting age African American population in [CD 3] and what that percentage would be in the proposed lines to ensure that the new lines that were drawn for [CD 3] . . . would not have less percentage of voting age African American population under the proposed lines . . . that exist under the current lines under the current Congressional District.<sup>146</sup>

It is true that a reduction in the proportion of African-American voters within a district *could* at some point fail to provide a community with the reliable ability to elect a candidate of choice—but that depends entirely on a functional assessment of local political engagement. The Virginia General Assembly never conducted such an analysis;<sup>147</sup> instead, it merely equated demographics with destiny. A federal court reviewing the General Assembly's work recognized the error, critiquing the "legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns,"<sup>148</sup> and later directly echoed the Supreme Court's Alabama decision in finding that the legislature "rel[ied] heavily upon a mechanically numerical view as to what counts as forbidden retrogression."<sup>149</sup> The court then found unlawful the linedrawing process driven by adher-

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145. Post-Trial Brief of Intervenor-Defendants and Defendants at 31, Page v. Va. State Bd. of Elections, No. 3:13-CV-00678 (E.D. Va. June 20, 2014), Doc. 106 (first quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion); then quoting 42 U.S.C. § 1973c(b) (2006)), <http://redistricting.lla.edu/files/VA%20page%2020140620%20dft.pdf>; cf. Intervenor-Defendants Va. Representatives' Memorandum in Support of Motion for Summary Judgment at 13 n.1, Page v. Va. State Bd. of Elections, No. 3:13-CV-00678 (E.D. Va. Dec. 20, 2013), Doc. 39, <http://redistricting.lla.edu/files/VA%20page%2020131220%20intervenor%20msj.pdf> (claiming that the Voting Rights Act "prohibited any diminution in minority voters' ability to elect their preferred candidate, thereby precluding reducing a majority-black district to a minority-black district or otherwise making a safe black district any less safe").

146. Plaintiffs' Response in Opposition to Defendants' and Intervenor's Motions for Summary Judgment at 17, Page v. Va. State Bd. of Elections, No. 3:13-CV-00678 (E.D. Va. Dec. 31, 2013) Doc. 42, <http://redistricting.lla.edu/files/VA%20page%2020131231%20resp.pdf>.

147. See Page v. Va. State Bd. of Elections, No. 3:13-CV-00678, 2015 WL 3604029, at \*4, \*9, \*18 (E.D. Va. June 5, 2015), *jurisdiction postponed to hearing on the merits sub nom.* Wittman v. Personhuballah, 136 S. Ct. 499 (2015); Page v. Va. State Bd. of Elections, 58 F. Supp. 3d 533, 539, 543-44 (E.D. Va. 2014), *vacated on other grounds sub nom.* Cantor v. Personhuballah, 135 S. Ct. 1699 (2015); Post-Trial Brief of Intervenor-Defendants and Defendants at 31, Page v. Va. State Bd. of Elections, No. 3:13-CV-00678 (E.D. Va. June 20, 2014), Doc. 106, <http://redistricting.lla.edu/files/VA%20page%2020140620%20dft.pdf>.

148. Page, 58 F. Supp. 3d at 553.

149. Page, 2015 WL 3604029, at \*17 (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015)).

ence to this artificial threshold.<sup>150</sup> Unsupported assumptions about a racial community's political allegiance or efficacy do not meet constitutional muster.

The examples above do not purport to comprise a complete list of those states engaging in an unduly blunderbuss approach to Voting Rights Act compliance. Absent litigation over the issue, it is difficult to assess a state's performance, simply because legislatures' true considerations in drawing redistricting maps are often less than transparent.

But by the same token, the list above is also relatively confined. Many states with specific responsibilities under the Voting Rights Act are undoubtedly doing the hard work necessary under the correct approach,<sup>151</sup> and some courts are admirably correcting the states that

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150. *Id.* at \*19.

151. For example, in Arizona, a consultant advising the state's commission on Voting Rights Act responsibilities correctly advised the commission "that determining whether a minority population had the ability to elect was a complex analysis that turned on more than just the percentage of minorities in a district." See *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1056 (D. Ariz. 2014), *probable jurisdiction noted*, 135 S. Ct. 2926 (2015) (mem.). The commission accordingly considered the past electoral performance of the communities in question. See *id.* at 1056-57. And although there was some dispute over the accuracy of the political efficacy analysis in Louisiana, it at least appears that the legislature considered minority electoral power beyond mere demographics. That is, the legislature appears to have attempted to consider whether majority-minority districts *actually* offered an effective ability to elect candidates of choice, rather than merely assuming the answer. See, e.g., STATEMENT OF ANTICIPATED MINORITY IMPACT 3-4, 9-19 (2011), Louisiana Preclearance Submission for H.B. 1, att. 6, <ftp://legisftp.legis.state.la.us/06%20Statement%20of%20Minority%20Impact/Minority%20Impact.pdf> (noting that the legislature extensively examined electoral data).

It is important to emphasize that just as considering the wrong factors does not itself guarantee failure to abide by the substantive requirements of the Voting Rights Act, see *infra* text accompanying notes 153-54, considering the right factors (but in the wrong way) does not guarantee success.



get it wrong.<sup>152</sup> The unjustifiably blunt approach to compliance with the Voting Rights Act is by no means universal. But the examples above show that it is sufficiently prevalent to be worrisome.

One final caveat is worth mentioning. The claim that the states above incorrectly went about the process of complying with the Voting Rights Act is not itself an assessment that they did not actually comply. It is entirely possible for a jurisdiction to get the analysis wrong but the answer—at least the statutory answer—right.<sup>153</sup> A state may have misgauged the appropriate way to comply with section 5 and yet still have drawn lines that happened to avoid retrogression; a state may have incorrectly attempted to comply with section 2 and yet still have drawn lines that provide an equal opportunity for minority voters to elect candidates of choice.<sup>154</sup> Those ques-

152. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015); *Page*, 2015 WL 3604029, at \*17; *Texas v. United States*, 887 F. Supp. 2d 133, 203-04, 232 (D.D.C. 2012) (three-judge court), *vacated on other grounds* by 133 S. Ct. 2885 (2013); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 656 (Fla. 2012).

In two other states, courts seem to bear the primary blame for demographic shortcuts of a different, albeit related, nature. In Arkansas, the politician commission charged with drawing state legislative lines seemed to acknowledge—at least in a legal defense of the lines that it had already drawn—that local political realities and not merely demographics would be important in fulfilling its obligations under section 2 of the Voting Rights Act. See, e.g., *Governor Beebe, Atty. Gen. Dustin McDaniel & the Ark. Bd. of Apportionment's Trial Brief* at 35-48, *Jeffers v. Beebe*, No. 2:12-CV-00016 (E.D. Ark. May 2, 2012), Doc. 75. The court reviewing that commission's plan, however, focused on demographics, finding that any district drawn with a majority of minority voting-age citizens necessarily complied with a section 2 obligation. *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012). That is, under the court's logic, in areas with section 2 obligations, a jurisdiction need only draw a district with a minority citizen voting-age population of 50.1% or more to immunize itself from challenge. Presumably, the court's fixation on demographics alone would refuse to find section 2 liability even for a majority-minority district *intentionally* drawn in light of local political realities to prevent the minority community from achieving an equal opportunity to elect candidates of choice, and actually having that effect (as in the allegations in Texas, see *supra* text accompanying notes 139-42).

In New Mexico, after the governor vetoed a legislative redistricting plan, the courts were tasked with drawing district lines. With elections impending, proceedings were "extremely expedited," particularly after the trial court's initial lines were appealed and returned on remand. *Maestas v. Hall*, 274 P.3d 66, 70 (N.M. 2012). One issue on appeal concerned a Hispanic population in the eastern portion of the state; the New Mexico Supreme Court considered presumptive proof of dilution established and directed the trial court to determine, on remand, "whether the relevant population is an effective Hispanic citizen voting-age population." *Id.* at 74. However, on remand, the trial court "interpret[ed] the remand from the Supreme Court to require that District 63 remain as close as possible to its present configuration and that, at a minimum, the percentage of the Hispanic voting age population not be decreased." Decision on Remand at 16, *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. Dist. Ct. Feb. 27, 2012), <http://redistricting.ils.edu/files/NM%20egolf%2020120227%20remand.pdf>. Only a focus on demographics alone would cause the court to equate the two distinct standards.

153. It is also possible, of course, that—as the Supreme Court noted in reviewing Alabama's redistricting plan—"a]sking the wrong question may well have led to the wrong answer." *Ala. Legislative Black Caucus*, 135 S. Ct. at 1274.

154. For example, the Department of Justice precleared every statewide plan submitted through the administrative preclearance mechanism in this redistricting cycle.

tions are entirely different from the main argument of this Article, which is that the improper use of blunt demographics alone—whether it happens to yield a result that complies with the statutory responsibility or not—involves a misguided process fueled by a misunderstanding of the Voting Rights Act with decidedly serious constitutional implications.

#### IV. RATIONALES AND CONSEQUENCES

There are several potential explanations for the apparent prevalence of demographic determinism in the states above.<sup>155</sup> The first is simple mistake: a real misunderstanding about what the Voting Rights Act requires. The cartoon version of the Act, demanding nothing more than matching raw demographic percentages to a readily available target, is relatively easy to grasp, and relatively easy (if incorrect) for counsel or fellow legislators to communicate. Formal or informal networks of officials tasked with redistricting may have passed along the overly simplified conception of the Act, as any law is inevitably distilled to a rough approximation by those who are not subject-matter experts.<sup>156</sup> To the extent that past districts were drawn using the shorthand but not challenged on those specific grounds in the courts, the districts' survival may have bolstered a

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*See Status of Statewide Redistricting Plans*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/statewides.php](http://www.justice.gov/crt/about/vot/sec_5/statewides.php) (last updated Aug. 6, 2015). The mere fact that the DOJ granted preclearance, however, does not itself indicate that the states' approach to complying with section 5 was legally permissible—only that the result was deemed by DOJ to have hit the mark.

155. These potential explanations are not mutually exclusive; within and across states, there may well have been multiple mechanisms at work simultaneously.

156. *See, e.g.,* Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 L. & SOC'Y REV. 493, 503 (2006) (reviewing findings that a particular regulated community “demonstrated little familiarity” with a complex regulatory structure beyond the law’s “general mandate”); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1546 (1992) (explaining generally how professionals help to convey legal interpretations and models of compliance); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 500 (1997) (noting that “professionals can act as a kind of Greek chorus, amplifying and reifying legal [developments] in ways that may have little to do with reality”).

In the context of Voting Rights Act compliance, this supposition provides an explanation, not an excuse. It is reasonable to expect the public to have an overly broad, overly blunt understanding of regulation. But it is also reasonable to expect the directly regulated community to be a bit more steeped in the nuances of actual regulatory requirements. That latter expectation seems even more reasonable when the directly regulated community is, as with the Voting Rights Act, largely a community of legislators professionally tasked with ostensibly understanding and issuing complex regulation. And it is even more reasonable still to expect legislators with profound expertise in elections and profound self-interest in the election process to pay more attention to the nuances of a statute that concerns electoral structures.

belief in the validity of the practice.<sup>157</sup> And conceiving of racial or ethnic groups of voters as fungible tokens without engaging intra-group political variation may be a comparatively natural mode of analysis for officials used to thinking about race or ethnicity in essentialist ways.

Indeed, this explanation for the misreading demonstrates a quality of law generally: at heart, law is a system of social ordering, and it therefore is what societies decide that it is. Despite the Voting Rights Act's constitutional foundation, statutory text, and legislative history—all of which demonstrate the need for nuance—and despite the relative consistency of administrative and judicial interpretation reaffirming that nuance, state legislators or their retained consultants in some of the states with the most troubling racial histories seem to have believed in a cartoon version of the Act, and it is not improbable that many were (and are) sincere in believing that their approach was lawful. Through informal communication networks, these officials could have readily propagated the misunderstanding to like-minded others, even “confirming” the incorrect analysis as others agreed.<sup>158</sup> They might thus have formed their own form of “common law” interpretation of the Act,<sup>159</sup> albeit one repeatedly rejected by the judicial branch. For substantial portions of the regulated community, the statute may have *actually* become nothing more than the shorthand.<sup>160</sup>

It is not clear how durable this cartoon is. The Supreme Court has now decisively held that the Voting Rights Act rejects demographic determinism, with respect to one particular state and with respect to one particular retrogression provision now rendered impotent by *Shelby County*.<sup>161</sup> But the Court's decision in the *Alabama Legislative Black Caucus* case was squarely in line with the text, regulatory guidance, and ample judicial precedent that the state bodies above

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157. Cf. Andrew Karch, *Emerging Issues and Future Directions in State Policy Diffusion Research*, 7 ST. POL. & POL'Y Q. 54, 60 (2007) (noting that public officials may be more likely to adopt an approach or policy perceived to have been successful elsewhere).

158. See, e.g., Daniel M. Butler et al., *Ideology, Learning, and Policy Diffusion: Experimental Evidence*, 60 AM. J. POL. SCI. (forthcoming 2016), <http://onlinelibrary.wiley.com/doi/10.1111/ajps.12213/full> (reviewing the evidence that policy understandings—or misunderstandings—may spread more readily among those who are ideologically aligned or co-partisans).

159. Cf. Elmendorf, *supra* note 1 (positing that the VRA is a common law statute that should be interpreted and developed jointly by Congress and the courts).

160. See Edelman & Suchman, *supra* note 156, at 502 (describing the interactive process of social construction that drives the practical meaning of law in action, eventually producing a “working agreement on what the law ‘is’ and what it ‘requires,’” which “may gradually become reified and institutionalized in formal structures and rational myths”).

161. See *Ala. Legislative Black Caucus*, 135 S. Ct. at 1272-74.

ignored on their way to a shorthand. Beyond Alabama and beyond section 5, the ability of the Court's decision to correct the popular but mistaken misreading remains to be seen.

A second explanation for the prevalence of the cartoon is administrability. Building districts upon raw demographic percentages is not only easy to grasp, but comparatively easy to administer. Map drawers who understand the nuanced electoral assessment required by the Voting Rights Act may nevertheless be tempted to apply the demographic shortcut based on limited time, budget, or attention—or some combination of the three.<sup>162</sup> Even when these pressures do not amount to lawful justification to substitute a shorthand for a statute, the pressures are nevertheless both very real and very powerful. Similarly, because cases alleging the unconstitutional use of race are difficult to prove and difficult to win,<sup>163</sup> line drawers may believe that they are generating less litigation risk by overcorrecting, using race in an unjustifiably coarse manner to create at least the facial impression that there is no substantial Voting Rights Act liability.<sup>164</sup> In reality, reliance on a target percentage alone remains unlawful,<sup>165</sup> but perhaps line-drawers believe that the ham-handed approach will better prevent them from landing in court<sup>166</sup> or that it can more easily be defended once there.

A third, and related, potential explanation may be a more strategic form of “misunderstanding.” As shown above, compliance with the

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162. Cf. Coglianese et al., *supra* note 89, at 712 (noting that performance standards may entail larger costs and greater uncertainty); *supra* text accompanying note 89 (identifying the Voting Rights Act as a performance standard rather than a design standard).

163. See *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001) (re-emphasizing that the burden of proof on the plaintiffs in such cases is “a ‘demanding one’” (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995))).

164. Cf. *Edelman*, *supra* note 156, at 1542 (positing that “[l]aws that are ambiguous, procedural in emphasis, and difficult to enforce invite symbolic responses—responses designed to create a visible commitment to law” but which may or may not mitigate the substantive wrongs the laws target).

165. Cf. *Johnson v. De Grandy*, 512 U.S. 997, 1019-20 (1994) (“Finally, we reject the safe harbor rule [necessarily insulating states with rough proportional control from liability under section 2 of the Voting Rights Act] because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity.”).

166. Thus far in the 2011 cycle, plaintiffs have filed at least 218 distinct lawsuits affecting state legislative or federal redistricting. *Litigation in the 2010 Cycle*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/cases.php> (last visited Apr. 1, 2016). Only eight states have (thus far) escaped litigation over their statewide districts. See *id.* It is likely that those states escaped litigation not because their redistricting process and resulting districts conformed to a Platonic ideal, but rather because no set of litigants with the resources to engage the courts was sufficiently outraged by the redistricting to sue. That is, while the right process may well prevent the *invalidation* of a district map, it is not clear that any approach to the redistricting process can reliably prevent the filing of a suit.

real statute entails extra effort; as shown below, some may find alternatives to the real statute appealing for reasons beyond resource constraint. It is possible—unlikely, but possible—that those adopting the shorthand in the course of drawing district lines did so with the hope that their misreading of the Voting Rights Act would be ratified by the courts, and thereby become law.<sup>167</sup> Thus far, only a few courts seem to have taken the bait.<sup>168</sup>

A fourth potential explanation is pretext for partisan or other self-regarding political gain.<sup>169</sup> Incumbents may seek to further personal or partisan political objectives by hiding behind the public cover of the cartoon of the Voting Rights Act: claiming, in essence, that “we built these districts in this way not because we want to, but because we have to.” In some cases, an unnecessary raw demographic target may serve as the excuse to overpack a district with cohesive minority voters, well beyond the level needed to actually comply with the Act’s mandates; such a district may contribute to the “safety” of the existing representative while bleaching the perceived threat of minority voting power in neighboring areas. This was, for example, one of the concerns expressed by a state judge evaluating Florida’s most recent redistricting.<sup>170</sup> In other cases, an unnecessary raw demographic target may serve as the excuse to draw a district that *appears* to be under a minority community’s control, but is actually designed to perform for an opponent. A federal court believed this sort of strategy to be the impetus for at least some districts in the 2011 Texas map—including, notably, the same District 23 struck down by the Supreme Court in 2006 *for the very same reason*.<sup>171</sup>

A final potential explanation also involves pretext for partisan political gain, but of a different and darker nature. In South Carolina, a

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167. I am grateful to Joseph Doherty for the insight.

168. See *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1301-02 (M.D. Ala. 2013), *vacated by* 135 S. Ct. 1257 (2015); *Dickson v. Rucho*, 781 S.E.2d 404, 416-17, 421-22, 431-35 (N.C. 2015).

169. See, e.g., Crayton, *supra* note 73, at 1008.

170. *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 693 (Fla. 2012) (Perry, J., concurring) (“It concerns me that under the guise of minority protection, there is—at the very least—an appearance that the redistricting process sought to silence the very representatives of the people the Legislature indicates it is trying to protect. For example, during floor debate one such representative, Senator Arthenia Joyner, rose in opposition to the redistricting plan, stating: ‘I believe that [the reapportionment plan] was prepared in violation of Florida’s Redistricting standards. Specifically I believe the Legislature is poised to use the pretext of minority protection to advance an agenda that seeks to preserve incumbency and pack minority seats in order to benefit a particular party.’”) (alteration in original) (footnote omitted).

171. Compare *Texas v. United States*, 887 F. Supp. 2d 133, 155 (D.D.C. 2012), *vacated on other grounds by* 133 S. Ct. 2885 (2013) (mem.), with *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 424-25 (2006); see also *id.* at 440-41 (noting the “use of race to create the facade of a Latino district” that was actually designed “to protect [incumbent] Congressman Bonilla from a constituency that was increasingly voting against him”).

state representative related the following anecdote in a sworn affidavit submitted in federal court:

As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. . . . Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a "D" by a candidate's name knows that the candidate is an African-American candidate. . . . Then he chuckled and said, "Well now, South Carolina will soon be black and white. Isn't that brilliant?"<sup>172</sup>

It is not necessary to subscribe to this latter view of the rationale for drawing districts based on demographics alone in order to find the practice disturbing. All of the explanations above fail to justify a practice that is intentionally discriminatory if pretextual, and unduly dependent on essentialist assumptions if not. As most courts have thus far recognized, the Voting Rights Act does not require, and the Constitution does not permit, shortcuts based solely on blunt minority population targets. Congress has demanded, and is constitutionally entitled to demand, more.

Indeed, by failing to account for real local electoral behaviors, the legislators operating on demographic assumptions are subscribing to a retrograde conception of race relations that undermines a good deal of what the Voting Rights Act was designed to accomplish. It betrays the very heart of the Act, which acknowledges that race and ethnicity are complex and nuanced concepts without fixed political consequences. Those drawing district lines based on demographic targets alone are conforming only to a dangerously essentialist cartoon. Courts—and consultants to the redistricting process who are worth their fees—should not hesitate to remind line-drawers that they should be paying more attention to the actual statute on the books.

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172. Affidavit of the Hon. Mia Butler Garrick at ¶ 16, *Backus v. South Carolina*, No. 3:11-CV-03120 (D.S.C. Feb. 22, 2012), Doc. 147.