CONFIDENTIAL TREATMENT FORM

INSTRUCTIONS. Complete either *Section 1* or *Section 2* of this CT Form and sign where indicated. This CT Form must be signed by the individual who signed the bidder's proposal. A completed CT Form must be submitted with your proposal, regardless of whether your proposal contains confidential information.

Failure to submit a completed CT Form with your bid is grounds for rejecting the proposal as non-responsive. See the **Confidential Treatment Form** and **The Freedom of Information Act** (FOIA) sections of the *Proposal Instructions* for additional information.

Section 1. CONFIDENTIAL TREATMENT IS NOT REQUESTED

This section must be completed, signed, and submitted with the proposal if the bidder does **not** request confidential treatment of any material contained in the proposal.

By signing below, the bidder affirms that confidential treatment of material contained in their proposal is not requested.

RFP Number **920, 210000001155**	RFP Title Voting Rights Act Legal Counsel
Signature /s/ Kareem Crayton	Date March 15, 2021
Printed Name, Title, Company	Manager, Crimcard Consulting

CONFIDENTIAL TREATMENT FORM

Section 2. CONFIDENTIAL TREATMENT IS REQUESTED

This section must be completed, signed, and submitted with the proposal if bidder requests confidential treatment of any material contained in the proposal. Submission of a completed CT Form is required to request confidential treatment.

Provide the information in the table below. Bidder may add rows or additional pages using the same format shown in the table. Bidder must specifically identify the information to be protected as confidential and Commission the reasons why protection is necessary.

The CT Form will not be considered fully complete unless, for each confidentiality request, the bidder: (1) Identifies the Proposal Page #, Section #, and Paragraph #, (2) Identifies whether the material is a Trade Secret (TS), Proprietary Financial Information (FI), or Proprietary Information (PI), (3) Explains the specific legal grounds that support treatment of the material as TS, FI, or PI. Bidders must provide a complete justification as to how the material falls within the scope of an applicable FOIA Exemption or relevant case law. Bidders must not simply cite to an applicable exemption or case name, and (4) Provides the contact information for the person at Bidder's organization authorized to respond to inquiries by the Commission concerning the material.

(1) Proposal Page #, Section #, Paragraph #	(2) Material is Trade Secret (TS), Proprietary Financial Information (FI), Proprietary Information (PI)	(3) Applicable FOIA Exemption with Written Justification	(4) Bidder Contact Information

By signing below, the bidder affirms that confidential treatment of material contained in their proposal is requested and has attached to this form a redacted "Public Copy" of the bidder's proposal.

RFP Number No. 920, 210000001155

RFP Title Voting Rights Act Legal Counsel

Signature

Date March 15, 2021

Printed Name, Title, Company

VENDOR QUESTION WORKSHEET

Provide a detailed response to each question. "You" and "company" refers to the bidder.

Information Sought	Bidder Response
1. Contact Information	
Bidder's sole contact person during the RFP process. Include name, title, address, email, and phone number.	Kareem Crayton, JD, PhD Managing Partner, Crimcard Consulting Services [redacted]
Person authorized to receive and sign a resulting contract. Include name, title, address, email, phone number. The awarded vendor will be required to establish an account in SIGMA Vendor Self-Service	Kareem Crayton, JD, PhD Managing Partner, Crimcard Consulting Services [redacted]
2. Company Background Information	
Legal business name and address. Include business entity designation, e.g., sole proprietor, Inc., LLC, or LLP.	Crimcard Consulting Services, LLC
What State was the company formed in?	Crimcard is an Alabama LLC
Phone number.	[redacted]
Website address.	http://kareemcrayton.com/crimcard.html
Number of years in business and number of employees.	Crimcard is a sole proprietorship consultancy/
Legal business name and address of parent company, if any.	N/A
Has there been a recent change in organizational structure (e.g., management team) or control (e.g., merger or acquisition) of your company? If the answer is yes: (a) explain why the change occurred and (b) how this change has affected your company.	This company was founded in 2010 and collaborates with elected leaders and public officials on election law and voting rights projects.
Discuss your company's history. Has growth been organic, through mergers and acquisitions, or both?	Crimcard has existed for more than ten years.
Has bidder ever been debarred, suspended, or disqualified from bidding or contracting with any entity, including the State of Michigan? If yes, provide the date, the entity, and details about the situation.	No.
Has your company been a party to litigation against the State of Michigan? If the answer is yes, then state the date of initial filing, case name and court number, and jurisdiction.	No.
Within the last 5 years, has your company or any of its related business entities defaulted on a contract or had a contract terminated for cause? If yes,	No.

provide the date, contracting entity, type of contract, and details about the termination or default.	
State your gross annual sales for each of the last 5 years. If receiving a contract under this RFP will increase your gross revenue by more than 25% from last year's sales, explain how the company will scale-up to manage this increase.	Crimcard is a boutique consultancy that collaborates with other social scientists and lawyers on projects of interest across the country. The firm has managed contracts that range above the six figure mark. These include consulting projects with public entities as clients.
Describe partnerships and strategic relationships you think will bring significant value to the Commission.	Dr. Crayton has developed extensive partnerships in academia, among public officials, and among community organizations presenting before Commissions. His credentials are unparalleled in the industry and establish his position to provide this crucial service.
For the bidder, primary contractor, principal(s) of the primary contractor, key personnel, any subcontractors, or employees provide disclosures regarding the following relative to their redistricting work with individuals, groups or any public or private entities for the same or substantially similar work described in this RFP: (1) list of past relationships and (2) identify any current relationships and (3) identify any anticipated or future relationships that will be sought by the bidder. For each of the 3 categories of relationships, please identify which could give rise to a potential, actual or apparent conflict of interest and provide measures that would be taken to avoid or address a conflict, should one currently exist or would likely arise in the future. These disclosure and conflict requirements are ongoing and will be the responsibility of the successful bidder for the full contract term.	Dr. Crayton has worked as consultant on several projects, and has prior working relationships in the academic community, in Congress, and in the non-profit world. In his capacity as a professor, he appeared on a panel in 2015 at Wayne State Law School, where Secretary of State Benson served as dean. He also represented the Congressional Black, Hispanic, & Asian Pacific Islander Caucuses as amicus counsel in a U.S. Supreme Court case NAMUDNO v. Holder (defending the constitutionality of the Voting Rights Act. None of these relationships pose a legal conflict.
State the physical address of the place of business that would have primary responsibility for this account if bidder is awarded a contract under this RFP.	124 Elm Drive Montgomery, AL 36117
3. Participation in RFP Development or Evaluation	
Did your company, an employee, agent, or representative of your company, or any affiliated entity participate in developing any component of this solicitation? For purposes of this question, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly: (1) either one controls or has power to control the other or (2) a third-party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership,	**Enter YES or NO.** No. If you enter "YES", you are not eligible for contract award or to work as a subcontractor for the awarded vendor.

identity of interests among family members, shared facilities or equipment, and common use of employees.	
If you are awarded a contract under this solicitation, in order to provide the goods or services required under a resulting contract, do you intend to partner or subcontract with a person or entity that assisted in the development of this solicitation?	**Enter YES or NO.** No. If you enter "YES," you are not eligible for contract award. An awarded vendor may not partner or subcontract with anyone to provide goods and services required under a resulting contract if that subcontractor or partner assisted in the development of this solicitation.
Will your company, or an employee, agent, or representative of your company, participate in the evaluation of the proposals received in response to this RFP?	**Enter YES or NO.** No. If you enter "YES", you are not eligible for contract award or to work as a subcontractor for the awarded vendor.
4. State of Michigan Experience and Prior Experience	
Does your company have experience working with the State of Michigan? If so, please provide a list (including the contract number) of the contracts you hold or have held with the State for the last 10 years.	Crimcard has not consulted in the state of Michigan, but Dr.Crayton has presented his research at Wayne State Law School in the past ten years.
Describe all relevant experiences from the last 20 years supporting your ability to successfully manage a contract of similar size and scope for the work described in this RFP. These experiences should include: • Significant expertise and experience in providing legal and advisory services specific to the Voting Rights Act ("VRA"), redistricting, and issues of equal protection and race in redistricting. • Experience and expertise in Michigan Election Law as it pertains to the Michigan Election Law (Act 116 of 1954). • Experience or expertise providing legal counsel and guidance to public bodies, boards or commissions	In addition to Dr. Crayton's scholarly and teaching record of more than a decade in the area of voting rights and redistricting redistricting (both in law and political science), he has served as a consultant nationwide, including statewide projects in California, Alabama, and North Carolina -- all which have Voting Rights Act compliance concerns. His principal role is providing guidance andanalysis of how the law applies in different contexts, including where decisionmakers are Commissioners. Though he has not worked in Michigan, he is familiar with its election law as well as the Amendment thatestablished the Commission. As he has in other cases, Dr. Crayton is more than able to assist decisionmakers to find ways to harmonize federal and statelaw mandates where possible. Note: Other related engagements are described in pertinent detail in resume and other responses.
Experience 1	
Company name. Contact name. Contact role at time of project.	North Carolina General Assembly Rep. Grier Martin House Minority Whip

VENDOR QUESTIONS WORKSHEET

Contact phone. Contact email.	[redacted] [redacted]
City. State. Zip.	Raleigh, North Carolina 27601
Dollar value.	Exceeding $100,000 (cumulative)
Start and end date (mm/yy – mm/yy)	January 2012-August 2012; August 2017
Status (completed, live, other – specify phase)	Completed
Results obtained.	Assessed mapping proposals and developed VRA compliance strategy (in light of newly interpreted state law rules) for legislative minority caucus; Dr. Crayton's theory for VRA compliance upheld by the U.S. Supreme Court in striking the legislature's first map. The General Assembly's remedial state and federal maps subsequently reflected these guiding districting principles.
Experience 2	
Company name. Contact name. Contact role at time of project. Contact phone. Contact email.	Los Angeles City Council Jan Perry Former Council Member, District 9 [redacted] [redacted]
City. State. Zip.	Los Angeles California 90012
1. Project name and description of the scope of the project. 2. What role did your company play? 3. How is this project experience relevant to the subject of this RFP?	Los Angeles City Redistricting Assisted Communities of select Council Districts in Developing Proposed Maps, specifically related to VRA compliance. This work included developing material presented to advisory non-partisan commission.
Dollar value.	Exceeding $100,000
Start and end date (mm/yy – mm/yy)	April 2013- September 2013
Status (completed, live, other – specify phase)	Complete
Results obtained.	Map survived legal challenge and city adjusted process based on recommendations to improve input collection and record keeping.
Experience 3	
Company name. Contact name. Contact role at time of project. Contact phone. Contact email.	African American Redistricting Collaborative Jackie Dupont Walker Advisor/Coordinator [redacted] [redacted]

VENDOR QUESTIONS WORKSHEET

1. Project name and description of the scope of the project. 2. What role did your company play?	Developed presentations to California Citizens Redistricting Commission on behalf of African American communities statewide; provided analysis of VRA implications of alternative plans and advised Commissioners about the more complex ways to comply with the statute, in light of the multiple communities seeking enhanced representation in the process. Contributed to the development of a Unity Map that informed the Commission's final configurations in key geographic areas in the state.

VENDOR QUESTIONS WORKSHEET

3. How is this project experience relevant to the subject of this RFP?	Key elements of legal research, advising, and coordination are closely analogous to the context in Michigan's commission. This is especially so with the confluence of federal law concerns with the practical consideration of representing multiple communities of interest.
Dollar value.	Exceeding $50,000
Start and end date (mm/yy – mm/yy)	March 2011 through June 2011
Status (completed, live, other – specify phase)	Completed
Results obtained.	Commission approved a map that adhered in significant part to the suggestions presented that would balance the different concerns of communities of color presenting to the commission. The principal contribution was to show that such a map could comply with the VRA considerations while also meeting practical concerns.
5. Standard Contract Terms	
Bidder must affirm agreement with the attached Contract Terms. If not in agreement, written exceptions in accordance with the Evaluation Process section of the Proposal Instructions must be provided with Bidder's proposal.	Agree
6. Michigan Economic Impact	
Number of employees currently employed at locations within the State of Michigan.	Zero
Number of additional employees to be employed at locations within the State of Michigan if awarded this Contract (if any)	Zero
Minimum wage paid to employees employed at locations within the State of Michigan.	N/A
Average wage paid to employees employed at locations within the State of Michigan.	N/A
Percentage of employees employed at locations within the State of Michigan that are covered by employer-provided health insurance.	N/A
8. Other	
Abusive Labor Practices. The Contractor certifies that it will not furnish any Deliverable that was produced fully or partially by forced labor, forced or indentured child labor, or indentured servitude.	**Enter YES or NO.** Yes.

VENDOR QUESTIONS WORKSHEET

Certification of Michigan Business- Public Act 431 of 1984, Sec. 268. I certify that the company has, pursuant to the provisions of Sec 268 of Public Act 431 of 1984, filed a Michigan Business Tax Corporate Income Tax Return. I certify that the company has, pursuant to the provisions of Sec 268 of Public Act 431 of 1984, filed a Michigan Income Tax return showing income generated in, or attributed to the State of Michigan. I certify that the company has, pursuant to the provisions of Sec 268 of Public Act 431 of 1984, withheld Michigan Income Tax from compensation paid to the company's	**Enter YES or NO.** N/A (Not a MI entity)

owners and remitted the tax to the Michigan Department of Treasury.	
Iran Linked Business- Public Act 517 of 2012. I certify that the Company is not an Iran-Linked business as defined by Public Act 517 of 2012.	**Enter YES or NO.** No.
Clean Corporate Citizen. I certify that the Company is a Clean Corporate Citizen as defined by the Environmental Protection Act, 1994 PA 451.	**Enter YES or NO.** Yes.
Convict Labor. The Contractor certifies that if using convict labor, it is complying with all applicable state and federal laws and policies.	**Enter YES or NO.** N/A
SOM Debt/Tax Payment. I certify that all applicable State of Michigan taxes are paid, and that no outstanding debt is owed to the State of Michigan.	**Enter YES or NO.** Yes.
Authorization to Verify Information Provided by Vendor. I authorize the Commission to verify that all information provided in this registration, in bidding and contracting documents, and any attachments or supplement documents and processes are accurate.	**Enter YES or NO**. Yes

SCHEDULE A- STATEMENT OF WORK CONTRACT ACTIVITIES

Contractor must enter company name here. Crimcard Consulting Services

Request for Proposal (RFP) No. 920, 210000001155

Voting Rights Act Legal Counsel

This schedule identifies the anticipated requirements of any Contract resulting from this RFP. The term "Contractor" in this document refers to a bidder responding to this RFP, as well as the Contractor who is awarded the contract. The term "bidder" is used to identify where specific responses to the RFP are required.

The Contractor must respond to each requirement or question and explain how it will fulfill each requirement. Attach any supplemental information and appropriately reference within your response.

IMPORTANT NOTE TO CONTRACTORS/BIDDERS: There are specific requirements for which acceptance must be simply acknowledged through a checkbox(es), and others that require further explanation. Click one checkbox and complete the entries as identified.

BACKGROUND

In accordance with the Michigan Constitution of 1963, Article IV, Section 6, an Independent Citizens Redistricting Commission (the "Commission") shall adopt a redistricting plan in Michigan, not later than November 1 in the year immediately following the federal decennial census, for each of the following types of Michigan districts: state senate districts, state house of representative districts, and congressional districts. This proposal and adoption of district lines (called "redistricting") shall comply with the Voting Rights Act and other federal laws as well as conform with all criteria set forth in Article IV, Section 6 of the Michigan Constitution, and in particular Article IV, Section 6, subsection 13 of the Michigan Constitution.

The Commission is seeking Requests for Proposals ("RFP") from attorneys, law firms or other entities, to provide legal and advisory services specific to the analysis and application of the Voting Rights Act ("VRA") and other state and federal laws applicable to redistricting, for the inaugural Commission. These legal and advisory services will aid the Commission in the proposal and adoption of redistricting plans, pursuant to the Michigan Constitution of 1963, Article IV, Section 6.

STATEMENT OF WORK

The required legal and advisory services may include, but will not be limited to, legal support to the Commission as well as Commission staff, attorneys and consultants regarding the redistricting process based on publicly available data, specifically as it relates to compliance

with the federal Voting Rights Act and similar criteria outlined in Article IV, Section 6, subsection 13 of the Michigan Constitution of 1963.

Any Contractor selected by the Commission will be required to enter into a Legal Services Agreement for the work described in this RFP. It is anticipated that work will begin as soon as practicable following the RFP selection process and continue through approximately March 2022.

Applicants must have demonstrated expertise in the federal Voting Rights Act and the application of it in evaluating redistricting plans during a redistricting process. In addition, expertise with Michigan Election Law (Act 116 of 1954) and relevant federal and state case law are preferred. Participation in public meetings as requested by the MICRC is required.

Qualifications and responsibilities for the attorney, law firm or other entity are as follows below:

1. Perform all normal and customary duties required of special redistricting counsel in connection with legal issues related to the full range of redistricting activities.
2. Work with and advise the Commission, its staff, attorneys and consultants with respect to legal issues (in particular pertaining to the Voting Rights Act) in connection with drawing new district boundaries and advise the Commission, its staff, attorneys and consultants as to the procedures, legality of documents, policy concerns and legal implications concerning redistricting activities.
3. Advise the Commission, its staff, attorneys and consultants regarding the requirements of State and Federal laws relevant to redistricting activities, and in particular demonstrate expertise and experience with Section 2 and Section 5 of the Voting Rights Act, and subsequent relevant cases.
4. Advise the Commission, its staff, attorneys and consultants of litigation risks associated with redistricting activities and approaches to limit such risks.
5. Participate in litigation or provide expert witness services related to compliance with the Voting Rights Act as well as state and federal laws. This legal support and defense of the redistricting plans approved by the Commission will be provided in consultation with the General Counsel of the Commission.
6. Attend various meetings and hearings, including but not limited to Commission public meetings and hearings when requested by Commission members or its staff or the Program Manager.

Contractors, subcontractors and employees must be in compliance with any applicable law or policy at all times, and if an attorney be in good standing with the State Bar of Michigan or their state licensing entity through the full contract term and any extensions. If the primary contractor is not licensed to practice in the State of Michigan, please provide information on local counsel that would be engaged or the process that would be used to select local counsel if direct representation becomes necessary, and whether their role is anticipated to be advisory or more substantive in nature. Contractor must possess the skill, experience, ability, background, certification and knowledge to provide the services described in this Contract on the terms and conditions describes herein.

1 Requirements

1.1 Key Deliverable One

Key expertise or desirable expertise to fulfill the Statement of Work above:

(a) **Redistricting Expertise.** The attorney, firm or other entity must demonstrate experience and expertise in legal and advisory services specific to redistricting andthe Voting Rights Act ("VRA") to advise the Commission, its staff, attorneys and consultants.

Provide a description of demonstrated expertise and experience with redistricting, reapportionment districting and elections activities and subsequent relevant cases, including the following:

i) Names of the public entities or private parties represented in redistricting matters, including experience representing public bodies, boards or commissions.

ii) The principle legal issues presented in each matter handled by the attorney, law firm or entity.

iii) The outcome of the prior redistricting representation.

iv) Any relevant published work.

v) Specifically address demonstrated experience as it pertains to Section 2 and Section 5 of the Voting Rights Act.

Bidder must provide a detailed response for requirement(s):

Among the very small group of formally trained law and politics experts nationally, Dr. Crayton is the only person with professional experience in and out of government (state and federal), which informs his ability to appreciate developing procedures and assessing alternate mapping proposals. His political science dissertation *What's New About the New South* examined legislative choices and strategies in states that faced racial gerrymandering lawsuits in the 1990s. Additionally, he has experience that includes:

o NC Redistricting – State and Federal Districts. On behalf of the North Carolina Democratic delegation, Dr. Crayton provided advice and guidance in developing a record that ultimately led to the 4th Circuit review that struck significant portions of this map in light of an intervening decision from the U.S. Supreme Court focused on the legislature's failure to comply with VRA considerations that Dr. Crayton highlighted during the process.

o CA Redistricting Commission – Dr. Crayton provided consulting advice for the African American Redistricting Collaborative, which advocated for districting principles that balanced voting rights concerns with practical considerations. He was a principal contributor to the Unity Map that informed the Commission's approach to districts in Los Angeles, San Diego, and the Bay Area.

o Los Angeles Redistricting Commission: Provided advice to community members in City Council Districts 8 and 9 in the development of preferred maps before the city's inaugural advisory commission.

o Lee v. City of Los Angeles: Served as expert witness on behalf of Koreatown plaintiffs in a 14th Amendment racial gerrymandering claim against the city council in federal court. Report focused on the lack of evidence showing racially polarized voting and evidence of unlawful racial intent in designing districts. This case ended in an adverse decision on summary judgment in district court.

o Alabama v. Alabama Legislative Caucus: Served as Special Counsel to the House Democratic leader in the AL Legislature for a session to draw new legislative districts to remedy racial gerrymandering violations found by the U.S. Supreme Court. The resulting maps were upheld by the U.S. District Court on review.

(b) **Michigan Election Law Expertise.** It is desirable that the attorney, firm or otherentity demonstrate experience and expertise in Michigan Election Law.

Provide a description of demonstrated expertise and experience in advisory and legal services (if any) as it pertains to Michigan Election Law (Act 116 of 1954), **Cumulative Experience.** Provide a summary of why, based on previous experience,the Contractor is uniquely qualified to assume the role of Voting Rights Act Legal Counsel for the Commission.

Bidder must provide a detailed response for requirement(s):

Dr. Crayton has not worked directly with Michigan's election law in past consulting projects. However, he is quite familiar with the structure and details of the 2018 revisions to the state law, as they largely track the system adopted in California for the 2010 redistricting cycle. He is therefore equipped to address the details and mandates of the current state law as it applies to the Commission's task. In addition to his record of published work on the Voting Rights Act, his experience includes the following:

- Dr. Crayton is the substantive architect of *The Redistricting Game*, the first-of-its kind online game that has taught practitioners and legislators about the law and policy of redistricting, including ideas for reform, for more than 10 years.

- Among litigation projects, Dr. Crayton has served as amicus counsel on:
  - NAMUDNO v. Holder. A constitutional test of Section 5 of the Voting Rights Act in US Supreme Court. Amicus brief was filed on behalf of Congressional Black Hispanic & Asian Pacific Islander ("Tri-Caucus") in support of the law's constitutionality. The Court upheld the statutory provision.
  - Shelby County v. Holder. A second test of Section 5 of Voting Rights Act's constitutionality in US Supreme Court, in which an amicus brief was filed on behalf of legal and social science scholars in support of constitutionality. The Court struck the provision's coverage formula.
  - Applewhite v. Commonwealth of Pennsylvania: Challenge to Pennsylvania's voter ID law in PA Supreme Court, in which an amicus brief was filed on behalf of Senate Democratic Caucus. The PA Supreme Court struck down the provision.
  - Dickson v. Rucho: Redistricting challenge to state legislative and congressional districts in NC Supreme Court, with an amicus brief filed on behalf of NC Legislative Black Caucus. The NC court upheld the maps, but federal courts later struck them based on related racial gerrymandering claims.

1.2 Key Deliverable Two

Key operational requirements and inquiries to fulfill the scope of work above:

(a) **Key Personnel.** In the case of a law firm or other entity, identify the lead attorney or other attorneys, if any, who will be assigned to the work and the anticipated percentage of time for each. Attorneys shall provide their state identification numbers and attest that they are in good standing with the state licensing agency. If the contractor is not licensed to practice in the State of Michigan, provide information on local counsel that would be engaged or the process that would be used to select local counsel if direct representation becomes necessary, and whether their role is anticipated to be advisory or more substantive in nature.

Bidder must provide a detailed response for requirement(s):

Principal Counsel/Consultant

Kareem Crayton, JD, PhD: Dr. Crayton is the founder and manager of Crimcard Consulting Services. He is distinguished as the country's sole JD/PhD (Political Science) whose principal research area focuses on issues of race, elections, and representation. An author of dozens of academic articles in law and political science, he is the substantive architect of the first-of-its-kind educational game called *The Redistricting Game*. His unique contributions to the world of redistricting, elections, and voting rights spans the academy, government, and the non-profit sectors. A *magna cum laude* graduate of Harvard College and Stanford University, Dr. Crayton has consulted and advised public and private clients on redistricting projects around the country, particularly on matters related to Voting Rights Act compliance. He is licensed to practice and remains in good standing in Alabama, the District of Columbia, and Maryland.

As it has in prior consulting projects for redistricting, Crimcard can work with the Commission to identify local counsel based on the issues presented.

SCHEDULE A- STATEMENT OF WORK CONTRACT ACTIVITIES

(b) **Motivations.** Provide a summary of why the attorney, firm or other entity seeks to serve the Commission.

Bidder must provide a detailed response for requirement(s):

This consulting practice is tailor made for the non-partisan, community centered, data driven process that this Commission envisions. Given the shifting legal landscape along with the evolving shape of diversity in Michigan's population, Commissioners will need experienced, reliable advice both about what is legally defensible and also about what is practically viable. To meet this charge, the firm offers an unparalleled and integrated services. The legal and practical attention to voting rights issues will help develop a clearer view of the key decisions that the Commission will encounter. Notably, this would include the ability to conduct and assess racially polarized voting trends as they might require certain district configurations under federal law.

(c) **Disclosures.** Disclose the following;

i) Previous legal services (paid or volunteer) by the attorney, firm, or other entity as it relates to redistricting, reapportionment, districting and elections activities provided to persons holding elective office, as well as partisan or non-partisan entities or organizations

ii) Any monetary political contributions or donations made on behalf of the attorney, firm or other entity

iii) Any monetary political contributions personally made by the attorneys listed in question 1.2(a).

Bidder must provide a detailed response for requirement(s):

Beyond the professional work listed above, Dr. Crayton has made limited political contributions to candidates for local office in Los Angeles (where he resided for five years) and in the 2020 presidential election (less than $2,500). Dr. Crayton has also made donations (none more than $100) to a variety of non-partisan, non-profit organizations but none of them has engaged in electioneering for or against a specific candidate for office.

During his tenure leading a public interest law organization through its transition, Dr. Crayton also has worked alongside lawyers at MALDEF and Common Cause in litigation-related matters in cases outside of Michigan.

(d) **Approach.** Provide a description of the approach of the attorney, firm or other entity to performing the responsibilities of Voting Rights Act Legal Counsel while remaining impartial, unbiased and non-partisan as set forth in Article IV, Section 6, Subsections 4 and 5 of the Michigan Constitution.

Bidder must provide a detailed response for requirement(s):

As mentioned above, the focus of this practice is to assist non-partisan entities with their efforts to develop maps that enhance democracy. Accordingly, the firm respects the key principles of impartiality and non-partisanship of the actors involved. For this reason, Dr. Crayton can commit that all individual members of his team (including subcontractors) will not engage in partisan donations, endorsements, or other partisan activity while working on this project. This prohibition would of course include activity within the state of Michigan.

Further, there is a reasonable concern that the advice and guidance delivered to the Commission reflect the best thinking of the firm. Projects will differ about the form such advice is delivered. Depending on the Commission's preferences, Dr. Crayton will (as he has in the past) establish norms of how and when communications occur (i.e., as a group or in smaller clusters), whether the role should be limited to advice or information gathering (serving as an information gathering resource), and whether the role should simply assist in developing analyses or providing a recommendation on a course of action. In all cases, of course, maintaining the confidentiality of the Commission's background work is of utmost importance.

1.3 Training

The Contractor must explain its training capabilities and any training that is included in its proposal, if any.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.

SCHEDULE A- STATEMENT OF WORK CONTRACT ACTIVITIES

List all exception(s):
Bidder must explain its training capabilities and any training that is included in its proposal: Dr. Crayton has taught election law and related subjects in law schools and political science departments around the county for almost two decades. Further, as an expert consultant, he has utilized the first-of-its-kind online game that he helped design (*The Redistricting Game*) for trainings. He possesses a deep well of experience training public officials, community members, and others nationwide on the mechanics of redistricting and the Voting Rights Act. His knowledge base on the current issues facing jurisdictions is unsurpassed. He is therefore especially well-suited to plan and execute trainings as envisioned this proposal.

2 Service Requirements

2.1 Timeframes

All Contract Activities must be delivered pursuant to work plans and internal deadlines set by the Commission. The receipt of order date is pursuant to the **Notices** section of the *Standard Contract Terms*.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.

List all exception(s):
Bidder must describe how they comply with the above requirement(s): Crimcard will work closely with the Commission to establish milestones for the development of work product as needed during this project. Related workplans detailing these deliverables will be agreed upon and followed with strict adherence, subject to adjustments as the circumstances may later warrant (with appropriate notice and agreement). Crimcard's working philosophy is that the development of these plans should be collaborative in nature, and it is a priority of Crimcard to keep all of its timeline commitments to provide information and advice to the Commission in the pursuit of its important work.

3 Reserved

4 Staffing

4.10 Contractor Representative

The Contractor must appoint one (1) contract administrator specifically assigned to the Commission account(s), who will respond to Commission inquiries regarding the Contract Activities, answer questions related to ordering and delivery, etc. (the "Contractor Representative").

The Contractor must notify the Contract Administrator at least 14 calendar days before removing or assigning a new Contractor Representative.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	
Bidder must identify its Contract Administrator: Kareem Crayton	

4.11 Work Hours

The Contractor must provide Contract Activities during the Commission's normal working hours Monday – Friday, 7:00 a.m. to 6:00 p.m. EST and possible night and weekend hours depending on the requirements of the project.

☐	I have reviewed the above requirement and agree with no exception.
☒	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s): Hours are acceptable. Worktime will be by arrangement, with prior notice for formal meetings.	

4.12 Key Personnel

The Contractor must identify all Key Personnel who will be directly responsible for the day-to-day operations of carrying out the key deliverables of the Contract ("Key Personnel"). Key Personnel must be specifically assigned to the Commission account, be knowledgeable on the contractual requirements, and respond to Commission inquiries within 24 hours.

Contractor's Key Personnel are expected to be available to participate in all MICRC meetings virtual or in person.

The Commission has the right to recommend and approve in writing the initial assignment, as well as any proposed reassignment or replacement, of any Key Personnel. Before assigning an individual to any Key Personnel position, Contractor will notify the Commission of the proposed assignment, introduce the individual to the Commission's Program Manager, and provide the Commission with a resume and any other information about the individual reasonably requested by the Commission. The Commission reserves the right to interview the individual before

granting written approval. In the event the Commission finds a proposed individual unacceptable, the Commission will provide a written explanation including reasonable detail outlining the reasons for the rejection. The Commission may require a 30-calendar day training period for replacement personnel.

Contractor will not remove any Key Personnel from their assigned roles on this Contract without the prior written consent of the Commission. The Contractor's removal of Key Personnel without the prior written consent of the Commission is an unauthorized removal ("Unauthorized Removal"). An Unauthorized Removal does not include replacing Key Personnel for reasons beyond the reasonable control of Contractor, including illness, disability, leave of absence, personal emergency circumstances, resignation, or for cause termination of the Key Personnel's employment. Any Unauthorized Removal may be considered by the Commission to be a material breach of this Contract, in respect of which the Commission may elect to terminate this Contract for cause under the **Termination for Cause** section of the Standard Contract Terms. It is further acknowledged that an Unauthorized Removal will interfere with the timely and proper completion of this Contract, to the loss and damage of the Commission, and that it would be impracticable and extremely difficult to fix the actual damage sustained by the Commission as a result of any Unauthorized Removal. Therefore, Contractor and the Commission agree that in the case of any Unauthorized Removal in respect of which the Commission does not elect to exercise its rights under Termination for Cause, Contractor will issue to the Commission the corresponding credits set forth below (each, an "Unauthorized Removal Credit"):

i. For the Unauthorized Removal of any Key Personnel designated in the applicable Statement of Work, the credit amount will be $25,000.00 per individual if Contractor identifies a replacement approved by the Commission and assigns the replacement to shadow the Key Personnel who is leaving for a period of at least 30-calendar days before the Key Personnel's removal.

ii. If Contractor fails to assign a replacement to shadow the removed Key Personnel for at least 30-calendar days, in addition to the $25,000.00 credit specified above, Contractor will credit the Commission $833.33 per calendar day for each day of the 30-calendar day shadow period that the replacement Key Personnel does not shadow the removed Key Personnel, up to $25,000.00 maximum per individual. The total Unauthorized Removal Credits that may be assessed per Unauthorized Removal and failure to provide 30-calendar days of shadowing will not exceed $50,000.00 per individual.

Contractor acknowledges and agrees that each of the Unauthorized Removal Credits assessed above: (i) is a reasonable estimate of and compensation for the anticipated or actual harm to the Commission that may arise from the Unauthorized Removal, which would be impossible or very difficult to accurately estimate; and (ii) may, at the Commission's option, be credited or set off against any fees or other charges payable to Contractor under this Contract.

The Contractor must identify the Key Personnel, indicate where they will be physically located, describe the functions they will perform, and provide current chronological résumés.

SCHEDULE A- STATEMENT OF WORK CONTRACT ACTIVITIES

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.

List all exception(s):

1. The Contractor must identify all Key Personnel that will be assigned to this contract in the table below which includes the following: Name and title of staff that will be designated as Key Personnel.
2. Key Personnel years of experience in the current classification.
3. Identify which of the required key personnel positions they are fulfilling.
4. Key Personnel's roles and responsibilities, as they relate to this RFP, if the Contractor is successful in being awarded the Contract. Descriptions of roles should be functional and not just by title.
5. Identify if each Key Personnel is a direct, subcontract, or contract employee.
6. Identify if each Key Personnel staff member is employed full-time (FT), part-time (PT) or temporary (T), including consultants used for the purpose of providing information for the proposal.
7. List each Key Personnel staff member's length of employment or affiliation with the Contractor's organization.
8. Identify each Key Personnel's percentage of work time devoted to this Contract.
9. Identify where each Key Personnel staff member will be physically located (city and state) during the Contract performance.

<Add more rows below as needed>

1. Name	2. Years of Experience in Current Classification	3. Role(s) / Responsibilities	4. Direct / Subcontract/ Contract	5. % of Work Time	6. Physical Location
Kareem Crayton	20	Founder/ Principal Consultant	Direct	80%-90%	Washington, DC area
Megan Gall	15	Social Science Data Assessment (RPV review)	Subcontract	10%	Washington, DC area

A. The Contractor must provide **detailed, chronological resumes** of all proposed Key Personnel, including a description of their work experience relevant to their purposed role as it relates to the RFP utilizing the required resume template labeled as Appendix A

Qualifications will be measured by education and experience with particular reference to experience on projects similar to that described in the RFP.

Bidder must provide the resumes and information as required above –as an attachment to this RFP labelled as Contractor-Resume.

4.13 Organizational Chart

The Contractor must provide an overall organizational chart that details staff members, by name and title, and subcontractors.

Bidder must provide detailed information as required above – as an attachment to this RFP labelled as Contractor- Org. chart

4.14 Disclosure of Subcontractors

If the Contractor intends to utilize subcontractors, the Contractor must disclose the following:

- The legal business name; address; telephone number; a description of subcontractor's organization and the services it will provide; and information concerning subcontractor's ability to provide the Contract Activities.
- The relationship of the subcontractor to the Contractor.
- Whether the Contractor has a previous working experience with the subcontractor. If yes, provide the details of that previous relationship.
- A complete description of the Contract Activities that will be performed or provided by the subcontractor.

Bidder must provide detailed information as requested in the above requirement(s).		
The legal business name, address, telephone number of the subcontractor(s).	Dr. Megan Gall	Censeo Consulting
A description of subcontractor's organization and the services it will provide and information concerning subcontractor's ability to provide the Contract Activities.	Dr. Gall is a quantitative political scientist & certified professional geographer (GISP) specializing in voting rights & redistricting. She focuses on quantitative analysis of Section 2 Voting Rights Act cases, supporting legal teams with statistics to measure racially polarized voting, illustrative redistricting plans, demographic analyses, and other quantitative assessments of disparate impact.	Firm that works with local jurisdictions to develop public policy through cutting edge data analysis. Major body of work has focused on economic / community development as well as political engagement and voter behavior.
The relationship of the subcontractor to the Bidder.	Collaborative Partner. Dr. Gall will help to execute analytical strategy as directed by Dr. Crayton's view of the Commission's needs to consider Voting Rights Act requirements.	Collaborative Partner. Censeo is available to offer additional support in the development of data the Commission may need in its consideration of VRA demands.
Whether the Bidder has a previous working experience with the subcontractor. If yes, provide the details of that previous relationship.	Dr. Crayton has collaborated with Dr. Gall on prior projects and is confident in her skill set to produce reliable data analysis to support his assessment of strategy.	Dr. Crayton has worked with Censeo on prior mapping projects and is confident in the company's ability to develop data analysis that can support this project.

SCHEDULE A- STATEMENT OF WORK CONTRACT ACTIVITIES

A complete description of the Contract Activities that will be performed or provided by the subcontractor.	As needed, Dr. Gall will supplement the work to develop reports on racially polarized voting that will support the recommendations Dr. Crayton will make about the applicability of the VRA in the mapping plans of the Commission.	If supplemental assistance is needed, Censeo can support the data development and analysis for prior elections to help produce the racially polarize voting reports and other statistical analysis as needed by the Commission in its work.
Of the total bid, the price of the subcontractor's work.	15-20%	5-10% (if needed)

The subcontractor must provide detailed, chronological resumes of all proposed Key Personnel, including a description of their work experience relevant to their purposed role as it relates to the RFP utilizing the provided template labeled as Appendix A. Qualifications will be measured by education and experience with particular reference to experience on projects similar to that described in the RFP.	Subcontractor must provide the resumes and information as required above –as an attachment to this RFP labelled as: Subcontractor Resume.

4.15 Security

The Contractor may be subject to the following security procedures:

- Background Checks

The Commission may require the Contractor's personnel to wear Commission issued identification badges for in person meetings.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	
Bidder must explain any additional security measures in place to ensure the security of the Commission and its facilities:	

5 Project Management

5.10 Project Plan

The Contractor will carry out this project under the direction and control of the Program Manager. Within 14 calendar days of the Effective Date, the Contractor must submit a final project plan to the Program Manager for approval. The plan must include: (a) the Contractor's organizational chart with names and title of personnel assigned to the project, which must align with the staffing stated in accepted proposals; and (b) the project breakdown showing sub-projects, tasks, timeline, and resources required.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.

List all exception(s):
Bidder must submit its project plan as described above: Please see file marked "Org. Chart & Work Plan"

5.11 Meetings

The Contractor must be available to attend all Commission meetings through the contract term either virtually or in person. The Commission will give the vendor as much notice as practical however, in no circumstances less than 18 hours of when they will be required to participate.

The Commission may require attendance at other meetings or events, as it deems appropriate.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

5.12 Reporting

In addition to submitting weekly status reports to the General Counsel of the Commission the Contractor should also identify other reports that would be helpful in accomplishing the Key Deliverables.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	
Bidder must explain its reporting capabilities and any reporting that is included in its proposal: As contemplated in the work plan, the Commission may desire reports that provide the general guidance about the application of the VRA in practice, both with respect to the existing (benchmark) district plan in Michigan as well as proposed plans presented to the Commission during the process. These assessments are the core of the work that Crimcard has developed as counsel and it could prove useful in considering the implications of adopting a configuration. The firm is capable of synthesizing the maps in an easy-to-follow way. Crimcard is also able to develop analysis of the process, to assure that the Commission is complying with the VRA's directive to assure that all communities have an equal opportunity to participate in the map drawing process. Based on prior experience, Dr. Crayton can offer ideas for assuring that outreach strategies are meeting these legal obligations so that resulting decisions represent the breadth of the state's input.	
Bidder must provide samples of required reports as attachments to this RFP. List file names here. Please see file marked "Sample Report A" & "Sample Report B"	

6 Pricing

7 Pricing

6.10 Price Term

Pricing is firm for the entire length of the Contract.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

6.11 Price Changes

Adjustments will be based on changes in actual Contractor costs. Any request must be supported by written evidence documenting the change in costs. The Commission may consider sources, such as the Consumer Price Index; Producer Price Index; other pricing indices as needed; economic and industry data; manufacturer or supplier letters noting the increase in pricing; and any other data the Commission deems relevant.

Following the presentation of supporting documentation, both parties will have 30 days to review the information and prepare a written response. If the review reveals no need for modifications, pricing will remain unchanged unless mutually agreed to by the parties. If the review reveals that changes are needed, both parties will negotiate such changes, for no longer than 30 days, unless extended by mutual agreement.

The Contractor remains responsible for Contract Activities at the current price for all orders received before the mutual execution of a Change Notice indicating the start date of the new Pricing Period.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

7Ordering

7.10 Authorizing Document

The appropriate authorizing document for the Contract will be a Delivery Order.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

8 Invoice and Payment

8.10 Invoice Requirements

All invoices submitted to the Commission must include: (a) date; (b) delivery order; (c) quantity; (d) description of the Contract Activities; (e) unit price; (f) shipping cost (if any); and (g) total

SCHEDULE A- STATEMENT OF WORK CONTRACT ACTIVITIES

price. Overtime, holiday pay, and travel expenses will not be paid.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

8.11 Payment Methods

The Commission will make payment for Contract Activities via EFT to the banking informationestablished in your vendor account within SIGMA-Vendor Self-Service.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

8.12 Procedure

Invoices must be submitted to: Julianne Pastula, the General Counsel of the MICRC for review,approval and forwarding for payment to Suann Hammersmith, the Executive Director of the MICRC.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

9 Liquidated Damages

Late or improper completion of the Contract Activities will cause loss and damage to the Commission and it would be impracticable and extremely difficult to fix the actual damage sustained by the Commission. Therefore, if there is late or improper completion of the Contract Activities the Commission is entitled to collect liquidated damages in the amount of $50,000 andan additional $1,000 per day for each day Contractor fails to remedy the late or improper completion of the Work.

☒	I have reviewed the above requirement and agree with no exception.
☐	I have reviewed the above requirement and have noted all exception(s) below.
List all exception(s):	

ORGANIZATIONAL CHART

Name	Role
Dr. Kareem Crayton	Principal counsel/consultant (advises Commission on legal and political considerations of mapping plans; develops strategy for process and mapping compliance; assesses proposed mapping plans, crafts reports on the legal implications of maps).
Dr. Megan Gall	Subcontractor (will deliver RPV study and other social science analysis as needed for VRA review)
Mr. Doug Turner	Subcontractor (provides supplemental support if deemed necessary by the Commission)

PROPOSED WORK PLAN

The following is a proposed timeline of the workplan for the engagement with the Commission, which contemplates a finished set of maps on or around Thanksgiving, 2021. The timing can vary depending upon the Commission's preferences, but the approach takes account of the fact that the census data is not expected to arrive before September 30. Since there is some estimated data available now about population changes, at least general review of possible changes to the map can occur during the summer through public meetings (which the Commission has already anticipated holding).

Additionally, this draft includes some attention to public engagement, an important factor in complying with federal voting rights law. This and other functions may be handled by governmental staff, but they are noted here for a broader view of how this team would approach the process. And this proposal does not take account of unexpected changes in the census numbers that may affect the availability of final numbers (one of the scenarios that the team, working with the city, can consider as it sets forth a strategy).

Time Period	Task	Personnel (subcontract)	Deliverables
April – May	Develop training for Commission Draft informational materials Update website for redistricting Craft strategy for public outreach Community outreach workshop Agreement on redistricting principles	Crimcard Commission	Finalize work plan (May 1) Public outreach plan (May 1) Updates to website (May 1) Educational materials (May 1) Start public outreach (May 15) First training sessions (May 30) Governing principles (May 30)
June – July	Commission training sessions (continuing) Public outreach about process Host public hearings Commission and Report RPV Study	Crimcard Commission (Gall) (Censeo)	Public hearings (ongoing) Outreach on public hearings (ongoing) Report on public input (July 31) RPV study/report (July 31)
August – September	Session discussing RPV study Open plan submission period Census Numbers arrive (Sept. 30) Mapping tool for public use?	Crimcard Commission (Gall) (Censeo)	Online mapping tool (Sept. 1) Hearing summary (Sept 15) Note decision points (Sept. 30) Training on maps (Sept. 30)
October – November	Commission review of public input Release of proposed map options Public hearings on map options City decision on final map Develop summary report on map Posting of final map for public comment	Crimcard Commission	Updates to website (ongoing) Reports on proposals (Nov 7) Hearings on proposals (Nov 15) Final map & report (Nov 30)
December	Finalize plan Posting of summary report on process Submitting to authorities	Crimcard Commission	Submission to state authority

CONTRACTOR REFERENCES

Start Date: *February 2011*	End Date: *July, 2011*
Client/Project: California Statewide Redistricting (Former Commissioner Connie Gallambos Malloy, [redacted]	
Employer: African American Resource Collaborative	
Title/Percentage of time: *Redistricting Consultant, 15% of time*	
Description: Worked on behalf of organization representing African American communities present plans that complied with the VRA before the inaugural Citizens Commission in California. Contributed to mapping configurations for the Unity Map largely approved by the Commission to balance competing concerns of advocacy organizations.	

Start Date: January 2012	End Date: June 2012
Client/Project: Los Angeles City Council Redistricting (Former member Jan Perry, [redacted]	
Employer: Jan Perry	
Title/Percentage of time: Consultant, 15% of Time	
Description: Assisted community members of CD's 8 and 9 present and assess mapping proposals to the city's inaugural advisory commission.	

Start Date: February 2012	End Date: September 2017 (periodically)
Client/Project: North Carolina redistricting (Rep. Grier Martin, [redacted]	
Employer: North Carolina General Assembly	
Title/Percentage of time: Redistricting Consultant, 20%	
Description: Assisted minority caucus delegation assess and develop alternate mapping configurations in compliance with the Voting Rights Act. Mapping principles were used to strike state map in the U.S. Supreme Court and ultimately embodied in remedial configurations.	

CONTRACTOR RESUMES

EDUCATION FOR KAREEM CRAYTON

Education		
Degree (i.e. PhD, Master's, Bachelors)	*Bachelors*	Year Completed: *1995*
Program	*Government, magna Cum Laude*	
University	*Harvard College, Cambridge, MA 02138*	

Additional Education		
Degree (i.e. PhD, Master's, Bachelors)	*J.D. & Ph.D.*	Year Completed: *2002*
Program	Law & Political Science	Political Science focus on American Politics
University	*Stanford University, Palo Alto, CA 94305*	

TRAINING – Provide any relevant technical or professional training related to the role resource will beproviding on this project.

Technical or Professional Training	
Course Name	Judicial Clerkship, U.S. Court of Appeals for the D.C. Circuit
Topic	Senior Judge Harry Edwards
Date taken	July 2002-July 2003

Certifications/Affiliations	
Name	Foreign Law Clerk, Constitutional Court for the Republic of South Africa
Topic/Description	Chief Judge Sandile Ngcobo (ret.)
Date completed	December 2003

EDUCATION FOR MEGAN A. GALL

Education		
Degree (i.e. PhD, Master's, Bachelors)	*Bachelors*	Year Completed: *2000*
Program	*Sociology*	
University	*Shepherd College, Shepherdstown WV*	

Additional Education		
Degree (i.e. PhD, Master's, Bachelors)	*Master's*	Year Completed: *2007*
Program	*Geographic Information Science*	
University	*University of Denver, Denver, CO*	

Additional Education		
Degree (i.e. PhD, Master's, Bachelors)	*Ph.D.*	Year Completed: *2013*
Program	Political Science	Political Science focus on American Politics
University	*University of Buffalo SUNY, Buffalo, NY*	

EDUCATION FOR DOUG TURNER (CENSEO)

Education		
Degree	*Bachelors*	Year Completed: *1990*
Program	*General Liberal Arts*	
University	*Birmingham Southern College, Birmingham, AL*	

Additional Education		
Degree (i.e. PhD, Master's, Bachelors)	*Master's*	Year Completed: 1994
Program	*Business Administration*	
University	*Dartmouth College, Hanover, New Hampshire*	

KAREEM U. CRAYTON

[redacted]

LEADERSHIP EXPERIENCE

Jul. 2008 – present

Crimcard Consulting Services, LLC – Montgomery, AL
Founder & Managing Partner
Provides foundations, public officers, and civic groups assistance with analysis and guidance on law and social science issues. Details at http://kareemcrayton.com/crimcard.html. Recruited and managed teams of experts on multiple projects that include:

- Redistricting Guidance (designed/presented plans for African American Redistricting Collaborative before the CA Redistricting Commission and for Democratic Caucus in NC).
- Litigation (consultant on *George v. Haslam*, challenging rule applied to TN ballot measure).
- Expert witness service (for Korean American Coalition in Los Angeles redistricting case).
- Amicus advocacy (led team of social scientists on brief in the U.S. Supreme Court case *Shelby County v. Holder* and on behalf of PA Senate Democrats in state voter ID case *Applewhite v. Commonwealth of Pennsylvania)*.

Jan. 2018 – Mar. 2020

Southern Coalition for Social Justice – Durham, NC
Interim Executive Director; Executive Director
Guided transition of advocacy organization working on voting rights and criminal justice issues.

- Managed and recruited a staff of approximately 15-20 employees and contractors, including lawyers, researchers, organizers, and administrative leadership.
- Raised $1.5 million in new funds, expanding the budget by 25%.
- Cultivated key individual relationships with foundation and high net worth donors.

Jan. 2017 – Jan. 2018

Alabama House of Representatives – Montgomery, AL
Chief of Staff & Special Counsel to House Democratic Caucus
Served in inaugural term of House Minority Leader Anthony Daniels.

- Led staff of 8-10 employees and contractors.
- Established statewide policy conference for experts, members, and civic stakeholders.
- Ran review protocol on state policies (e.g., tax, health care, education, election regulation).
- Developed caucus redistricting floor strategy to remedy a constitutional violation.

Feb. 2013 – present

Foundation for Society, Law and Art in South Africa
Founding Board Member & General Counsel
Established American entity to help secure resources for the long-term viability of a world-class art collection that features themes of art and social justice housed at the Constitutional Court of South Africa. Specific tasks included drafting organizational materials, collaborating to create an online art gallery for the works, and developing plan of donor relations and foreign partners. The Foundation has attracted more than half of a 2 million USD campaign for a sustaining endowment.

RESEARCH EXPERIENCE

Jan. 2016 – Jan. 2017 **Vanderbilt University Law School – Nashville, TN**
Visiting Professor of Law
Taught courses on Constitutional Law & Election Law.

Aug. 2014 – Dec. 2014 **University of Alabama School of Law – Tuscaloosa, AL**
Visiting Professor of Law
Taught four-week upper level course on voting rights litigation.

Jul. 2010 – Jul. 2015 **University of North Carolina School of Law – Chapel Hill, NC**
Associate Professor of Law
Taught Law & Social Science, Comparative Constitutional Law, Voting Rights, and Legislation. Served as faculty consultant/advisor in UNC's Institute for African American Studies. Presented comparative research in Canada, Australia, South Africa and Indonesia. Led selection of scholarly articles as special editor for *Journal of Civil Rights & Economic Development*.

Jul. 2005 – Jul. 2010 **University of Southern California School of Law – Los Angeles, CA**
Assistant/Associate Professor of Law & Political Science
Taught Voting Rights, Civil Procedure, Constitutional Law, Comparative Constitutionalism, and American Politics (undergraduate). Served on university's strategic planning committee. Content & Policy Director for first-of-its-kind online educational tool ***The Redistricting Game*** (www.theredistrictinggame.org). Special editor for work featured in Voting Rights Act edition of *USC Review of Law & Social Justice*.

Jul. 2005 – Jul. 2009 **Harvard University – Cambridge, MA**
Visiting Scholar/Affiliated Faculty, Department of Government
Collaborated with Department of Government scholars on research; attended interdisciplinary colloquia throughout the university, including the Department of History, Radcliffe Institute, and the Department of African American Studies.

EDUCATION

Aug. 1995 – Jun. 2002 **Stanford University – Palo Alto, CA**
JD/PhD (Political Science)
Dissertation: "What's New About the New South?" Teaching and research assistant in Law, African & African American Studies, and Political Science Departments. Served as graduate student representative on University Provost Search Committee, Faculty Appointment Committee. Awarded NSF Graduate Fellowship and Lane Family Graduate Fellowship. Foreign Law Clerk on Constitutional Court for South Africa and Law Clerk in U.S. Court of Appeals for the DC Circuit.

Aug. 1992 – Jun. 1995 **Harvard University – Cambridge, MA**
A.B. (Government, magna cum laude)
Honors Thesis: "Race, Remedies, and Redistricting: An Empirical Study of Politics and Race in the New South." Co-Founded Harvard Association Cultivating Inter-American Democracy and Harvard Mediation Service. Harvard College Scholarship and Advanced Placement Scholarship.

SELECTED PUBLICATIONS

Regulation By Charter: Judicial Review of Elections in South Africa, in YAP PIN JO, ED. JUDICIAL REGULATION OF ELECTION LAW (2016)

Legislative Politics & the Politics of Legislating, 14 ELECTION LAW JOURNAL (2015)

Three Chapters of the American Civil Rights Movement in TRIUMPHS AND TRAGEDIES OF THE MODERN PRESIDENCY, MAXMILLIAN ANGERHOLZER III, JAMES KITFIELD, CHRIS LU, & NORM ORNSTEIN, eds. (2015)

Unteachable: Shelby County, Canonical Apostasies, and Ways Forward for Voting Rights, 67 SMU L. REV. 3 (with Terry Smith) (2014)*, reprinted in* 31 CIVIL RIGHTS LITIGATION AND ATTORNEYS FEES ANNUAL HANDBOOK (2015)

The 1965 Voting Rights Act: Defeating Jim Crow in TRIUMPHS AND TRAGEDIES OF THE MODERN CONGRESS, MAXMILLIAN ANGERHOLZER III, JAMES KITFIELD, CHRIS LU, & NORM ORNSTEIN, eds. (2014)

The Art of Racial Dissent: African American Political Discourse in the Age of Obama, 89 CHICAGO-KENT L. REV. 689 (2014)

Five Justices, Section 4 & Three Ways Forward in Voting Rights, 9 DUKE J. OF CONST. LAW & PUB. POL. 113 (with Jane Junn) (2013)

Gender Unbound? Making Sense of Female Candidates in American Politics, 80 GEO. WASH. L. REV. 101 (2013)

Sword, Shield, & Compass: The Uses and Misuses of Racially Polarized Voting in Voting Rights Enforcement, 64 RUTGERS L. REV. 973 (2012)

The Changing Face of the Congressional Black Caucus, 19 S. CAL. INTERDISCIPLINARY L. J. 43 (2010)

You May Not Get There With Me: Barack Obama and the Black Political Establishment in BARACK OBAMA AND BLACK POLITICAL EMPOWERMENT, MANNING MARABLE & KRISTEN CLARKE eds. (Palgrave Press, 2009)

Beat 'Em or Join 'Em?: White Voters and Black Candidates in Majority-Minority Districts, 58 SYRACUSE L. REV. 547 (2007)

SELECTED MEDIA & PUBLIC APPEARANCES

Panelist, Georgia Public Radio's *Political Rewind,* "Redistricting and the Partisanship at Play," (December 27, 2019)

Moderator, Criminal Justice Reform Panel at Broadway's MCC Theater musical *The Wrong Man* (November 16, 2019)

Panelist, A Decade of Supreme Court Redistricting Decisions, *Making the Maps* National Conference of State Legislatures Seminar (June 21, 2019)

Panelist, NC Public Radio's *The State of Things*, "Constitutional Crisis? A Look at NC Proposed Amendments" (October 16, 2018)

Panelist, NPR's *1A,* "The Supreme Court Returns to Talk Gerrymandering and More" (October 2, 2017)

Interview, *PBS News Hour,* "50 Years on, Does the Voting Rights Act Offer Adequate Protection?" (August 6, 2015)

Op-Ed, *New York Times,* "The Confederate Flag Has Become a Trademark for Racism, Despite Its Historic Appeal" (June 19, 2015)

Interview, *PBS News Hour,* "Was the Supreme Court Ruling a Setback for Voting Rights?" (April 21, 2014)

Op-Ed, *USA Today,* "Court Ignores Reality" (June 26, 2013)

Interview, *NPR The Takeaway,* "Supreme Court Sidesteps Affirmative Action" (June 24, 2013)

Interview, *PBS News Hour,* "Democrats Play Offense in the South in Hopes of Turning Some Red States Blue" (September 3, 2012)

Guest Column, *SCOTUS Blog,* "What Powell v. McCormack Teaches Us About Contemporary Race and Politics" (February 24, 2010)

Guest Column Series, *LA Times,* "Dust Up: The Final Stretch (2008 Election)" (October 6-10, 2008)

PROFESSIONAL AFFILIATIONS

Member of Bars of Maryland, District of Columbia, Alabama and U.S. Supreme Court. Member of American Political Science Association and American Bar Association.

MEGAN A. GALL, PHD, GISP

833 Edgewood Drive · Charleston, WV 25302 · USA
[redacted] · www.megangall.com

LITIGATION:

Internal Voting Rights Expert for Lawyers' Committee for Civil Rights Under Law
3/2014 – 9/2017

As the in-house expert, I conducted 44 investigations into potential VRA violations including: 30 local jurisdictions such as school board, county commission, city council, and police jury; 10 judicial jurisdictions such as State Supreme Court, Circuit Court, and Magisterial Court; and 4 additional county and state wide districts such as State House Districts.

Several investigations evolved into litigation including:
- *Alabama State Conference of the NAACP v. State of Alabama – 2:16-cv-00731*: litigation under Section 2 of the VRA challenging Alabama's at-large method of electing justices and judges of the Alabama Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.
- *Georgia State Conference of the NAACP, et al. v. Gwinnett County Board of Commissioners, et al. – 2:16-cv-00731:* litigation alleging that the district boundaries for the Gwinnett County Board of Commissioners and the Gwinnett County Board of Education violate the Voting Rights Act of 1965. We believe this is the first coalition claim to demonstrate the African-American, Latino, and Asian-American voters constitute a single voting bloc.
- *Hall et al v. Jones County Board of Commissioners et al – 4:2017cv00018*: litigation under Section 2 of the Voting Rights Act (VRA) challenging Jones County, SC at-large method of electing the County Board of Commissioners. Because the case settled favorably, I served as internal and external expert.

Independent Consultant
8/1/2019 – 12/31/2019
I worked with Dr. Lisa Handley on illustrative redistricting plans for the Phase III report of Port Chester, NY court ordered VRA compliance.

Internal Voting Rights Expert for the Native American Rights Fund
2/1/2021 – 2/1/2022

As the in-house expert, I'm investigating jurisdictions in Indian Country for 2021 redistricting and VRA compliance.

CENSEO

Professional Profile
Doug Turner

Background

Founded Censeo at age 28 to join professional interests in public policy and data analysis. Major body of work has focused on economic / community development as well as political engagement and voter behavior.

Education

MBA – Tuck School – Dartmouth College – Finance Concentration
BA – Birmingham-Southern College – Honors Program (General Liberal Arts)
Magna Cum Laude

Skills:

- Data modeling, warehousing, and analytics
- GIS data development and spatial relationship analytics
- Visual presentation of analytical results and complex systems
- Strategic planning from multi-source data analytics and research – particularly for government agencies, public-private partnerships, and political / electoral efforts
- Financial structuring and analytics for community / economic development initiatives

Select Recognition:

- "Deal of the Year" The Bond Buyer - $125 million raise for public housing renovation and redevelopment
- "Best Political Campaign" (aka "Pollie" award) – American Association of Political Consultants

Select Governmental GIS Engagements:

- Development of Congressional, State Legislative and State / Local School Board plans (subsequently adopted with amendment) for Alabama Education Association following 2000 Census.
- Municipal Council / Board of Education redistricting plans following 2010 Census to be used in Birmingham, Alabama

Contact:

[redacted]
[redacted]

CENSEO

March 16, 2021

Dear Kareem:

I'm writing to express my interest in working as subcontractor on the proposal that you are planning to submit to the Michigan Citizens Redistricting Commission. I've shared with you my resume and relevant information on my practice, which you should feel free to circulate to the members. If your proposal is selected, I'll be happy to support the project in the manner that you have directed.

Sincerely,

[redacted]

Doug Turner
President

PO Box 131055 • Birmingham AL 35213

MEGAN A. GALL, PHD, GISP

[redacted] · Charleston, WV 25302 · USA
[redacted] www.megangall.com

Dear Kareem:

I'm writing to express my interest in working as subcontractor on the proposal that you are planning for submission to the Michigan Citizens Redistricting Commission. I've shared my resume and relevant information on my practice with you. Please feel free to circulate to the members as appropriate. If your proposal is selected, I'll be happy to support the project in the manner that you have directed.

Sincerely,
Megan A. Gall

REPORT ON
AARC REDISTRICTING PROPOSAL

PRESENTED TO
THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION
MAY 26, 2011
NORTHRIDGE, CALIFORNIA

The African American Redistricting Collaborative (AARC) is a collection of civic groups that serve the African American and other communities throughout the state of California.[1] Our constituent groups have extensive experience in the areas of political participation and voting rights—including past local and statewide redistricting processes. Past projects include community organizing, public education, mapping, legislative advocacy, legal analysis and litigation. AARC's goal is to guarantee that the political arena provides opportunities for the most robust and meaningful participation by its members. While unapologetic about its roots in the African American community, AARC works on behalf of Californians with varied cultural backgrounds who seek a voice in the centers of power.

Redistricting is among the single most important moment for assigning political power in this state. As with foundational public policies like budgeting, the redistricting process also helps to define in tangible ways both who and what matters in California. With the line drawing managed by the Commission for the first time in this cycle, AARC has worked diligently to demonstrate the continuing need to recognize the significant contributions that African Americans in California continue to make in our diverse state.

AARC's Redistricting Activities

AARC has worked over the past several months to assure that African Americans participate in this redistricting cycle to the fullest extent—from raising awareness in our community about the process and testifying about our neighborhoods, to crafting and commenting on proposed maps. Specifically, AARC has conducted a series of community meetings to solicit ideas and feedback from our members about the commission's current process and important elements in any AARC-sponsored district plan.[2] Further, AARC has collaborated

[1] The associate member groups of AARC include: The Advancement Project, AME Fifth Episcopal District, Black American Political Association of California, Brotherhood Crusade, California Black Chamber of Commerce, California Black Women's Health Project, Community Coalition of South Los Angeles, Council of Black Political Organizations (COBPO), COGIC First Jurisdiction, Greenlining Institute, Inland Empire African American Redistricting Coalition, Lawyers' Committee of the San Francisco Bay Area, Los Angeles NAACP, Los Angeles Urban League, NAACP California State Conference, NAACP Legal Defense and Educational Fund, Inc. (LDF), Osiris Coalition, SB Strategies, LLC, SCOPE/AGENDA, Southern Christian Leadership Conference (SCLC), WARD Economic Development Corporation, Watts Labor Community Action Council, and West Angeles COGIC Community Development Corporation.

[2] AARC has sponsored, conducted and/or participated in community education workshops and redistricting forums in Oakland, Sacramento, San Bernardino, San Diego, San Francisco and throughout South Los Angeles.

with other significant community-based groups in this process to discuss the best ways to apply governing mapping principles and find joint areas of concern in developing our district plans.[3]

After these extended discussions, and with due consideration of applicable state and federal law, AARC appointed a team of redistricting experts to craft a district plan that reflected the collective sense of what our membership desired in key parts of the state.

AARC respectfully presents this report on its district proposal, which focuses on regions of California that AARC has identified as key areas of interest. There are three areas emphasized in this report: (1) South Los Angeles, (2) East Bay/Alameda County, and (3) the Inland Empire. Where applicable, we offer district maps for three levels of government (California Assembly & Senate, along with U.S. Congress). This report addresses the highlights of our preferred configuration in narrative form, including select references to the supporting statistical summaries of the districts.[4]

General Summary & Statement of Goals

African Americans in California remain an important share of the state's growing non-white population. A brief review of aggregate changes makes this point apparent. According to the 2010 Census, African Americans are roughly 6.2% of the total state population of 37,253,956. The African American share of the total population is slightly less than the 6.7% they represented after the 2000 Census, but that number represents a very small change compared to the dramatic reduction in the size of the white population in California.

The statewide trend for African Americans is not as robust as comparable measures for the Asian Pacific Islander and Latino communities,[5] but the African American population remains geographically situated largely in two urban core areas—South Los Angeles and Oakland. To a lesser degree, relatively newer populations have continued to grow in areas of the Inland Empire (San Bernardino and Riverside Counties). These locations might be considered ―exurbs‖ of urban core areas.

The geographic concentration of African Americans in California has been salient in the effort to elect African American preferred candidates at all relevant levels of political office. The Assembly districts with the highest levels of African American concentration are: AD's 47, 48, 51, and 52 (in South LA) along with AD's 9, 16, and 62 in other regions of the state (including the East Bay, Sacramento, and the Inland Empire). All of these districts have successfully elected preferred candidates for the Assembly. Two California Senate districts (SD's 25 and 26 in South LA) with significant African American concentrations have also elected candidates preferred by the community as well. Finally, in Congress, the communities

[3]These groups include, but are not limited to, MALDEF and APALC.

[4]AARC hereby endorses the proposal from the Inland Empire African American Redistricting Coalition, which is a plan to establish a new African American influence district in San Bernardino County. For the sake of brevity, we will not discuss details of that district in the report in great detail.

[5]For the sake of consistency, we employ the term ―Latino‖ throughout this document to refer to the various ethnic groups collectively defined as ―Hispanic‖ by the 2010 Census. Thus, all statistical references to ―Latino‖ refer to the official census category of ―Hispanic Persons.‖ Further, the statistical references to ―African American‖, ―White‖, and ―Asian American‖ references all refer to the ―Non-Hispanic‖ subsets of each of these groups as they are defined in the 2010 Census.

located in CD's 9 (Oakland), 33, 35, and 37 (all in South LA) have produced successful candidates who have been preferred by African American voters.[6]

The background information that is cited above is not intended to address any of the legally prohibited subjects related to a particular incumbent or a political party. Rather, we believe that the effectiveness of African American communities in these districts is a key factor that must be weighed heavily in any effort to redraw the maps in California. The effectiveness of this configuration of districts is important to bear in mind for three particular reasons.

First, we find that federal law demands attention to the extent that protected groups statewide are exercising the political franchise effectively. The current performance of districts in California represents an important baseline to assess possible changes. Section 5 of the Voting Rights Act requires the Commission to demonstrate that any final change in the district map configuration does not cause "retrogression" with respect to protected racial groups.[7] The Commission may address a variety of factors in defending its decisions, but the election of preferred candidates is a core element in any such showing.[8] Accordingly, we contend that the electoral effectiveness in the aforementioned districts ought to influence the way the Commission draws lines in these areas.

Second, the manifest electoral effectiveness also suggests that traditional voting rights configurations are inapt in this context.[9] Where past elections indicate robust participation and the effectual exercise of the franchise, remedies like majority-control districts are unnecessary. In practice, districts with effective representation for legally protected groups with sub-majority margins (i.e., less than 50% of voters) need not be refashioned as electoral majorities. Indeed, efforts to impose such changes (especially against the expressed desires of the African American communities in these areas) would invite voting rights challenges related to "packing". Accordingly, the Commission should reject all arguments and interpretations of Section 2 that ignore the demonstrated effectiveness of these communities to elect candidates of choice.

Finally, the proven political effectiveness of these districts is relevant because it is probative evidence on an important state law issue. This record provides great support for the case that many of the neighborhoods, as currently designed, form an important community of

[6] In all of these effective districts, the African American share of the total population ranges between 23 and 30% of the total number of voters. Unlike other states, where differentials and age and participation among racial groups tend to reduce the functional political influence of African Americans, California is a distinct political setting in which rates of participation and organization tends to improve African American standing in the political arena relative to other groups. When one accounts for other measures, (e.g., voting age population and citizen voting age population) African Americans in these California districts represent a solid though not majority bloc of the active voters in these constituencies.

[7] The current test for retrogression centers on whether the change causes a loss in a relevant group's ability to effectively exercise the political franchise.

[8] It is important to note that while Section 5 of the VRA covers only select counties in California, it is our view that a full preclearance review will address the overall status of all protected groups throughout the state with respect to changes in the ability to exercise of power. See 28 C.F.R. Ch. I §§ 51.57, 51.59.

[9] AARC firmly believes that Section 2 of the Voting Rights Act is an important tool for enforcing the political rights of racial minorities. But we also believe that this enforcement remedy should only be employed where they are necessary. Here, the elections in the current configurations show that African Americans are successful in promoting their preferred candidates, in conjunction with other groups. Whether one defines these districts as "influence" or "coalition" districts, the configurations are effective platforms for exercising the political franchise.

interest. Pursuant to Proposition 11, California law mandates that district lines show regard to communities of interest. While we know of no controlling definition of this concept in existing law, we would respectfully submit that a community of interest refers to an identifiable set of people who have a common set of experiences or interests that also inhabit a specific geographic area. Drastic changes to existing districts with a community of interest should be taken only with the utmost care.[10]

The evidence reveals multiple social and cultural reasons that neighborhoods and institutions in AARC's areas of interest ought to be recognized as communities of interest. But the clearest indication that these communities fit just about any definition is their proven record of working effectively in the political arena. The fact that Californians in these existing districts commonly agree on preferred candidates and also organize in candidate and non-candidate campaigns is exceedingly strong evidence of their civic relationship to each other. Accordingly, efforts and proposals to seriously rework or dismantle these existing, effective communities should be approached with great caution.

With these thoughts in mind, AARC has pursued an overall strategy of maintaining the basic configurations of districts in its areas of emphasis. These districts comply with the directives outlined in the Commission's guidelines. The district lines meet norms of compactness and also do not create any places of point contiguity. We recognize the need in some areas of interest to increase population in order to meet the population equality standard. However, we maintain that this task can be accomplished without destroying the existing cores of communities. We have adhered to a minimal level of population deviation but have established ways of either preserving or (in some cases) establishing districts where African American communities may exercise influence in political contests.

The sections that follow, focusing on each area of concern for AARC, offer a more detailed look at the districts that we have proposed. Where helpful, we have reported statistical information about district profiles using Citizen Voting Age population (CVAP).[11]

A. South Los Angeles

For decades, South Los Angeles has been the focal point for the most significant political activity by the African American community in the State of California. Historically, African Americans from the Deep South frequently relocated to the neighborhoods of South LA in search of a more hospitable economic and social climate. These core communities that have grown and flourished in this part of Los Angeles continue to form an identifiable center for organization that links African American residents of varied social and economic classes by their shared racial and cultural heritage.

Largely African American neighborhoods that have long defined this area of the city include Crenshaw, Leimert Park, Baldwin Hills in the north, as well as Carson, Torrance and Compton to

[10] Indeed, we believe that such changes could raise the possibility of a voting rights lawsuit alleging vote dilution of African American political power.

[11] Additional details on the district proposal, including supporting statistical data, is located in the appendices.

the south. The area is also anchored by the large concentration of the country's largest African American centered churches (including AARC member organizations West Angeles COGIC and First AME Church). Further, the Crenshaw and Inglewood neighborhoods are the sites of some of the most significant commercial enterprises (barber shops, hair salons, and media outlets) that are both owned and patronized by African Americans throughout the city.

In short, South LA is an integral part of the political, cultural and economic imprint of African Americans on the state's largest city. While its demographics have grown more racially complex, with the influx of Latino and Asian American residents, this area nevertheless continues to be one of the main anchors for forming electoral coalitions that determine the outcome of city and county elections.

The existing neighborhoods of South LA-- largely lying to the south of the 10 Freeway and to the west of the 110 Freeway – are represented by four assembly districts in which African Americans represent approximately 30% of the entire population (slightly higher, taking CVAP into account), two state senate districts (SD's 25 and 26), and three Congressional districts (CD's 33, 35, and 37). All of these districts were under-populated following the 2010 Census. Accordingly, the major question for the Commission is how to account for the lost population in any new district map.

AARC's proposed map preserves the existing cores of these districts by expanding into new, but related territory in order to equalize populations. We believe that this strategy is warranted for two important reasons. First, the effectiveness of these districts with African American influence can hardly be questioned. With its numerous organizing institutions and existing political representation, South LA is the undisputed foundation for African American political effectiveness in the state. Some might favor the alternative approach of consolidating districts in this area to create majorities of African Americans; however, the current level of political effectiveness with less robust African American margins indicates that such a change is unnecessary.[12]

Second, utilizing the territory to the west and north of the existing South LA districts is appropriate given current demographic trends. As mentioned above, the population decline among white residents of California is a significant subplot within the overall narrative of growth in the state; this negative trend is evident in the western portions of Los Angeles that have lost residents during the last decade.[13] Consolidating part of the western coastal area into fewer districts would be one reasonable way of equalizing numbers than dismantling the established and politically salient neighborhoods that form the core of the South LA districts.

Our proposal accomplishes the goal of preserving the core of South LA districts while maintaining compact districts that also comply with the mandate to respect communities of interest. Further, the population deviation for these districts remains well under 1%. The new

[12] Indeed, it may prove an ill-considered one as a legal matter. Any decision to eliminate or existing districts with demonstrated effectiveness of reflecting the preferences of African Americans may raise difficult Section 2 problems concerning racial vote dilution.

[13] For example, the population decreases in existing AD 53 (which combines the area along the Pacific Coast, from Santa Monica to Torrance) rivals the under-population in the existing South LA districts.

AD 47 expands slightly westward to take in more parts of Culver City and other territory that is currently part of existing District 53. The new AD 48 (which maintains the area in and around the USC campus as one of its anchors) grows laterally, adding on its northern border the neighborhoods adjacent to the east of AD 47 and then runs toward Walnut Park and South Gate. In, AD 51 the existing areas in Inglewood and Gardena are now expanded to the southeast to include Carson, which is part of a corridor joined by the 110 Freeway. In similar fashion, AD 52 moves to the southeast to incorporate neighborhoods located near Lakewood and Cypress Gardens (part of the region that is in the current AD 55).[14]

These proposed assembly districts are compact enough to nest quite into proposed SD's 25 and 26, which largely follow the broad contours of the area described above for the assembly districts. Similarly, the contours of the proposed Congressional districts (CD's 33, 35, and 37) preserve the cores of the existing South LA districts while expanding slightly northward and westward to pick up additional neighborhoods immediately adjacent to the existing core.

The changes that we propose will result in the following resulting district profiles, which largely maintain the level of African American influence that currently exists in South LA:

Assembly District	Population	Deviation (%)	Latino CVAP (%)	White CVAP (%)	AA CVAP (%)	API CVAP (%)
47	463,039	-0.6	19.9	31.1	38.1	8.5
48	464,097	-0.3	43.1	5.9	47.5	2.1
51	466,134	0.1	30.3	17.9	35.8	12.9
52	460,589	-1.1	34.0	22.3	33.4	7.3

**The White, AA, and API CVAP percentages all refer to the figure for non-Latino persons, as defined in the 2010 Census.*

Senate District	Population	Deviation (%)	Latino CVAP (%)	White CVAP (%)	AA CVAP (%)	API CVAP (%)
25	926,723	-0.5	32.1	20.0	34.7	10.3
26	927, 136	-0.5	28.9	21.3	41.8	6.0

**The White, AA, and API CVAP percentages all refer to the figure for non-Hispanic persons, as defined in the 2101 Census.*

Congressional District	Population	Deviation	Latino CVAP (%)	White CVAP (%)	AA CVAP (%)	API CVAP (%)
33	702,905	0	19.4	34.9	31.8	11.7
35	702,905	0	31.9	17.1	42.2	7.0
37	702,904	1	32.8	23.8	27.5	12.3

**The White, AA, and API CVAP percentages all refer to the figure for non-Latino persons, as defined in the 2010 Census.*

B. East Bay/Alameda County

[14] Importantly, these district changes do not greatly encroach on the core neighborhoods located in surrounding areas that help to assure the political representation and effectiveness of the Latino community.

Like South LA has influenced the Southland, the East Bay has been northern California's hub of African American political and cultural activity. Since the late 1960s, Oakland has been the primary center for this concentration. Oakland was among the first major cities to elect an African American (a preferred candidate) as its mayor, and the local political representation for the city reflects the success of organizing and participation in these communities.

The myriad of indicia showing the influence of African Americans in Oakland largely mirrors the story with South Los Angeles. One can identify numerous local businesses, religious institutions (including the Love Center and Allen Temple Baptist Church), and civic organizations that serve the African American community and frequently run social outreach programs in the city. The neighborhoods of Oakland also have been an important building block for social and political activism in the Bay Area since the days of Vietnam-era civil protest; importantly; the residents of the corridor connecting Oakland and Berkeley have often found common cause on issues of racial equity and economic justice.

This part of California (including Berkeley and Richmond in the north and flowing south through San Leandro and Hayward) currently takes up some of the assembly districts with relatively minor population deviation. For instance, AD 11 is only under the ideal size by about 7,000 voters (relatively minimal difference), and AD 8 (located just to the north of current AD 11) exceeds the ideal size by about 5,000 voters. However, the geographic area of greatest substantive interest for the African American community lies in AD 16, which is currently about 10% below the ideal population for a new district.

Our proposal is to achieve compliance with the equal population standard by maintaining an Oakland-based assembly district (AD 16) with a total population of 466,274 persons (0.1% deviation). Each of the major racial groups in this district would range between 21 and 28% of the Voting age population; African Americans would represent 25.15% of all persons in the revised district over the age of 18. After due consideration, AARC proposes to reconfigure AD 16 to join the neighborhoods located in Albany, Berkeley and Emeryville with Oakland. This change would incorporate three adjacent communities that share important historical, social, and political ties with the residents of Oakland.

The expanded version of AD 16 would not only reflect shared patterns of behavior in a political sense; it would also reflect the daily practices of the people who live there. The residents of this area frequently commute within the district's boundaries for work and entertainment purposes; indeed, surface streets that connect this area are lined with commercial interests that barely note the difference between the jurisdictions. The district plan complies with the principles of compactness; its contours largely follow the existing ―bayshore‖ configuration of the current AD 16, which hugs the 880/80 Freeways (a common transportation route for residents in this area).

AARC also supports the minor adjustment of the existing East Bay congressional district with its anchor in Oakland as well. Our proposed map establishes CD 9 to achieve a total population of 702,904 (zero deviation), which secures the continued level of political influence that African American communities have exercised in past elections for Congress. The details of this proposed district follow:

Congressional District	Population	Deviation	Latino CVAP (%)	White CVAP (%)	AA CVAP (%)	API CVAP (%)
9	702,904	0	11.4	44.4	25.6	15.2

**The White, AA, and API CVAP percentages all refer to the figure for non-Latino persons, as defined in the 2010 Census.*

C. Inland Empire (AD 62, SD 32, CD 43)

The final, located in San Bernardino and Riverside Counties, has witnessed some of the state's most significant growth during the last decade. Accordingly, line drawing for districts in this area was fairly easy to accomplish; taken as a whole, the territory exceeds an ideal district population by a total of about 200,000 persons (roughly half the size of an ideal assembly district population).

The area of emphasis currently comprises two assembly districts: AD 61 (a significantly African American population) and 62 (with approaches a majority of Latino voters). District 63, with about a 45% nonwhite CVAP (about 10% of African Americans are there) moves eastward and covers Redlands. In Riverside County's Moreno Valley to the south are the remaining three –north-south oriented‖ districts with similar demographic profiles. African Americans range between 7-9% of the CVAP in each of them and the overall non-white CVAP falls between 35-37%. Districts 64 and 65 divide the African American concentration in the Moreno Valley; meanwhile, District 66 extends its borders well into the northern part of San Diego County.

AARC would recommend that the Commission consider a district that reflects the role that African Americans have played in contributing to the growth in the Inland Empire. While not as heavily concentrated as the population in South LA, the African American residents in this area do share a common set of interests that are not especially well reflected in the way districts are currently designed. In community meetings, some members have expressed an interest in an assembly district that consolidates what some call –The Ebony Triangle‖ – which includes neighborhoods lying between the 10, 15, and 215 freeways. Major hubs of the district include Colton, San Bernardino, and Rialto.

Conclusion

AARC sincerely appreciates the opportunity to provide substantive input in the Commission's proceeding. We are hopeful that this report provides a helpful roadmap that the Commission may employ in the consideration of district plans. While we recognize that this is one part of a prolonged and complex process of designing new maps for California, we sincerely hope that the ideas contained here are carefully reviewed before line drawers approach the areas of interest to AARC. Our maps show that maintaining the political influence of our communities can be accomplished in a way that also complies with the Commission's stated goals. We are available to answer any questions that members or staffers may have about this proposal.

MEMORANDUM

To: Council Members Parks & Perry

From: Kareem Crayton, J.D., Ph.D.

Re: Assessment of Los Angeles City Council Districting Plan

Date: September 15, 2012

This memo provides a review and assessment of the City of Los Angeles 2012 redistricting process for its council seats. I have summarized my thinking about the process following my service to you as an expert consultant on the matter. As I have discussed with you during the work on this project, there are important legal and policy concerns that arise due to city's choices in designing the new districts. Notwithstanding our efforts to highlight these issues during the process, the decision-makers have moved ahead with a critically flawed plan that establishes far more problems than it solves.

The irony of the city process is that it involves a relatively smaller number of movable parts than the state redistricting, yet it has produced far more barriers to a shared understanding and a consensus that are necessary to address the desires expressed in the public hearings. Compared to the statewide redistricting's mostly successful effort -- despite having more conflicting groups involved, three different district plans at issue, and thornier intersecting political interests -- the city's effort has fallen far short of achieving the basic goal of its reform – to provide a transparent, accessible, and supported public-oriented process.

Not only are there major procedural problems evident in the city's effort to identify and to apply the information used for the new districts but the resulting configurations raise new concerns that will likely immerse the city in prolonged and costly litigation. My assessment is that, notwithstanding the city's assertion that its districts are "defensible", at least some of these claims are likely to have traction and could produce an adverse decision. And this outcome was completely avoidable. If the lawsuit filed on behalf of residents in the Koreatown communities offers any indication, this map will face heavy scrutiny in the courts that will test much of the logic (or lack of it) lurking behind these decisions.

Below, I provide a summary of the line drawing process, followed by a detailed accounting of the aspects of this mapping effort that I believe are among the most troubling for your

constituencies in particular and for the entire city more generally. Finally, I conclude with a series of recommendations (both immediate and long term) that might help to resolve the legal wrangling and also help to avoid similar mapping problems in the future.

Review of the Process

For the last two census cycles, the City of Los Angeles has relied on an "advisory commission" model for drawing districts. Rather than leave the power to redraw lines with elected officials who face political pressures, the 1999 City Charter Reform Commission approved the establishment of a body of citizens who would presumably be insulated from political/and partisan influences. Their expectation was that in the absence of such external forces, the Commission could concentrate more closely on the public interest.

Importantly, though, the insulation anticipated by the design of the Citizens Commission was not absolute. Indeed, it has largely proved ineffective. Members of this 21 member body were appointed by individual council members along with certain citywide officials – including the mayor, city attorney, and the city controller. The mandate of the redistricting commission, according to the terms of the city charter, is to create a plan that reflected public input, that takes account of communities of interest, and that complies with federal and state law. The maps produced by the Commission are advisory in nature – the council retains final authority to revise and/or to replace any plan submitted by the commission.

After appointing an executive director and line drawer in January 2012, the commission began organizing a plan for crafting districts. At this stage, the group rejected proposals to adopt guiding principles and goals on the grounds that doing so might limit the group's discretion. The Commission also opposed ideas to make any line drawing sessions accessible to the public. Due to concerns about the Brown Act, members instead organized themselves into smaller "regional working groups" to discuss potential configurations for a limited number of districts.

Because the size of these working groups was smaller than a quorum, Commissioners believed, they could legally conduct proceedings in private. If any group was unable to decide a set of issues or the group agreed to certain matters that were inconsistent with decisions reached by other groups, a "resolution committee" was then convened to settle any differences – following an initial effort to "harmonize" a full map by the line drawer. Several disagreements within at least one of these groups (covering the mid-city area) led to a dispute about whether any final map represented a consensus. However, the resolution sessions produced a draft proposal which was the starting point for the full Commission's review and consideration.

After accepting the public testimony from the several community hearings, which largely rejected the choices reached in the regional sessions, Commissioners reviewed and then finalized a second draft set of districts. Their second draft map was altered in a flurry of amendments in public, which included several important changes that appeared either inconsistent with or entirely insensitive to the strong weight of public testimony. For example, there were major

changes approved to CD's 8 and 9, over the vocal objections of residents in the affected communities as well as from the Council Members and the Commissioners representing these areas. The Commission's final map went to the city council for consideration, along with a minority reports signed by five of the dissenting Commissioners.

For its part, the Council took the recommendation and made further alterations to the map, often in the absence of supporting evidence from public input. Much of this work was completed in the Rules committee. Perhaps the most notable example of an unsolicited mapping change is the decision to move the University of Southern California from CD 8 to CD 9. The only publically submitted plan that included this particular change was rejected, and the strong weight of testimony prior to the Council's action was that CD 8 (which initially included USC) should remain unchanged. In fact, officials from USC registered no public testimony on the matter until well into the final stages of the council's consideration. Perhaps most troubling, the two members whose districts are directly affected by this change and registered their opposition to this adjustment were ignored.

Following a series of amendments to the map described as "technical in nature", the council approved the final proposal in June. The mayor signed the maps into law in early July. And a lawsuit challenging the new districts followed shortly thereafter.

Analysis and Assessment

A comprehensive treatment of my concerns about this process would take far more space than this format allows. Having participated in the statewide redistricting in California, I can say generally that this city's process, in comparison to others, has raised more legal problems and utilized far less evidence than any other line drawing I have seen. There are some key concerns that deserve special attention, which I highlight here.

I have organized my comments into three different categories – structure, procedure, and results.

A. Structure:

At the conceptual level, the core design of LA's redistricting system is not especially troubling. In fact, many jurisdictions nationwide are moving toward the Commission-driven process of line drawing. The recent maiden voyage of the California statewide commission is one such illustration of a largely successful model. To the extent that the political "foxes" can be kept out of the hen house, a decision-making body has more latitude to follow the principle of community-based line drawing even when it might upset conventional expectations among political actors.

However, the basic design flaw in the city's model is that commissioners were not completely independent from the council. In fact, they are more subject to political influence than in other models because there was no bar on communications and any

exchanges are outside of the public's view. I note that Council Member Perry made a motion to adopt such a rule to govern the council's activity, but that proposal was apparently never considered or addressed. On the part of the Commission, there were no rules to prohibit "ex parte" outside influences, and the members could also be hired and replaced at the behest of their appointing authority. The same concerns about conflicts of interest and undue influence are relevant to the Commission's appointment of the executive director, whose previous employer was the council president. Without any safeguards in place to assure that these decision-makers are beyond the influence of council members, and without any public review of the contacts made between the council members (or their staffs) with Commissioners, this process is actually more – not less- susceptible to undue influence.

In addition to these basic flaws was the failure of the Commission to hire a legal specialist on voting rights and election law who could provide guidance. Los Angeles is among the most racially complex and conceptually challenging places to apply voting rights principles. More than this, the applicable law is in flux, due to new cases that have developed new views of existing law on vote dilution. Compounding these concerns are the various cross-cutting local interests that have presented conflicting mapping proposals. All of this demanded a very sophisticated, careful consideration and analysis of the proposals presented to the Commission. Instead, the Commission relied solely on general advice from the city attorney (one of the appointing authorities for its members). In the absence of more customized advice that assessed the legal obligations of the city with respect to each racial/ethnic group affected by the process, the Commission made critical errors in the process that were only worsened by the actions of the Council.

A final critical flaw in the process was thec absence of sufficient framework that would guide the Commission. While the Charter provided some initial guides that include respecting communities of interest and following existing law, Commissioners were left to their own devices to give meaning to these broad directives. For example, one early debate that was never resolved was whether various non-white communities were entitled to a specific number of districts in which they would have an equal opportunity to elect preferred candidates. Another example was whether such "opportunity" districts had to be drawn with a majority of non-white voting age citizens. Finally, the debate about the relevance of neighborhood councils posed problems of consistency. Members had initially declined to endorse neighborhood councils as a primary criterion for line drawing. But their drafts all took close account of these areas, except where Koreatown was concerned. Concerning all of these matters, the commissioners tabled efforts to determine how these complex ideas might be implemented in practice, particularly where they might conflict with other commitments.

B. Procedures:

The most fundamental problem with the way the Commission proceeded was that they divided their work into small groups that (1) kept the public out of view and (2) did not apply uniform criteria for drawing maps. While there may have been reasons for tabling the proposed set of guidelines in the early going, the lack of clear guidance left small discussion groups rudderless to answer major questions about prioritizing certain goals. By the time their choices reached the public's eye, the most significant mapping choices were largely unchangeable. The only person who saw the entire map was the staff line drawer, who was neither skilled in applying the law nor familiar with the politics of given districts. Within the small groups, not all of the approaches to handling the major questions were complementary. The choice to hold breakout sessions meant that small groups were creating districts without a joint understanding about the concepts that would resolve difficult areas that required the exercise of discretion.

Very few of these districts reveal any clear rationale, nor did they include explanation to support their clear departures from the clear thrust of public testimony. Neither the working groups nor the line drawer herself provided any explanation for the particular configurations adopted in this presentation, which was surely one reason for the lack of public satisfaction expressed in the hearings. Without a rationale, one cannot dismiss claims that the Commission engaged in either unfair or illegal considerations in making its decisions. For example, one issue that has often been raised is the treatment of areas like downtown and Korea Town; there was more than ample testimony that differs from the district configurations in the draft map. Another example is the configuration of the downtown area, which was consolidated in CD 14, despite the weight of the testimony expressing satisfaction with CD 9. In both cases, there is no apparent rationale for the decisions to depart from this testimony in designing districts in these areas.

In fact, record comments by the Commissioners themselves raise serious constitutional concerns about the intent behind some of the districts. The Supreme Court has been quite clear that race cannot be the predominant motive in drawing districts, yet Commissioners appeared to make race the central factor in their line drawing. Commissioner Ellison, for example, explained his desire to excise the present diversity from CD 10 (a coalition district) and to build a larger base of black support. His proposed draft reduced African American CVAP in CD 8 from 60% to barely 51% -- the lowest CVAP majority in the city – even though this district only exceeded the ideal size by 13,000. In explaining his changes, Commissioner Ellison simply claimed that it would be an insult to the incumbent from that district not to increase the black percentage.

Similar comments extended into the meetings involving the whole Commission as well. Reviewing proposed changes to South Los Angeles districts, Commissioner Cornejo (along several with others) repeatedly expressed their desire to make CD 9 a majority Latino CVAP seat by transferring that district's African American voters into CD 8. At no time did Commissioner Cornejo produce evidence that these areas formed a specific community of interest. And there was also no evidence presented that showed racially polarized voting in CD 8, CD 9, nor any other part of this city. To pursue their goal of establishing a new Latino majority CVAP district, Commissioner Cornejo and a majority of members repeatedly stated that they would block any proposed changes to maintain the existing racial coalition district in CD 9.

Finally, there are serious issues about the use of public testimony by the Commission as the charter directs. At least once, the evidence indicates that this information was never utilized. When one Commissioner requested public input records to assess whether the weight of the testimony supported a proposed change, Chairman Vargas indicated that he could not produce evidence to support this claim. In fact, the Executive Director later acknowledged that neither the hearing transcripts nor the citizen comment cards had ever been analyzed by the staff. The only available information was the number of persons who opposed the draft map (which, in fact, was overwhelming). Chairman Vargas ended this exchange by directing Commissioners to "rely on their recollections" in weighing the public testimony they heard.

In all of these respects, the Commission and the Council failed to develop the kind of thorough record analysis to justify a particular district configuration. Their comments actually raise major questions about the propriety of the choices they made. Yet when invited to do so, neither bodies took the effort to justify their decisions with evidence. In fact, the record of their own activity suggests that even readily available evidence from public hearings went unexamined.

C. Results:

The most disheartening element of this process, of course, relates to the outcome. Given the flaws in design and procedures, the fact that the resulting map misses the mark is not especially surprising. The litany of problems described earlier increased the likelihood of a disastrous outcome. But the tragedy is that the resulting districts carry serious negative consequences for the communities that are now reshuffled in ways the public does not prefer and that raise questions about their continued vitality.

This city has a unique pattern of effective and durable cross-racial political coalitions that have led to a more diverse political class. Since the time of Mayor Bradley, these alliances have led to the electoral success of non-white candidates in several political

contests, which one might wish to preserve where possible. This trend has been rather robust – whether considering the elected office, a geographical are, or an ethnic group. For instance, the current mayor of Los Angeles (Latino), the previous City Attorney (Latino), the county sheriff (Latino), and several council members (Latino, African American) are all elected with strong support from ethnic groups other than their own.

After reviewing various configurations, however, the Council consistently chose to expand ethnic-majority districts at the expense of these coalitions. Not only did these decisions reshuffle existing communities of interest, as expressed in public hearings, but they also dismantled many of these cross-racial coalitions like CD 9. The material effect of these changes cannot be overestimated, as the new plan excises many of the more economically vigorous areas in the district – leaving districts with fewer economic assets and greater concentrations of poor and working class residents.

At the same time, the city's choices ignore its historical commitment to assure that significant groups in the city have a voice on the council. For the reasons described below, this plan does not seem to promote this principle particularly for Asian Americans, despite their significant growth in the city. The new maps limit Asian American political opportunity to elect a preferred candidate in the two open-seat contests for city council, despite their clear requests to the contrary. A detailed accounting of these concerns follows:

First, the Commission never explained its reasons for invoking federal law, which it appeared to do inconsistently. The Voting Rights Act seems to be utilized quite differently in districts that are similarly situated, even while officials refused to collect or to review any racially polarized voting evidence – a requisite step in assessing the demands of this statute. The populations of majority non-white districts like CD's 14 and 7 appear to be treated quite differently from the African American majority population in CD 8, even though all three of these districts presumably enjoy parallel federal protections and all of them have a history of effective political participation.

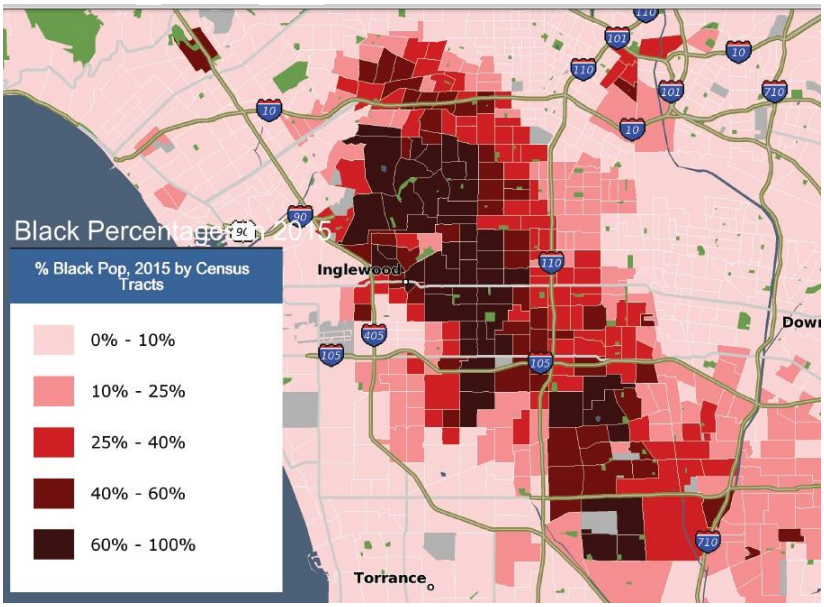
Second, in addressing districts around Mid-City, the final map divides the Korea Town community and places a majority of this area into CD 10. This is among the most troubling choices made by the Council, since it runs directly counter to some of the most vocal public comments in the record. Several Commissioners emphasized their observations that the overwhelming and consistent testimony from the residents of this community that they formed a community of interest, and proposals were made in the Commission and the Council that kept this area undivided in a district without an incumbent. The rejection of these proposals interferes with the community's ability to be effective within a single council district, which is an especially troubling outcome given

that not one of the fifteen council districts currently has a candidate of choice from the Asian American community (a pattern that has lasted over a decade).

Finally, a specific motivation that has been expressed by the Council President in favor of these districts is that they provide a protection of the African American community in three of the city's fifteen seats. To the extent that this assertion is that the preferred candidates of the African American community will be elected after this plan, the evidence strongly indicates otherwise.

CD 9 had consistently elected a preferred candidate of African American voters (along with other ethnic communities) since the 2000 cycle (CM Jan Perry); however, that effective coalition district has been summarily dismantled by the Council in favor of a Latino majority district. There has been no indication that this change was necessary as a matter of law or due to public testimony. Indeed, the change poses harms to the Asian American community. Voters in Little Tokyo have been a significant and effective component of the coalition with South LA in CD 9 since the 1970s. The nearly unanimous record testimony from that community was that Little Tokyo desired to remain in CD 9 due to its historic ties to the area and its ongoing alliances with South LA institutions. No record evidence from this community justifies the decision to move it to CD 14. And the alternative proposals from CM Perry for organizing CD's 9 and 14 shows that the Council's chosen path was neither legally required nor practically necessary.

Additionally, the long term status of CD's 8 – the only African American majority CVAP district – is now also in doubt with this plan. The new map maintains the African American majority population in this district, but the status of the population is only paper-thin. This district is now among the most under-populated in the city, and many of the high growth communities that were previously located in CD 8 are now moved to CD's 9 and 10. The illustration below shows the pattern of projected growth for this community. This shift is especially surprising given that the district was slightly above the ideal population at the start of the process. Given the dispersion of the African American growth areas and the increases in the Latino population of this area, the sustainability of the majority in all three districts during the next decade is in grave doubt.



Recommendations:

Normally, my recommendations would focus almost entirely on prospective ways to improve some future redistricting process. However, in this case, it seems proper also to include more immediate changes that might limit the city's exposure to the aftermath of any finding of legality in their district choices. I briefly indicate some ideas below:

-First, the Council should adopt measures that assure that the Commission can operate without undue influence from political actors. The purpose of the charter reform was to provide a truly independent commission, but the execution of that policy clearly illustrated the failure of the effort. Reforms are therefore necessary to guarantee that this principle works in practice. While members might retain the power to appoint members, the ability to communicate with and to fire members is questionable.

-Apply the VRA consistently. The major flaw in this process is that the Council never conducted a racially polarized voting analysis nor determined whether the VRA has a particular application in the city. Throughout the process, officials and interests groups asserted the potential for legal problems associated with certain configurations, including racial gerrymandering and vote dilution problems. Yet neither the Commission nor the Council made an effort to assess the validity of either set of claims with a review of the relevant evidence. The failure to do so led to statements and decisions that are legally risky. The attention to race throughout this process (evident in statements and in mapping decisions) is significant, but it is never justified using any method to assess what federal law demands. Indeed, the dismantling of existing communities of interest on the map is some indication that traditional considerations have been ignored in favor of racial concerns. Further, the drawing of districts with majority non-white populations should be handled consistently.

-Reconsider the political relevance of the Asian American community. Perhaps the most surprising point evident in this map is that Asian Americans enjoy very little potential to elect candidates of choice. The city appears to have taken the approach of entrenching majority-opportunity districts for Latino communities (e.g., CD's 1, 7, 9, 14), but it has ignored similar claims from Asian American residents seeking configurations that enhance their political opportunity. This poses a serious legal problem in a city where approximately 10% of the population is Asian American does not have one seat with a candidate from that community. The reasons for this choice may be complex, but the decisions to divide Koreatown and to reject Little Tokyo's efforts to remain in CD 9 remove two clear opportunities where these voters could elect a candidate of choice in an open seat contest.

-Adopt clear governing principles at the start of the process for drawing districts. One of the major problems with the process is that the Commissioners never could articulate clear goals for their drawing process. The victim of this systemic problem is the public, since the voters needed that information to inform their early proposals for districts and the testimony they would provide in hearings. While the charter directs that members should take account of public testimony, that directive is meaningless if the Commission cannot provide greater direction to participants about how it will assess and review mapping proposals. In the absence of these basic principles, Commissioners had even more latitude to follow their own sense of what the public wanted, which partly accounts for these troubling outcomes.

It has been a pleasure to work with you on this project, and I would be more than happy to answer any questions you might have about the issues I have described above. I extend my best wishes to you both.

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

*Kareem U. Crayton**

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. *See id.*

II. A PRIMER ON RACIALLY POLARIZED VOTING

A. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Varieties of RPV Analysis

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

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

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

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

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

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

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

1. Exit Polls

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

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

A wealth of social science research confirms that people have a

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

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

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

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

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

2. Homogenous Precinct Analysis

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

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

29. *See id.*

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

31. *NCSL National Redistricting Seminar Highlights: Measuring Minority Vote Dilution*, REDISTRICTINGONLINE.ORG (Jan. 25, 2011), http://redistrictingonline.org/sancsl2011mvdtalk.html.

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

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

34. *See id.* at 373.

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

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

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

3. Ecological Inference

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

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

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

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

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

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

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

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

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

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

C. Scholarship & RPV

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

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

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

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

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

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

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

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

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

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

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

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

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

50. *Id.* at 2209.

51. *Id.* at 2218.

52. *Id.* at 2209-10.

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

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

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

56. *Id.* at 1524.

57. *Id.* at 1530.

58. *See id.* at 1529.

59. *Id.* at 1538.

words, it is suggested that coalitional districts are now sufficient in some parts of the country due to the decrease in RPV.[60]

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

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

60. *See id.*

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

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

63. *See id.*

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

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

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

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

68. *Id.*

contrary to the assertion that racial polarized voting is significantly decreasing. In fact, scholars that reject this contention insist that "acute racism" persists in voting practices and that RPV continues "in striking form."[69]

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

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

D. Evolution of RPV in the Law

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

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

70. *Id.*

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

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

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

74. *Id.* at 97.

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

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

77. *Id.*

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

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

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

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

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

80. *Id.* at 310-12.

81. *Id.* at 337.

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

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

84. *Id.* at 569.

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

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

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

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

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

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

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

88. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 624-27 (1982).
89. 412 U.S. 755, 759-64 (1973).
90. *See id.* at 766-68.
91. *See id.*
92. *Rogers*, 458 U.S. at 625-27.
93. *Id.* at 623.
94. 485 F.2d 1297, 1302-03 (5th Cir. 1973).
95. *See id.* at 1307.
96. *See id.* at 1305-07.
97. *See id.* at 1307.
98. *See* S. REP. NO. 97-417, at 19-24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177,

enactments, the drafting process yielded a politically acceptable but doctrinally confusing standard. The most contentious part of the legislative debate was the adoption of an "effects only" prong of the dilution standard in section 2.[99]

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

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

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

196-202.

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

100. *See id.* at 36.

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

102. *See id.* at 1400.

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

104. *Id.* at 29.

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

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

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

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

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

III. USES & MISUSES OF RPV STUDIES

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

107. *Id.*
108. *See id.* at 61-62.
109. *Id.* at 56.
110. *See* Way, *supra* note 3, at 1442-44.

severely undermine the pursuit of voting rights enforcement.

A. (Mis)using RPV as Shield

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

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

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

111. *See id.* at 1449.

112. *See id.*

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

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

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

resulting decision was motivated by any prohibited intent.[116]

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

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

1. North Carolina Redistricting

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

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

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

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

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

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

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

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

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

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

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

122. *Id.*

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

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

were supporting them) belied any such assertion.

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

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

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

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

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

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

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

2. Los Angeles Redistricting

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

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

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

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

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

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

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

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

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

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

133. *See Zahniser*, *supra* note 130.

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

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

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

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

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

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

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

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

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

B. RPV as Compass

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

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

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

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

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

141. *See id.*

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

143. *Id.*

a consideration of these three debates for both legislative discussions.

1. A Prolonged Emergency?

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

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

In the first "re-enactment," the House member speaking most often against renewing section 5 were those like Representative Collins of Texas, who registered misgivings about the motivations of the sponsors of the proposed extension.[151] The main reason for his distaste was that there were no longer the kinds of extraordinary circumstances that had justified the remedy.[152] For example, he

144. *Id.*

145. *Id.*

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

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

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

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

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

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

152. *Id.* at 22,924.

urged colleagues not to short-circuit a serious review of the provision due to any perceived political emergency.[153] Indeed, Representative Collins was not especially willing to concede that the original enactment of section 5 was justified even in 1965.

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

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

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

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

155. *Id.* at 22,923.

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

> Sisyphus, whose endless plight in tortured immortality was to heave and push, tug and tow a huge, rough, rock up the awkward, craggy slopes of a steep mountain—upon reaching the pinnacle—only to see that boulder plummet, crashing, and breaking, down to the ugly bottom. . . .
>
> Our duty . . . is to do our part to eliminate the egregious burden of disenfranchisement that has plagued [minorities] . . . throughout our spotted history.
>
> . . . .
>
> I ask you to shoulder the burden, speaking not only as a fellow colleague, but also as one who has directly benefited from this ever so necessary act.
>
> . . . [W]e must shoulder this formidable burden together and pass this act. I know that together, this heavy, heinous boulder called disenfranchisement can be easily tossed into the liberating sea.

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

157. *See* Michael J. Pitts, *Section 5 of The Voting Rights Act: A Once and Future*

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

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

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

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Remedy?, 81 DENV. U. L. REV. 225, 244-267 (2003).

158. *See* note 156 and accompanying text.

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

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

> [W]e are already way past temporary. And the application of section 5 is now arbitrary because this House cannot present evidence of extraordinary continuing State-sponsored discrimination in the covered States . . . .
>
> As such, section 5 has served its purpose and is no longer an appropriate remedy in light of today's new voting problems.

Id.

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

162. *Id.*

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

that the provision required states to "maximize the number of districts where a certain political party wins," so that in most cases, section 5 only protects the right to elect a "Democrat minority candidate."[164]

2. The South Has Fundamentally Changed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Others lampooned the apparent mismatch between the jurisdictions where participation lagged behind the country and those where the preclearance provisions applied.[176] For example,

169. *See* 152 CONG. REC. 14,219-21 (2006) (statement of Rep. Hastings).
170. *Id.* at 14,260 (statement of Rep. Price).
171. *Id.* at 14,238 (statement of Rep. Waters).
172. *Id.* at 14,237 (statement of Rep. Westmoreland).
173. *Id.* at 14,275.
174. *Id.* at 14,221 (statement of Rep. Gingrey).
175. *Id.* at 14,226 (statement of Rep. Norwood).
176. *See id.* 14,275 (statement of Rep. Baker).

Representative Conaway of Texas noted the clearest evidence of discrimination actually came from jurisdictions that are not covered under section 5.[177]

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

3. Constitutional Problems

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

One basis of the argument in 1982 was that section 5 placed an impermissible emphasis on racial proportionality. According to this thinking, the statute was inconsistent with the Court's effort to take race out of public decision-making.[183] Evident in its public law

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

Id.

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

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

179. *See id.*

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

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

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

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

decisions, including questions on employment and education, was an overriding directive that plaintiffs must demonstrate intent-based evidence showing racial discrimination.[184] The *Bolden* decision[185] sparked a conflict about section 5 because it proposed a broad conception of the rights protected under the statute.[186] While the sponsors of the reenactment desired to dismantle the *Bolden* decision, opponents worked to defend it.[187] Renewing section 5 for some meant that Congress endorsed a federal mandate of proportional political representation.

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

Finally, Collins described "[t]he most serious constitutional

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

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

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

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

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

189. *Id.*

190. *Id.*

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

> [E]very time we change a little commissioner's district we have to make application.
>
> . . . We cannot elect a city council, we cannot appoint a school board, we cannot have a commissioners election because everything is going through all of this redtape .
>
> I do believe that if all of you fine gentlemen had this redtape and bureaucracy and delays in your own States, you would submit a more reasonable bill to us today.

Id. at 22,923.

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

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

Some members suggested that a constitutional inquiry might dwell on matters quite reminiscent of Representatives Collins's meditation on administrative red tape.[199] Focusing on the more quantifiable burdens born by the covered jurisdictions, these

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192. *Id.* at 22,925.

193. *Id.*

194. *See id.*

195. *Id.*

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

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

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

> [I]t is an extraordinary imposition on a jurisdiction to say that they have to have any decision they make precleared by those at the Justice Department. But the Court has said, as long as you have those two things, congruency and proportionality, they will allow it. That is why I have some question about extending it for a full 25 years.
>
> Back in 1982, I think there was ample reason for us to extend it for 25 years. You would still have a sense of a temporary nature. But to do it now, I think does call into question whether we are following what the courts have told us.

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

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

members advised their colleagues about the financial costs of participating in the compliance process over a prolonged period. When these costs for local, county, and state officials were aggregated, they presented a significant problem of tailoring in the statute. "While there is no doubt that the Voting Rights Act was necessary when enacted, some of the bill's provisions have turned into a costly financial burden for States affected by the law."[200]

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

> This [bill] is here because the 15th amendment has given jurisdiction to Congress to do certain things, and we act on those facts. But the facts are still the facts even though this bill may attempt to say they are something different.
>
> Just because some of our Members prefer to linger in the sins of the past, it is our responsibility to legislate on the facts of the present, and those facts do not justify an extension of section 5.[202]

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

While it was surely helpful to the Congressional deliberations, the insight from the Katz study on the major question about the continuing need for section 5 is somewhat limited by the selection of the information contained in the research. This RPV information taken from this study focuses only includes actual lawsuits filed under section 2 of the VRA—the traditional "sword" usage of RPV analysis.[204] In this case, the data includes approximately 100

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

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

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

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

204. *See id.* at 645.

different elections at various level of government over a span of twenty-five years.[205] Consequently, the share of elections included in the analysis is but a fraction of available data from section 5 jurisdictions (either where no suit might have been filed or where no RPV evidence was cited by the courts) that could possibly reveal broader trends of RPV.

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

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

IV. REASONS FOR MISUSE

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

One obvious causal factor that supports the trend of under-use of RPV data is the role that local self-interest typically plays in the

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205. *Id.*

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

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

208. *See supra* pp. 998-1007.

design of election rules and procedures. In any given jurisdiction, there are always political incentives to drive policy decisions in a manner that achieves biased outcomes.[209] This principle is a mainstay in political science literature as well as public choice scholarship.[210]

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

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

A second reason that the misuse of RPV data is so common is

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

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

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

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

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

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

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

One ideal illustration of this problem is the very case that partly aided North Carolina's recent mishandling of the redistricting

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

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

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

216. *Id.*

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

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

process. In *Bartlett v. Strickland*, the Court found that a district in North Carolina's previous legislative map ran afoul of the principles of section 2.[219] Rejecting the state's rationale that its plan complied with federal law, the majority ruled that section 2 did not require drawing any voting rights district in which a nonwhite group was less than a majority of eligible voters.[220]

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

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

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

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

219. *Id.* at 1239-41.
220. *Id.* at 1241-45.
221. *Id.* at 1242.
222. *See id.* at 1247-50.
223. *See id.* at 1246-49.
224. *See* Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

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

V. RECOMMENDATIONS

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

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

A. Local Jurisdictions

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

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

most likely entities to find themselves as defendants in voting rights litigation.[226]

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

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

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

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

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

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

228. *See, e.g., 2010 City of Los Angeles Population*, CITY OF L.A., http://ens.lacity.org/cla/importdocument/clacdrc319873623_10062011.pdf (last visited Sept. 21, 2012).

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

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

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

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

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

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

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

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

citizen groups—including those who might resort to a lawsuit.

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

B. Congress

A second recommendation for reform addresses the role that federal legislators can play to improve the existing system. Much of the responsibility for the underutilization of RPV evidence traces back to problems of statutory interpretation. In framing the temporary provisions VRA, as the earlier section illustrates, Congress left many unanswered questions about how to identify and measure changes in race discrimination in the political arena. Most people recognize that contemporary politics are vastly improved compared to the 60's era, but the Congressional debates about the VRA reveal that few have ever agreed on the proper indicators of a climate where discrimination no longer plays so troubling a role as to obviate the need for special federal oversight.[233]

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

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

233. *See supra* Section III.B.

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

235. *See supra* Section III.B.

direction to determine the extent to which progress might occur over the next twenty-five years. Absent such a measure (or an external event), the next Congress that addresses this issue is almost destined to engage in another "reenactment."

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

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

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

C. The Judiciary

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

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

established the *Gingles* framework that brought RPV data into greater use as a litigation "sword."[237] Since that time, the trial courts have been responsible for applying this framework to resolve dozens of vote dilution cases across the country. Thus, any comprehensive strategy for changing the ways that RPV data plays a role in the law requires attention to the ways that the federal judiciary handles this information.

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

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

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

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

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

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

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

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

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

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

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

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