Testimony of Professor Nathaniel Persily

Charles Keller Beekman Professor of Law and Political Science

Columbia Law School

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REDISTRICTING AND THE 2010 CENSUS: ENFORCING SECTION 5 OF THE VOTING RIGHTS ACT

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Thank you, Mr. Chairman and Members of the Commission, for inviting me today to testify on the enforcement of the Voting Rights Act in the current redistricting cycle. My name is Nate Persily. I am the Charles Keller Beekman Professor of Law and Professor of Political Science at Columbia Law School, where I teach courses on Constitutional Law and Election Law. I am also the Director of the Center for Law and Politics at Columbia, which is home to the DrawCongress.org project, a repository of nonpartisan congressional redistricting plans for the whole country drawn principally by my students. Perhaps of most relevance to my testimony here today, however, are my experiences as a court-appointed, nonpartisan expert assisting judges in drawing redistricting plans in New York, Maryland, and Georgia. I am also currently serving as Special Master, appointed by the Connecticut Supreme Court to draw that state's congressional districts. I have experienced the requirements of the Voting Rights Act firsthand, as I have drawn plans for covered jurisdictions on several occasions.

I. Introduction

Section 5 of the Voting Rights Act (VRA) is a unique statute in many different ways. Its selective application to certain parts of the country represents an exception to the general rule of nationwide application of provisions in the U.S. Code. The inversion of the federal-state relationship of the preclearance process is exceptional in the fact that state laws of a particular sort (that is, those relating to voting) can be held up by the federal government, either the Department of Justice (DOJ) or the U.S. District Court for the District of Columbia (D.D.C.). Finally, although other laws have sunset periods and have been reauthorized, the VRA has been

reauthorized multiple times for different lengths of time, most recently in 2006 for another 25 years.

These unique characteristics of Section 5 are well-known and often debated. The state of African American voting rights at the birth of the VRA in 1965 demanded such "extraordinary medicine." One question, debated now in the courts, Congress, and beyond, is whether section 5 is still necessary or whether the changing facts on the ground, including new challenges to minority voting rights, require reform of the statute.

I would like to spend my time here today speaking about another aspect in which Section 5 is extraordinary: namely, the power it vests in the federal government to oversee aspects of our electoral system. Unlike most countries of the world, the United States does not have national overseer of our elections. The Federal Election Commission only deals with a small slice of our electoral practices, predominantly limited to campaign finance. Other agencies, such as the Election Assistance Commission, are not designed or charged with the responsibility to ensure elections are conducted fairly or even efficiently. Instead, most regulation and enforcement of election law occurs at the state and local level.

When placed in this context, Section 5 of the VRA and the authority it vests in the DOJ appear quite distinct, even apart from the unique aspects of the statute that are considered most aberrational. The statute gives the federal government the power to prevent electoral practices deemed unfair according to criteria specified in law. In this sense, at least among covered jurisdictions, Section 5 enforcement has the potential to harmonize certain electoral practices, or at least those considered to have potentially discriminatory effects.

Given that unique charge of Section 5 and the general absence of a national nonpartisan overseer of American election, it should come as no surprise that enforcement of the VRA leads

many to criticize the DOJ for the decisions it makes. Criticism of the voting section of the Department of Justice is nothing new. Indeed, lawyers there have come to expect it as part of the job. To some extent, an absence of criticism might constitute a sign of a problem, given the sensitive task that the voting section performs in enforcing section 5 of the Voting Rights Act. If the voting division is not angering someone, then it is probably not performing the function the statute envisions.

The character of the criticism during the 2011 redistricting process, however, is of a different kind and degree. In large part, this is the result of forces beyond the DOJ's control. The polarization of our politics, the perceived stakes of this redistricting process, and the uncertain meaning and future of section 5 combine to place the DOJ in an impossible position. The elections since the 2001 redistricting cycle have completed the Southern realignment that commenced with the VRA's passage.[1] Southern White (former) Democrats now identify and vote Republican. Racial minorities (particularly African Americans, but Latinos as well) tend to vote for Democrats. With partisan polarization mapping onto racial differences in many covered areas, the DOJ's role in approving redistricting plans is necessarily fraught with partisan consequences. Such was not the case when Democrats held a monopoly on Southern politics, and when Democratic control of the U.S. House of Representatives seemed entrenched. Now, each preclearance determination, especially concerning statewide redistricting, is seen as a zero sum game between the political parties with great political and policy consequences.

[1] *See* Nelson W. Polsby, How Congress Evolves: Social Bases of Institutional Change (2003); Richard H. Pildes, Thomas M. Jorde Lecture: Ungovernable America?: The Causes and Consequences of Polarized Democracy 12-18 (Apr. 14, 2010), *available at* http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__news/documents/documents/ecm_pro_065536.pdf.

At the same time, unfinished debates from the 2006 VRA reauthorization process have left the Department with a choice between two different interpretations of section 5's new retrogression standard: one favored by Democrats and the other favored by Republicans.[2] The debate boils down to a disagreement over whether the new retrogression standard protects only majority-minority districts or protects districts where minorities have an "ability to elect" their preferred candidates irrespective of their particular share of the population.[3] Even when the partisan stakes are low, such as with a local redistricting process or a move to nonpartisan primaries, the interpretive choices made by the DOJ are seen as sending partisan signals for the more contentious preclearance submissions. It should therefore come as no surprise that many Republican-controlled states have opted to seek preclearance from the D.C. District Court for their redistricting plans and voter identification laws.[4]

As the DOJ navigates the political minefield of the preclearance process during the high-stakes 2011 redistricting process, the Supreme Court is looking over its shoulder, threatening to declare section 5 unconstitutional. The signals sent in the *Northwest Austin* case,[5] as well as the brief opinion in the recent Texas redistricting case, *Perry v Perez*,[6] have indicated that section 5 is living on borrowed time. Assuming the personnel on the Court remains constant, the question is not whether the Court will declare section 5 unconstitutional, but when and how. Realizing that, the DOJ necessarily views each preclearance determination as a potential vehicle that could

[2] *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 184-90 (2007) [hereinafter Persily, *Promise and Pitfalls*]
[3] *See id*. at 237-45 (discussing debate over "ability to elect" standard).
[4] *Cf.* Hans A. von Spakovsky, *Texas Has Its Day in Court*, Nat'l Rev. Online, The Corner (Jan. 10, 2012, 2:22 pm), http://www.nationalreview.com/corner/287720/texas-has-its-day-court-hans-von-spakovsky (noting Texas made "smart move" in seeking preclearance in D.C. District Court because of "bias and politics driving the Holder Justice Department").
[5] Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).
[6] Perry v. Perez, Nos. 11-713, 11-714, 11-715, 2012 WL 162610 (U.S. Jan. 20, 2012).

destroy section 5 itself. It must choose its battles wisely, lest the "wrong" case emerge as the test case for either the meaning of the retrogression standard or the constitutionality of section 5.

Given these conflicting pressures and DOJ's unique position as a federal overseer of elections, it is no wonder that the DOJ receives criticism from all sides. And it should be understood that the cross-cutting pressures described lead to different and contradictory criticisms, not a chorus of critics pointing in one direction. Republicans view the DOJ as pursuing a Democratic partisan agenda with the preclearance process.[7] Civil rights groups and some Democrats see the DOJ as too timid, having denied preclearance in only a few, largely insignificant cases.[8] "Color-blindness" and states' rights advocates, uncomfortable with the VRA in general, and section 5 in particular, see in every DOJ action an example of racialization of politics or excessive and arbitrary federal intrusion on states' prerogatives.

While recognizing that the DOJ is "damned if it does and damned if it doesn't," it is useful to define exactly where we are in the debates over the meaning of the VRA and to analyze how we have arrived at this particular destination. What follows is an explanation of how the contentiousness of this redistricting process was both predictable and foreordained by the choices not made in the VRA reauthorization process. I then turn to an analysis of the twenty

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[7] *Compare* Elise Cooper, *Why Eric Holder Must Go,* Am. Thinker (Jan. 29, 2012), http://www.americanthinker.com/2012/01/why_eric_holder_must_go.html (quoting Republican Congressman Ted Poe as saying, in enforcing section 5, Attorney General "Holder's interpretation of the law undermines the Constitution, and . . . is motivated by politics, not by equal justice under the law"), with Jeffrey Toobin, *Poll Position: Is the Justice Department Poised To Stop Voter Fraud—or To Keep Voters from Voting?*, New Yorker, Sept. 20, 2004, at 56 ("The main business of the Voting Section is still passing judgment on legislative redistricting in areas that have a history of discrimination. Under Ashcroft, its actions consistently favored Republicans—for instance, in Georgia, where the department challenged the Democrats' gerrymander, and in Mississippi, where the Voting Section stalled the redistricting process for so long that a pro-Republican redistricting plan went into effect by default.")..

[8] *See* Sandhya Somashekhar, *La. Redistricting Seen as a Crucial Test*, Wash. Post, June 5, 2011, at A3 (noting concern of civil rights groups that the DOJ "may not necessarily be on their side").

preclearance denials issued since the VRA was reauthorized. I pay particular attention to three high profile preclearance actions: the objection to the nonpartisan election initiative in Kinston, North Carolina; the objection to South Carolina's Voter ID law; and the DOJ's position in the Texas redistricting case.

If there is an argument to be unearthed from what follows it is this: The complaints against the DOJ this redistricting cycle are inevitable, given the architecture of section 5 and the state of our politics. Actions and interpretations that previously would not have raised partisan eyebrows are now seen as outrages. Such is the fate of applying a statute that regulates politics in an environment where political impartiality is universally questioned and each decision is seen as one that might determine control of a legislative chamber. At the risk of beginning on a note of pessimism, it is also far from clear that any minor reform of the current system will be able to restore bipartisan confidence in the preclearance process. These types of criticisms, or their mirror image, may be an unavoidable result of polarized politics in an age where party and race have become intertwined.

II. The New VRA and the Current DOJ: The Seeds of the Present Discontent

The contentiousness surrounding the DOJ's oversight of the 2011-2012 redistricting process was entirely predictable for those who watched closely the VRA reauthorization debates in 2006. While partisan criticism has appeared to increase in every redistricting cycle, the partisan valence of the papered-over legislative reauthorization debate foreordained the arguments now coming to full bloom. I have recounted elsewhere that legislative history and thus will only provide a brief summary here.[9] Despite massive and bipartisan support in the final

[9] *See* Persily, *Promise and Pitfalls*, *supra* note 2, at 179-92.

votes on the new VRA, it became clear in both the pre- and post-enactment legislative history that the political parties had very conflicting views over the meaning of the new retrogression standard, as well as the constitutionality of the statute.

a. The 2006 Amendments to the VRA

i. The *Georgia v. Ashcroft*-Fix

The principal source of controversy, then and now, concerned what is known as the *Georgia v. Ashcroft*-fix, named after the Supreme Court case it attempts to overturn.[10] *Georgia v. Ashcroft* had interpreted section 5's retrogression standard as allowing for jurisdictions to trade off influence districts against "control" or majority-minority districts, in a context where minority legislators voted for the Democratic gerrymander at issue and stood to gain in terms of committee assignments and other indicia of legislative power. In other words, the Court held that in certain contexts, the potential to elect minority-preferred candidates was not the touchstone of the retrogression standard.[11] Influence, broadly defined, could compensate for a loss of electoral control in one or more districts.

The *Georgia v. Ashcroft*-fix attempts to refocus the retrogression standard on the ability to elect and away from influence (however defined). Specifically, it directs that preclearance should be denied if the voting law at issue "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color [or language minority status] . . . to elect their preferred candidates of choice . . . ."[12] The devil is in

[10] Georgia v. Ashcroft, 539 U.S. 461 (2003).
[11] *Georgia*, 539 U.S. at 479-85.
[12] 42 U.S.C.A. § 1973c(b) (West Supp. 2007).

the details, of course, over how one estimates the "ability to elect" minority-preferred candidates, and, in particular, whether bright lines exist distinguishing ability-to-elect districts from others.

Republicans tended to favor an approach with bright line rules, whereas Democrats proffered a more flexible and functional interpretation of the "ability to elect."[13] To be specific, Republicans interpret the retrogression standard to be limited to the protection of "naturally occurring majority minority districts." A jurisdiction that eliminates such districts will run afoul of Section 5 under this interpretation, but districts that do not currently surmount the fifty percent threshold are not entitled to protection.[14]

For Democrats, no such bright line exists. The "ability to elect" depends on a myriad of factors, not the least of which is the extent of racially polarized voting in a jurisdiction. Minorities' ability to elect their preferred candidates will turn not only on their share in the population, but also on the relative levels of political cohesion and turnout between whites and minorities.[15] A *majority*-minority district might constitute an ability-to-elect district, under this view, or it might not. In some areas, over-fifty percent status will not be enough to characterize a benchmark district as protected. In others, districts with small minority population shares may have the ability to elect minority-preferred candidates. As such, section 5 protects a greater variety of districts. It also would allow for tradeoffs between majority-minority districts and other ability-to-elect districts, for example, where minorities can still elect their preferred candidates because of white crossover voting.

[13] *See* Persily, *Promise and Pitfalls*, *supra* note 2, at 188-89 (summarizing disagreement between Democratic and Republican interpretations of amendments).
[14] *See id*. at 237-40.
[15] *See id*. at 243-45.

ii. The *Reno v. Bossier-Parish* Fix

The 2006 reform that received comparably little attention was the "fix" to another Supreme Court case, *Reno v. Bossier Parish*.[16] That case held that the "purpose prong" of section 5 only prevented voting laws that had retrogressive purposes. In other words, a purpose to discriminate was insufficient to justify a preclearance denial; the law at issue would need to have the purpose of making minorities worse off (retrogressing).[17]

The 2006 amendments to the VRA overturned *Bossier Parish* by clarifying that "any discriminatory purpose" would constitute grounds for a preclearance denial.[18] Given that a large share of preclearance denials in the pre-*Ashcroft* period grew out of the DOJ's interpretation of the purpose prong,[19] this reform has the potential for DOJ involvement in redistricting on par with the *Ashcroft*-fix. Because the law places the burden on the jurisdiction to demonstrate the nonexistence of discriminatory purpose, the DOJ can be in a position to deny preclearance even in some situations where the effect of a voting law on minorities is unclear or contested. Given the difficulty in estimating a minority group's ability to elect and the lack of an agreed-upon methodology for doing so, denying preclearance under the purpose prong exists as an effective tool for preventing voting laws that appear to disadvantage minorities.

However, evaluations of purpose, which are quite familiar in the law but rarely unmoored from some type of effect, necessarily entail the exercise of considerable discretion. Factors that appear discriminatory to some will not appear so to others, and different decisionmakers will

[16] Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000).
[17] *See* Persily, *Promise and Pitfalls*, *supra* note 2, at 217 n.165.
[18] 42 U.S.C.A. § 1973c(c) (West Supp. 2007).
[19] *See* Peyton McCrary, Christopher Seaman & Richard Valelly, The Law of Preclearance: Enforcing Section 5, *in* The Future of the Voting Rights Act 20, 26 tbl.2.2 (David L. Epstein et al. eds., 2006).

provide different evaluations of the balance of factors suggesting discriminatory purpose. The DOJ's interpretive regulations and the House Report accompanying the 2006 VRA Amendments point to the classic case of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*[20] for clarifying what constitutes a discriminatory purpose.[21] *Arlington Heights* provides illustrative categories of factors while admitting the obvious: that in particular cases, the presence or absence of a given factor should not be determinative.[22]

This variance (and hence, discretion) in evaluations of such purposes can be particularly acute in the redistricting context when partisan purposes can be enmeshed and overlapping with discriminatory purposes. When race and party preference among voters are highly correlated, it can be difficult to disentangle racially discriminatory and partisan purposes. This can be true for both Democratic and Republican partisan gerrymanders. The decision to overconcentrate or excessively disperse minorities (usually loyal Democrats) may prove to be the best strategy to gain partisan advantage. Everyone involved in a redistricting process will know this to be true, but only some linedrawers will be sufficiently ill-advised to characterize (in a discoverable manner) the proposed plan as designed to disadvantage minorities.

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[20] 429 U.S. 252, 268 (1977).

[21] H.R. Rep. No. 109-478, at 68 (2006); Dep't of Justice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011).

[22] The DOJ's interpretive guidelines read: "In determining whether there is sufficient circumstantial evidence to conclude that the jurisdiction has not established the absence of the prohibited discriminatory purpose, the Attorney General will be guided by the Supreme Court's illustrative, but not exhaustive, list of those ''subjects for proper inquiry in determining whether racially discriminatory intent existed,'' outlined in Village of Arlington Heights v. Metropolitan Housing Development Corp. . . . In that case, the Court, noting that such an undertaking presupposes a ''sensitive inquiry,'' identified certain areas to be reviewed in making this determination: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decisionmakers." Guidance Concerning Redistricting, 76 Fed. Reg. at 7471 (citations omitted).

b. DOJ Interpretations of the 2006 VRARA

Although the parties may have had different interpretations of the retrogression standard during the reauthorization debates, the DOJ needed to take a position on the meaning of the new provisions to provide some direction for this redistricting cycle. It did so on February 9, 2011, by issuing "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act,"[23] and on April 15, 2011, it presented its "Revision of Voting Rights Procedures."[24] In general, the Department proffered an interpretation that eschews bright-line rules and requires intensive context-specific and fact-based determinations of purpose and effect.

On the purpose prong, the Guidance provides some direction, but relies principally on the *Arlington Heights* factors. In particular, the Guidance provides:

> In determining whether there is sufficient circumstantial evidence to conclude that the jurisdiction has not established the absence of the prohibited discriminatory purpose, the Attorney General will be guided by the Supreme Court's illustrative, but not exhaustive, list of those "subjects for proper inquiry in determining whether racially discriminatory intent existed," outlined in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977). In that case, the Court, noting that such an undertaking presupposes a "sensitive inquiry," identified certain areas to be reviewed in making this determination: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5)

[23] Guidance Concerning Redistricting, 76 Fed. Reg. 7470.
[24] Dep't of Justice, Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239 (Apr. 15, 2011) (to be codified at 28 C.F.R. pt. 0, 51).

> contemporaneous statements and viewpoints held by the decisionmakers. Id. at 266–68. [25]

It is doubtful that the Department could give any greater direction than this. The inherently contingent purpose inquiry necessarily implies considerable DOJ discretion as to when inferences can be made concerning what went into the minds of those who drew the lines. [26]

In contrast, the Guidance concerning "retrogressive effect" takes a side in the debate that was in the background of the reauthorization of the VRA. In particular, it makes clear that ability-to-elect districts are not distinguished by population percentages above a particular threshold, such as "over fifty percent minority CVAP or VAP."[27] Rather, rates of eligibility, turnout, and racially-polarized voting will interact with minority population thresholds to determine if a district has the ability to elect. The relevant paragraph in the Guidance clarifies:

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

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[25] Guidance Concerning Redistricting, 76 Fed. Reg. at 7471;. *see also* 28 C.F.R. § 51.57(e) (2011) (reiterating *Arlington Heights* factors).

[26] The Guidance, as well as the codified regulations, make clear, however, that the failure to maximize the number of majority-minority districts should not be seen, by itself, as an indication of discriminatory purpose. See Guidance Concerning Redistricting, 76 Fed. Reg. at 7471; *see also* 28 CFR § 51.59(b) ("A jurisdiction's failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.").

[27] Cf. Persily, *Promise and Pitfalls*, *supra* note 2, at 183-93 (discussing debate in Senate over whether "ability to elect" districts would be defined by a specific threshold).

> Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination. 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan.[28]

The ability to elect is dichotomous under this view. "That ability to elect either exists or it does not in any particular circumstance."[29] In other words, "ability" is not seen as a continuum where districts might be arrayed from those that have no ability to elect to those that have some such ability to those that have a definite ability to elect a minority-preferred candidate. [30] As a result, a jurisdiction cannot trade off influence districts against ability-to-elect districts, as directed by the *Georgia v. Ashcroft* fix, nor can it trade off a few *definite* ability-to-elect districts in favor of a greater number of *likely*-to-elect districts. The retrogression inquiry, while entailing a totality-of-the-circumstances type of analysis to estimate the ability to elect minority-preferred candidates, also entails a straightforward mathematical analysis in which the DOJ tallies up the number of ability-to-elect districts in the proposed plan and makes sure it equals or exceeds the number in the benchmark plan.[31]

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[28] Guidance Concerning Redistricting, 76 Fed. Reg. at 7471 (emphasis added); *see also* 28 C.F.R. §§ 51.57-.59 (setting forth factors that go into a retrogression determination).
[29] Guidance Concerning Redistricting, 76 Fed. Reg. at 7471
[30] *Cf.* Persily, *Promise and Pitfalls*, *supra* note 2, at 243-45 (noting debate in Senate over whether or not "ability to elect" requires meeting an exact threshold).
[31] As discussed later, it is possible that the calculation becomes a bit more complicated in instances where a jurisdiction increases the number of districts in its plan, for example, as a result of added congressional seats due to population growth.

III. DOJ Enforcement of the Reauthorized VRA

The DOJ Guidance and revised regulations signaled to jurisdictions what types of plans and voting laws would be denied preclearance. Although specific numbers are not readily available for the entire post-2006 era, the Department considered 19,664 voting changes in the period just from January 2010 to March 2011.[32] By my count, which might not be completely accurate, they have denied preclearance to twenty submitted requests since 2006.[33]

To be sure, the small number of preclearance denials underestimates the effect of section 5 or even the putative aggressiveness or timidity of the DOJ. To get a fuller picture, one would need to add in the number of more-information-requests (MIRs), as well as the positions the DOJ has taken in cases before the D.C. District Court. Moreover, each preclearance denial has a deterrent effect on laws similar to the one submitted. For example, the decision to deny preclearance to South Carolina's voter identification bill, plus MIRs from the DOJ, has led Texas to seek preclearance of its ID law from the D.C. District Court.[34]

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[32] *See* Dep't of Justice, Section 5 Changes by Type and Year, http://www.justice.gov/crt/about/vot/sec_5/changes.php (last updated March 31, 2011).

[33] *See* Dep't of Justice, About Section 5 of the Voting Rights Act: Section 5 Objection Determinations, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Jan. 31, 2012). It would be incorrect to say the Department has denied preclearance to twenty voting related laws because each submission sometimes includes several different laws.

[34] *See* Press Release, Greg Abbott, Tex. Att'y Gen., Texas Files Suit Seeking Swift Enforcement of Its Voter Identification Law (Jan. 23, 2012), *available at* https://www.oag.state.tx.us/oagNews/release.php?id=3961 (announcing filing of suit in D.C. District Court in order "to ensure Texas' photo identification law is implemented as quickly as possible" due to concerns following DOJ refusal to preclear South Carolina law).

A. DOJ Preclearance Denials

As has been the case throughout the history of the VRA, few of the denials since 2006 have been sufficiently salient to receive national attention or much criticism. They run the gamut from garden variety local redistricting plans to creations of novel representational arrangements, nonpartisan elections, and a voter identification law. Noticeably, the Department has not denied preclearance to any statewide redistricting plans, although, of course, a few covered states, such as Texas, have opted to submit their plans to the U.S. District Court for the District of Columbia.[35] A list of these post-2006 preclearance denials appears below.

1. Randolph County, Georgia, Change in voter registration and candidate eligibility (September 12, 2006)[36]
2. Buena Vista Township, Michigan, Closure of Secretary of State's office that offered voter registration services (December 26, 2007)[37]
3. Mobile County, Alabama, Change in method of election for filling vacancies on County Commission (January 8, 2007; withdrawn July 23, 2008)[38]
4. Fayetteville, North Carolina, Redistricting plan and reduction in number of districts (June 25, 2007)[39]
5. Charles Mix County, South Dakota, Increase in number of commissioners and redistricting plan (February 11, 2008)[40]
6. Texas, Candidate qualifications for water districts (August 21, 2008)[41]
7. Calera, Alabama, Annexations and redistricting (August 25, 2008)[42]

[35]See Dep't of Justice, Status of Statewide Redistricting Plans, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last visited Jan. 31, 2012) (detailing the approval of redistricting plans for almost all the covered states).

[36] Letter from Wan J. Kim, Assistant Att'y Gen., to Tommy Coleman, Hodges, Erwin, Hedrick & Coleman (Sept. 12, 2006).

[37] Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Brian DeBano, Chief of Staff and Chief Operating Officer, and Christopher Thomas, Dir. of Elections (Dec. 26, 2007)

[38] Letter from Wan J. Kim, Assistant Att'y Gen., to Troy King, Att'y Gen,, Ala. (Jan. 8, 2007).

[39] Letter from Wan J. Kim, Assistant Att'y Gen., to Michael Crowell, Esq., Tharrington Smith (June 25, 2007)

[40] Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Sara Frankenstein, Gunderson, Palmer, Goodsell & Nelson (Feb. 11, 2008).

[41] Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Phil Wilson, Sec'y of State (Aug. 21, 2008).

[42] Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Dan Head, Esq., Wallace, Ellis, Fowler & Head (Aug. 25, 2008)

8. Gonzales County, Texas, Bilingual election procedures for 2004, 2006, and 2008 elections (March 24, 2009)[43]
9. Georgia, Voter verification program (May 29, 2009)[44]
10. Louisiana, Designation of time period preventing changes in precinct boundaries (August 10, 2009)[45]
11. Kinston, North Carolina, Move to nonpartisan elections (August 17, 2009)[46]
12. Lowndes, Georgia, Redistricting plan (November 30, 2009)[47]
13. Gonzales County, Texas, Bilingual election procedures (March 12, 2010)[48]
14. Mississippi, Majority vote requirement for county boards (March 24, 2010)[49]
15. Runnels County, Texas, Bilingual election procedures (June 28, 2010)[50]
16. Fairfield County, South Carolina, Addition of appointed positions to elected school board of trustees (August 16, 2010)[51]
17. Galveston, Texas, Switch to combined districted and partially at-large elections (October 3, 2011)[52]
18. East Feliciana Parish, Louisiana, Redistricting plan (October 3, 2011)[53]
19. Amite County, Mississippi, Redistricting plan (October 4, 2011)[54]
20. South Carolina Voter identification law (December 23, 2011)[55]

[43] Letter from Loretta King, Acting Assistant Att'y Gen., to Robert T. Bass, Esq., Allison, Bass & Associates, et al. (Mar. 24, 2009).
[44] Letter from Loretta King, Acting Assistant Att'y Gen., to Thurbert E. Baker, Att'y Gen., Ga. (May 29, 2009)
[45] Letter from Loretta King, Acting Assistant Att'y Gen, to William P. Bryan III, Esq., Assistant Att'y Gen., La., and Erin C. Day, Esq., Assistant Att'y Gen, La. (Aug. 10, 2009).
[46] Letter from Loretta King, Acting Assistant Att'y Gen., to James P. Cauley, III, Esq., Rose Rand Wallace (Aug. 17, 2009) [hereinafter Kinston Objection Letter].
[47] Letter from Thomas E. Perez, Assistant Att'y Gen., to Walter G. Elliott, Esq., Elliott, Blackburn, Barnes & Gooding (Nov. 30, 2009).
[48] Letter from Thomas E. Perez, Assistant Att'y Gen., to Robert T. Bass, Esq., Allison, Bass & Associates (Mar. 12, 2010).
[49] Letter from Thomas E. Perez, Assistant Att'y Gen., to Margaret L. Meeks, Esq., Special Assistant Att'y Gen (Mar. 24, 2010).
[50] Letter from Thomas E. Perez, Assistant Att'y Gen., to Elesa Ocker, Cnty. Clerk (June 28, 2010).
[51] Letter from Thomas E. Perez, Assistant Att'y Gen., to C. Havird Jones, Jr., Esq., Senior Assistant Att'y Gen., S.C. (Aug. 16, 2010).
[52] Letter from Thomas E. Perez, Assistant Att'y Gen., to C. Robert Heath, Esq., Bickerstaff Heath Delgado Acosta (Oct. 3, 2011).
[53] Letter from Thomas E. Perez, Assistant Att'y Gen., to Nancy P. Jensen, Garnet Innovations (Oct. 3, 2011).
[54] Letter from Thomas E. Perez, Assistant Att'y Gen., to Tommie S. Cardin, Esq., Butler, Snow, O'Mara, Stevens, & Cannada (Oct. 4, 2011).
[55] Letter from Thomas E. Perez, Assistant Att'y Gen., to C. Havird Jones, Jr., Esq., Assistant Deputy Att'y Gen., S.C. (Dec. 23, 2011) [hereinafter S.C. Voter ID Objection Letter].

Because the preclearance submissions and other documents relevant to the DOJ decisionmaking process are not readily available to the public, it is difficult to evaluate a denial of preclearance based merely on an objection letter. However, the practices of the DOJ either since 2006 or since 2008 do not seem, at first blush, to be systematically different than those of earlier years.[56] To be sure, there are some salient differences from the previous administration: Most notably, the recent denial of preclearance to South Carolina's voter ID law is in tension with the earlier grants of preclearance to both Arizona and Georgia's similar laws.[57]

However, the relatively low number and salience of objections demonstrates that today, as in earlier periods, the sum total of DOJ preclearance objections does not accurately reflect either the costs or benefits of section 5. Perhaps more to the point, section 5 has its greatest impact on the panoply of low level governmental decisions that are likely not to be viewed in partisan terms, if they are viewed at all. Covered jurisdictions may be likely to view any DOJ preclearance denial as unfair in some respect.[58] Yet at least some of these disagreements are a natural consequence of the discretion vested in DOJ by the capacious language of the statute, which inevitably leads to disagreements over its meaning in a particular application.

[56] One notable exception needs to be made to this general point. In the span between *Reno v. Bossier Parish II* and the 2006 reauthorization, denials of preclearance based on discriminatory purpose naturally waned and have reappeared due to the *Bossier Parish*-fix.

[57] *See* Persily, *Promise and Pitfalls*, supra note 1, at 215 (noting "divisions between the career attorneys and the political appointees concerning the Georgia and Arizona photo identification laws" that were precleared); S.C. Voter ID Objection Letter, supra note 55 (denying preclearance to South Carolina voter ID law).

[58] *See, e.g.,* Charlie Savage, *Justice Dept. Cites Race in Halting Law over Voter ID,* N.Y. Times, Dec. 24, 2011, at A1 (quoting South Carolina Governor Nikki Haley calling the preclearance denial a "terrible, clearly political decision").

B. Recent Salient Preclearance Denials and Positions

I now turn to the objections for which the DOJ has received the greatest recent criticism. Perhaps some may find other denials equally deserving of attention, but critics tend to focus on the denial of preclearance to a nonpartisan elections initiative in Kinston, North Carolina, the rejection of the South Carolina voter identification law, and the position taken by the DOJ in the D.C. District Court concerning the Texas statewide redistricting plans. Each of these decisions could garner a dissertation-length explanation and review, but for space and time reasons, I provide here a simple explanation and description of these decisions' implications.

1. Nonpartisan Election Initiative in Kinston, North Carolina

On August 17, 2009, the Acting Assistant Attorney General sent a letter objecting to the change to nonpartisan elections in Kinston, North Carolina.[59] The change to nonpartisan elections with a plurality vote requirement was passed by initiative in the 2008 general election. The objection letter explained that the reform would "likely reduce the ability of Blacks to elect candidates of choice" and therefore preclearance should not be granted based on the potential retrogressive effect.[60]

Because African Americans constitute a majority of the population, voting age population, and registered voters in Kinston, this decision naturally led to both perplexity and criticism. In particular, it appeared that the DOJ was objecting to a reform supported by African

[59] Kinston Objection Letter, supra note 46.
[60] *Id.* at 2.

Americans themselves.[61] After all, 53.1% of the voters who turned out in the 2008 election in which the initiative appeared were African American. Moreover, the preclearance letter seemed to merge the VRA-related interests of African Americans with those of the Democratic Party, causing worry that federal law somehow requires a Democratic primary in areas with racially polarized voting.

The basis for the objection was the DOJ's conclusion that party labels facilitate white crossover voting for Black-preferred Democratic nominees.[62] Although African Americans constituted a majority of voters in the 2008 election, they usually turn out at lower rates than whites in Kinston. Therefore, in a typical election – especially an off-year election in which city officers would be chosen under the new initiative – it is likely that African Americans would constitute a minority of voters who actually turn out. For example, only 37.1% of the voters in the 2009 election were Black. Therefore, under those conditions, election of the Black candidate of choice will require either higher than average Black turnout or some white crossover voting. Whites, the letter concluded, would be more likely to cross over if the Black-preferred candidate were running on the Democratic Party line in the general election. As the letter states, "It is the partisan makeup of the general electorate that results in enough white cross-over to allow the black community to elect a candidate of choice. . . . [A] small group of white Democrats maintain strong party allegiance and will continue to vote along party lines, regardless of the race

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[61] *See, e.g.*, Editorial, *Justice Department to Blacks: We Know Better*, Wash. Times, Oct. 27, 2009 (criticizing DOJ denial of preclearance because it "overruled Kinston's Black voters themselves, who helped vote overwhelmingly . . . [to have] nonpartisan local elections"); Press Release, Ctr. for Individual Rights, CIR Challenges Section 5 of Voting Rights Act (April 7, 2010), *available at* http://www.cir-usa.org/legal_docs/laroque_v_holder_release.pdf (noting, among other statistics, that the referendum "passed in 5 of 7 precincts where Blacks were a majority of voters").

[62] Kinston Objection Letter, supra note 46, at 2 (noting that success of Black voters in electing candidates of choice is due to "small, but critical, amount of white crossover votes [that] results from the party affiliation of Black-preferred candidates").

of the candidate. . . . Removing the partisan cue in municipal elections will, in all likelihood, eliminate the single factor that allows black candidates to be elected to office."[63]

Available electoral data for the City of Kinston from the past decade suggest a few details to the story that has come to be told about this case. First, despite the fact that African Americans comprised a majority of voters in the 2008 election, it would be difficult to prove that a majority of African Americans voted for the initiative. In homogenous Black precincts about 30% of voters voted for the initiative and about 36% voted against. However, the interesting "story" that emerges from that particular initiative vote concerns the disparate roll-off of Black voters. About 35% of voters in homogeneous Black precincts chose not to vote on the initiative, as compared to about 15% in precincts that were 20% Black. In other words, African Americans appeared divided on the initiative, but a substantial share chose not to vote.

This finding has implications for the general theory of the preclearance letter that nonpartisan elections make it less likely for African Americans to elect their preferred candidates. Much of the attention in the letter focuses on turnout and racially polarized voting. Indeed, turnout is usually lower among African Americans in Kinston, and as Figure B suggests with respect to the 2008 presidential election, voting is racially polarized.[64] Less attention had been paid to the phenomenon of roll-off – the decision (disproportionately made by African Americans) to vote a straight party ticket and not to vote for down-ballot races, such as the initiative. As Figure C indicates, by aggregating together all of the votes taken between 2006 and 2010, roll-off can sometimes be as significant a factor as turnout in affecting the likelihood

[63] *See* Kinston Objection Letter, *supra* note 46, at 2. The letter also mentions the important role that parties play in supporting and funding their general election nominees. *Id*. In a nonpartisan election, resource-constrained candidates, likely from the minority community, would not have the aid of party in running their campaigns.

[64] As is clear from Figure B, race is a more powerful predictor than party of Obama's vote share in each precinct.

that African Americans would vote for a particular office. This phenomenon is not as relevant to the Kinston preclearance submission, in particular, though, because the elections that would have been affected by the initiative would all have occurred together in off-years on the same ballot. All the races on the ballot would then be nonpartisan, so we should not expect the degree of roll-off that is present when partisan and non-partisan races both appeared on the ballot.

Figure A. 2008 Nonpartisan Election Initiative Results by Race
(complete Kinston precincts)

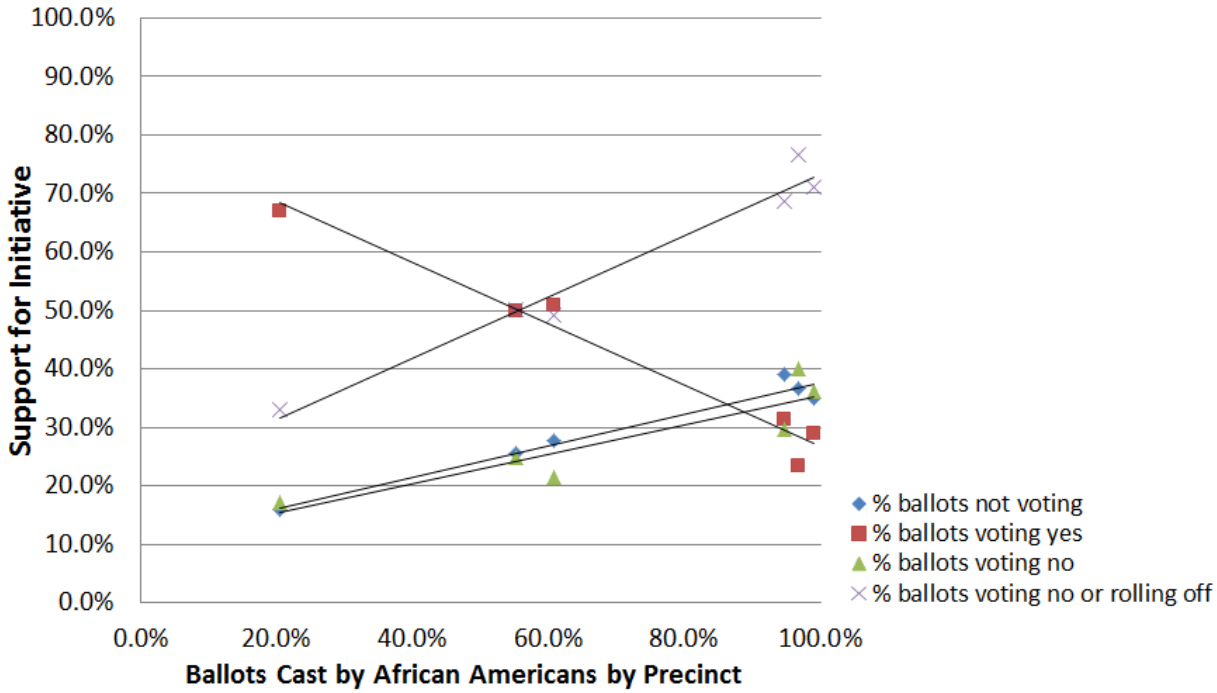


Figure B. Racial Polarization in 2008 Presidential Election
(partial and complete Kinston precincts)

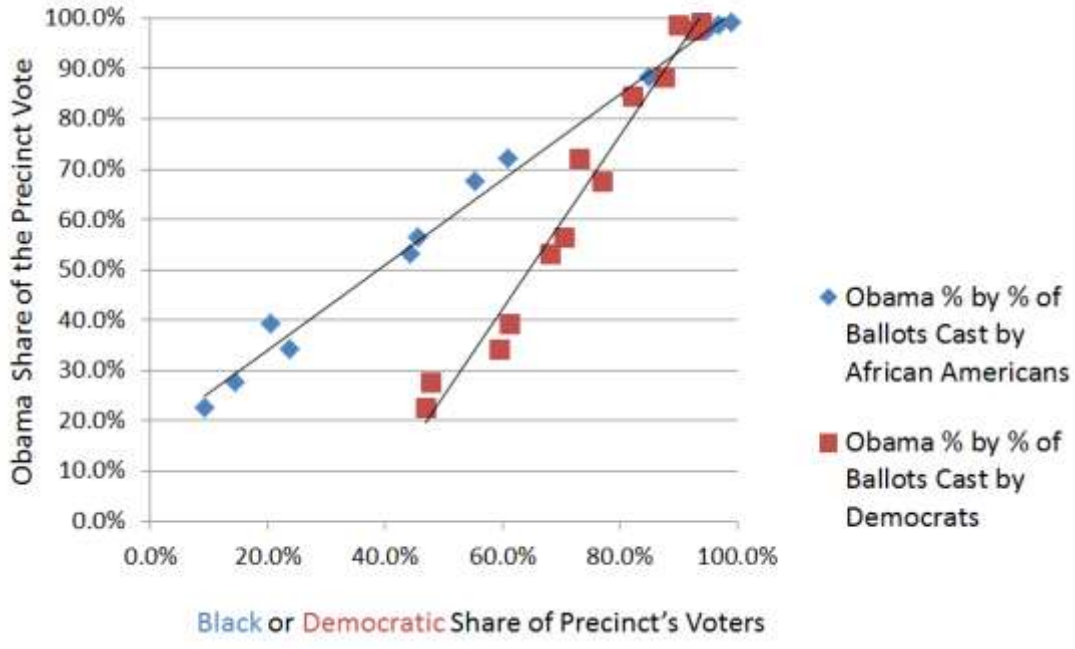
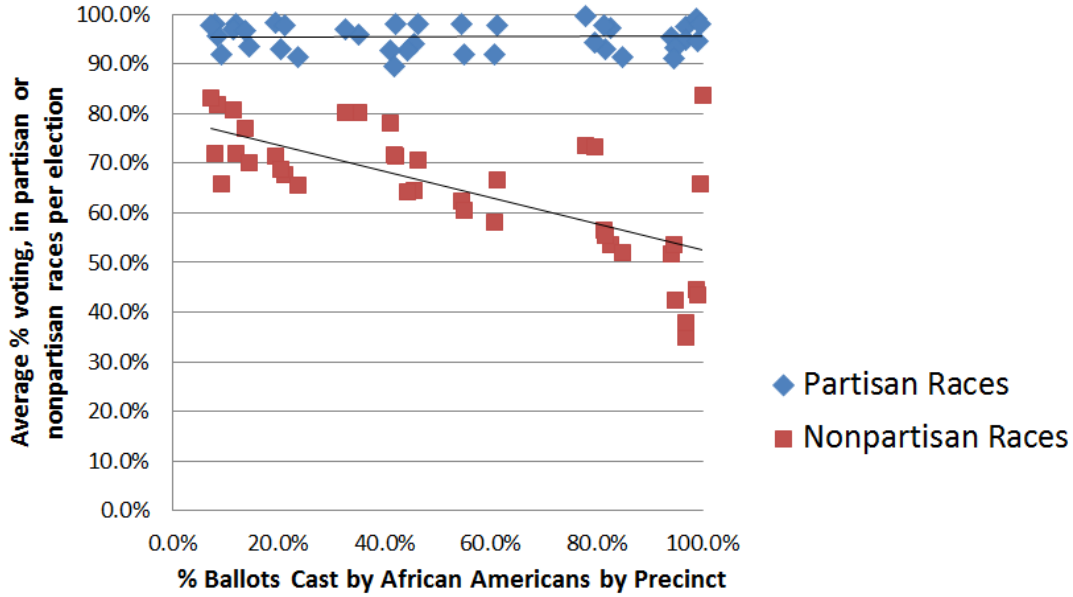


Figure C. Roll-off in Non-Partisan Contests by Race, 2006-2010
(partial and complete Kinston precincts)



Of greater relevance is the related phenomenon of straight-ticket voting. The preclearance letter suggests that, despite racially polarized voting, some share of White Democrats will vote a straight party ticket, which will often benefit Black Democratic nominees. Making the races nonpartisan would remove the option of voting a straight party ticket, so Black-preferred candidates may lose some of the votes that running on the party line might otherwise give them. As can be seen in Figures D and E, which depict the rates of straight-ticket voting in 2008 and 2009, party-line voting was especially high during the presidential year, and the likelihood of casting a straight ticket increases with the Black vote share in the precinct. Even in the off-year elections that would be affected by the initiative and when voters are more likely to vote for each individual contest, the share of voters in largely White precincts who cast straight tickets is not negligible (around 15% or so). If those voters would be less likely to vote for the Black-preferred candidate when the straight ticket option and party labels are removed, then such candidates may have less of a chance of winning.

Figure D. Straight-Ticket Voting by Race, Kinston Elections (2008)
(partial and complete Kinston precincts)

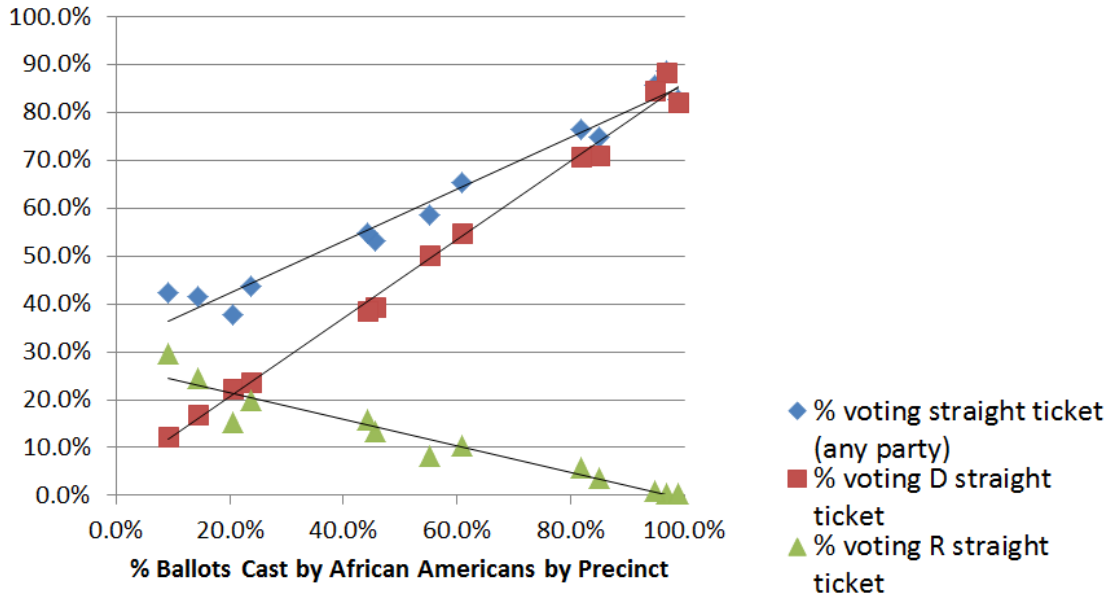
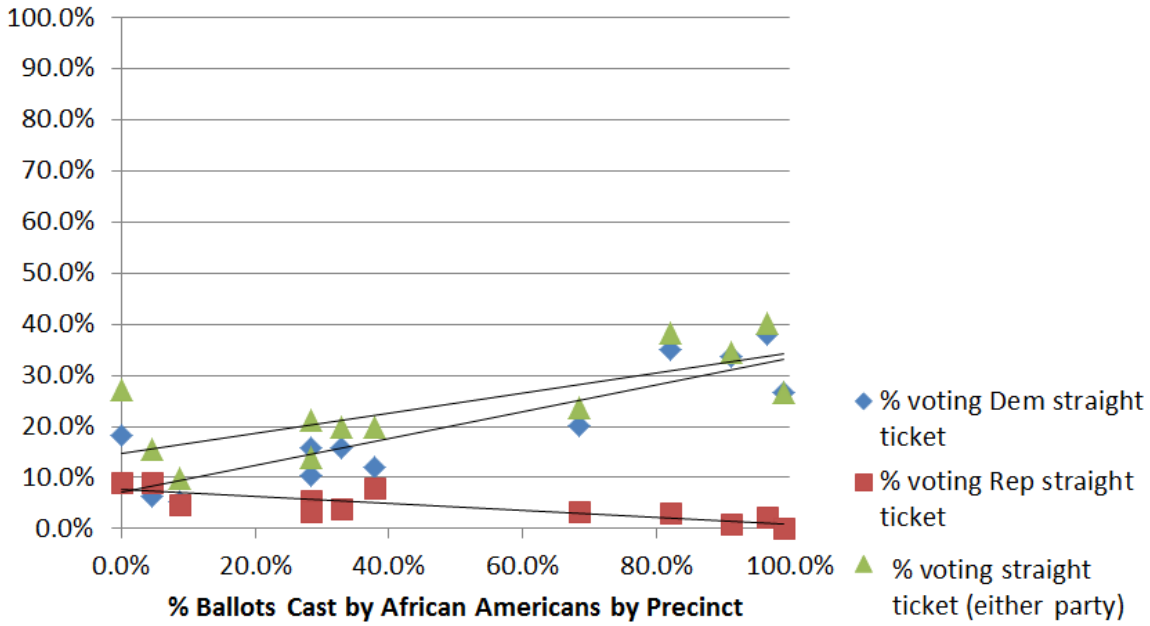


Figure E. Straight-Ticket Voting by Race, Kinston Elections (2009)
(complete Kinston precincts)



The implications of the theory underlying the Kinston preclearance denial are substantial, as no doubt suggested by the fact that it has become a vehicle for challenging the constitutionality of section 5 itself.[65] The letter not only requires familiar inquiries as to turnout and crossover voting, but also an evaluation of the interaction between party and race in the submitting jurisdiction. In that sense, it exposes, in an honest way, something litigators and political scientists have known for some time: The racial composition of the party primary and general electorate can play a significant role in affecting the likelihood that minorities can elect their preferred candidates.[66] Of course, this honest appraisal portends interpretations of the retrogression standard that raise uncomfortable questions about untangling the interests of minority voters from those of the party they tend to support.

Also, by bringing issues of turnout and straight-ticket voting front and center into the retrogression inquiry, especially in a majority-Black jurisdiction, the preclearance denial raises more fundamental questions about how to measure the "ability to elect." In other words, the denial forces difficult questions as to when, if ever, the legacy of discrimination and current socioeconomic inequality as manifested in lower turnout and higher roll-off should be set aside in favor of an interpretation that focuses on whether minorities have the opportunity to control election outcomes were they fully to use the power of their numbers. The preclearance denial makes perfect sense from the standpoint of a prediction as to the likely electoral effects, at least in the short term, for minority-preferred candidates running under the conditions of the initiative. However, an interpretation that focused on minority electoral opportunity in the abstract – that is,

[65] *See* LaRoque v Holder, No. 10-0561, 2011 WL 6413850 (D.D.C. Dec. 22, 2011).
[66] *See generally* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001) (concluding that analysis of minority ability to elect must take into account many factors, including composition of primary and general electorate and participation of different groups).

assuming levels of potential, instead of actual, participation both in turning out and voting a full ballot – would lead to a different result.

2. South Carolina's Voter ID Law

About six weeks ago, the DOJ denied preclearance to South Carolina's new requirement to present a photo ID in order to vote.[67] For all the sound and fury surrounding the decision,[68] the preclearance denial follows a predictable formula for estimating burdens that disproportionately fall upon minority voters. As with the focus of the Kinston preclearance denial on rates of turnout, the voter ID decision presents a straightforward analysis that preclearance should be denied to barriers to voting with disparate racial impacts. Given that most election regulations have such an effect, the question is not why preclearance should be denied to South Carolina's voter ID law, but rather why preclearance should be granted to laws with comparable discriminatory impacts. Or perhaps more specifically, given that even minor voting qualifications have disparate racial impacts and therefore "diminish the ability of minorities to elect their preferred candidates of choice,"[69] how should the preclearance standard be interpreted to distinguish permissible regulations from impermissible ones?

The South Carolina preclearance objection letter bases the denial on a comparison of rates of photo ID possession between registered white and non-white voters. According to the letter, 8.4% of white voters did not have a DMV-issued photo ID, as compared to 10.0% of non-

[67] S.C. Voter ID Objection Letter, supra note 55.
[68] *See, e.g.*, Hans von Spakovsky, *South Carolina and Voter ID: When Politics Drives Law Enforcement*, Foundry (Dec. 27, 2011, 4:51 pm), http://blog.heritage.org/2011/12/27/south-carolina-and-voter-id-when-politics-drives-law-enforcement/ (accusing the DOJ of "ignoring inconvenient facts and clear legal precedent" in denying preclearance for South Carolina voter ID law).
[69] *See* 42 U.S.C.A. § 1973c(b) (West Supp. 2007).

white registered voters. From that, the letter extrapolates that "minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by [the] new requirements. . . . Put differently, although non-white voters comprised 30.4% of the state's registered voters, they constituted 34.2% of registered voters who did not have the requisite DMV-issued identification to vote."[70] Assuming these numbers are correct, 81,938 minority registered voters in South Carolina lack the required photo identification. Unless the state's efforts to make IDs more broadly available were to succeed – a possibility the preclearance denial suggests, but about which there was insufficient evidence – the ID requirement is retrogressive.

To be sure, it is difficult to estimate the precise effect –racially disparate or otherwise – on turnout of an ID law. To understand the effect, one must not only estimate the differential rates of ID possession, but also the likelihood that those who would otherwise turn out to vote will not do so because of the added barrier. If voter ID possession is, itself, highly correlated with other factors that determine turnout, such as socioeconomic status, then it may be that many of those prevented from voting because of ID requirements would not have voted anyway. Moreover, many other factors, such as relative enthusiasm for minority-preferred candidates or other sources of differential mobilization, may swamp the discriminatory effect of voter ID laws in any given election. Such may have been the case, for example, in the lack of an observed

[70] S.C. Voter ID Objection Letter, supra note 55, at 2-3. It should also be noted that South Carolina voters without photo ID have the opportunity to cast a provisional ballot, and some would not need to present an ID if they can show that a "reasonable impediment" prevents them from getting one.

racially discriminatory impact as discerned by relative rates of turnout in Indiana before and after their recent institution of voter ID.[71]

All that said, the conclusion reached by the DOJ is a reasonable one under the statute, especially given that the burden of proof is on South Carolina to prove lack of a retrogressive effect. The DOJ limited itself to evaluations of those already registered to vote,[72] among whom voting intentions would naturally be higher than the voting age or voting eligible population. Thus, one might reasonably think that the voter ID law would have its greatest measurable effect on those who otherwise are more likely to vote. Even if the retrogression determination were based on the racially disparate rate of ID possession among the general voting eligible population, retrogression might still be discerned by the addition of a barrier that would fall more heavily on minority potential voters. In other words, a voter ID requirement adds an additional cost to mobilizing nonvoters, and that cost will fall disproportionately on minority voters less likely to have ID.

This logic is not limited to voter ID laws, however. Virtually every obstacle to voting will place a disproportionate burden on those with less resources, and correlatively racial minorities. Even voter registration requirements, for example, have a disparate racial impact. The same could be said for restrictions on early voting or use of certain balloting technologies. The result in the South Carolina voter ID submission, then, is less of a mystery than the fact that the same logic has not been applied to deny preclearance to a range of regulations with a similar magnitude of disproportionate racial effect.

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[71] *See* Jeffrey Milyo, The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis 5-7 (Inst. of Pub. Policy, Univ. of Mo., Report 10-2007, 2007) .

[72] *See* S.C. Voter ID Objection Letter, supra note 55, at 2 ("In assessing the impact . . . we turn first to the data the state has provided concerning registered voters within the state.").

3. The DOJ Position in the Texas Redistricting Cases[73]

The 2011 Texas redistricting plans have received a great deal of attention in several different courts. The DOJ's position in the preclearance proceedings in the U.S. District Court for D.C. are revealing in that they provide the most complete account of the Department's interpretation of the reauthorized VRA as applied to a redistricting plan. A full discussion of the issues in that case would require much more space than available here. What follows are just a few key points to be gleaned from the DOJ's filing in the case. Moreover, the D.C. District Court's agreement and disagreement with the DOJ's legal arguments can give a sense as to an emerging consensus concerning the interpretation of the reauthorized section 5.

a. A functional assessment of the ability to elect that eschews fixed rules based only on population percentages

As promised by its earlier Guidance on retrogression determinations, the DOJ advocated for a functional and fact-based analysis of minorities' ability to elect their preferred candidates. It urged an inquiry that considered rates of racially polarized voting, turnout, and other political factors that might affect whether the minority community could elect its candidate of choice. The State of Texas sought an interpretation with fixed, bright line rules. Specifically, it proposed an interpretation that considered Black ability-to-elect districts to be those where they constituted over 40% of the voting age population and Hispanic ability-to-elect districts as those where Hispanics constituted over 50% of the citizen voting age population.[74]

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[73] *See* United States' Opening Trial Brief, Texas v. United States, No. 1:11-cv-1303 (D.D.C. Jan. 13, 2012) [hereinafter DOJ Texas Brief].

[74] *See* Texas v. United States, No. 11-1303, 2011 WL 6440006, at *6 (D.D.C Dec. 22, 2011)

The District Court agreed with the DOJ's approach at the summary judgment stage. According to the opinion, "a simple voting-age population analysis cannot accurately measure minorities' ability to elect and, therefore, . . .Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed plans."[75] As a result, districts with populations well in excess of 50% minority might not be considered ability-to-elect districts, whereas some districts below 50% may, because of white crossover voting, constitute ability-to-elect districts. That said, the District Court created something of a safe harbor for districts with a "minority voting majority of sixty-five percent (or more)."[76] Contrary to the DOJ's argument,[77] the Court considered districts with super majorities at that level to constitute presumptive ability-to-elect districts.

The functional argument has had particular bite in the Texas case given the DOJ's allegation that the state deliberately substituted lower turnout Hispanics for higher turnout Hispanics so as to create the impression of a constant minority population percentage but with a decreased ability to elect Hispanic-preferred candidates.[78] A retrogression determination predicated merely on the maintenance of majority-minority districts, under this view, could overlook a decline in the relative ability of minorities to elect their favored candidates in a proposed plan. The effect is clear if one were to estimate retrogression, for example, merely by reference to total population percentages in a situation where ineligible minority voters (e.g.,

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[75] *Id*. at *12.; *see also id*. at *14 ("However, population demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished . . . .").
[76] *Id*. at *16.
[77] *See* DOJ Texas Brief, supra note 73, at 3.
[78] *Id.* at 1 (arguing that plan was drawn "to diminish the ability of minority voters to elected their preferred candidates" in part by "substituting low-turnout Hispanic voters for those more likely to turn out").

noncitizens or prisoners) were strategically placed to maintain the veneer of an unchanged racial composition of a district. Even if citizen voting age population or registered voters is considered the appropriate population denominator for retrogression determinations, this position maintains, rates of turnout and crossover voting will affect the minority community's ability to elect their preferred candidates. For the DOJ, the strategic replacement of high turnout minority voters with those less likely to turn out is also evidence of prohibited discriminatory purpose in violation of section 5.[79]

b. Consideration of aggregations of minorities with a combined ability to elect minority-preferred candidates

Parties to the Texas litigation dispute whether minority groups can be combined together for section 5 purposes to define a district as a minority ability-to-elect district. The DOJ takes the position that, for example, a district with "a cohesive minority coalition of Asian, Hispanic and Black voters with the ability to elect" is a protected district in the benchmark House plan.[80] The argument here is similar as the previous one: Just as in a crossover district, in which a minority group is able to elect its preferred candidate due to white crossover voting, so too could a coalition of minorities elect their collectively preferred candidate if they vote cohesively. Therefore, in addition to tallying up the number of Black and Hispanic ability-to-elect districts, the retrogression inquiry must consider the number of districts in which cohesive minority coalitions have the ability to elect candidates preferred by the coalition.

[79] *Id.* at 9 (arguing "line drawers purposefully removed high turnout Hispanic voters from District 23 and replaced them with Hispanics demonstrated to turn out at a lower rate").
[80] *See* DOJ Texas Brief, supra note 73, at 3.

The District Court appears to have agreed with that position.[81] "Since coalition *and* crossover districts provide minority groups the ability to elect a preferred candidate," the Court held, "they must be recognized as ability districts in a Section 5 analysis of a benchmark plan."[82] The Court is less clear in its denial of summary judgment than is the DOJ in its brief as to whether the minority coalition districts are ability-to-elect districts for one of the included minority groups or for the minority groups in aggregation. The difference may only be a semantic one, however, in that the assumption that drives the notion of a protected minority coalition district is that all minorities in the district vote cohesively for the candidates that minorities collectively prefer. In such a district, there may be no difference, for example, between a Hispanic-preferred candidate and one preferred by the aggregated minority coalition, which may include Hispanics and African Americans, for example.

c. Retrogression measured as a share of total districts, rather than a number of districts

Because Texas gained four new congressional districts as a result of its population growth, the state presents an interesting retrogression fact pattern. The legal question concerns whether the anti-retrogression principle requires merely the maintenance of the same *number* of ability-to-elect districts as in the benchmark plan or keeping constant the *share* of ability-to-elect districts over the total number of districts. The Supreme Court had weighed in on the subject in *Abrams v. Johnson*.[83] That case appeared to take the position that "number" instead of "share" was the appropriate retrogression metric. Otherwise, the Court said, "each time a state with a

[81] *Texas*, 2011 WL 6440006, at *19.
[82] Id. (emphasis added).
[83] 521 U.S. 74 (1997).

majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority."[84]

The DOJ, nevertheless, maintained that in the Texas context, given the large number of added districts, the share of districts is the appropriate retrogression metric.[85] "Whereas the benchmark plan leaves minority voters two congressional seats shy of rough proportionality with their share of the citizen voting- age population," the DOJ argued, "the proposed plan leaves them at least three seats below that mark. That change is retrogressive in violation of Section 5 in a way that plan at issue in *Abrams* is not."[86] This growth in the shortfall from proportionality due to added districts, the argument goes, increases the degree of minority underrepresentation in the proposed plan. (The District Court appears to believe *Abrams* does not control, but nevertheless found this particular argument unavailing.[87])

Perhaps of greater significance, the DOJ argues that the failure to create another majority-minority district is evidence of discriminatory purpose, given that Hispanic population growth is largely responsible for the awarding of four new congressional districts.[88] Even if the test for retrogressive effect may only require the maintenance of a constant number of ability-to-elect districts, DOJ argues, the deliberate failure to increase the number of such districts may provide circumstantial evidence of discriminatory purpose.[89] On this point, the District Court appears to agree.[90]

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[84] Id. at 97-98.
[85] *See* DOJ Texas Brief, supra note 73, at 4.
[86] *Id.* at 4.
[87] *Texas*, 2011 WL 6440006, at *20.
[88] *See* DOJ Texas Brief, supra note 78, at 4.
[89] *Id.* at 8-10.
[90] *See Texas*, 2011 WL 6440006, at *21 ("Although Texas' alleged failure to account for the significant increase of the Hispanic population in the State does not establish retrogression, it is relevant to the Court's evaluation of whether the Congressional Plan was enacted with

d. Use of racial data in aid of a partisan gerrymander

The claims made against the Texas redistricting plans highlight the predicament described earlier concerning how the section 5 regime works when race and party preference remain highly correlated. In particular, as dominant parties pursue strategies to minimize their opponents' voting power, partisan discrimination and racial discrimination will continue to overlap. As long as partisan gerrymandering claims remain unavailable or unwinnable (though not only then), we should expect defendants in voting rights cases to say party, not race, was the motivation behind a plan or a district.

In the Texas preclearance case, the DOJ suggests race was purposefully used as a proxy for political affiliation.[91] This argument is different than one merely suggesting that a deliberate Republican gerrymander is necessarily evidence of discriminatory purpose because minorities favor Democrats. The DOJ argues that racial discrimination in aid of a partisan goal (e.g., maximizing a party's seats) is evidence of discriminatory purpose. In particular, the DOJ argues that the linedrawers used racial data to make inferences of political affiliation when party data were not available. Discriminating against Democrats would be one thing, under this view, but it is quite another to employ racial data as a means to that end and therefore knowingly to

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discriminatory purpose. A redistricting plan that does not increase a minority group's voting power, despite a significant growth in the minority group's population, may provide significant circumstantial evidence that the plan was enacted with the purpose of denying or abridging that community's right to vote.").

[91] *See* DOJ Texas Brief, supra note 73, at 5, 10 (citing Garza v. County of Los Angeles, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part)); see also *Texas*, 2011 WL 6440006, at 22 n.38 (quoting Bush v. Vera, 517 U.S. 952, 968 (1996) (plurality opinion) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotyping requiring strict scrutiny is in operation.")).

discriminate against minorities en route to discriminating on the basis of party. In other words, finding racially discriminatory animus is not the beginning and end of section 5's purpose inquiry if racial considerations fed into decisions that otherwise would have been wholly legitimate. On this point we have yet to hear from the D.C. District Court.

IV. Conclusion

This tour through the law, regulations, and enforcement actions under the newly reauthorized VRA illustrates the conceptual and practical challenges facing the Department of Justice in its enforcement of the statute. Potential for criticism is hardwired into this statute, as it would be for any statute that allows for discretionary action in the regulation of race and politics. Some will always view the Department as too timid, while others (specifically the targets of preclearance denials) will view it as too aggressive. Still others will question the motivation of individual decisions or trends in particular directions.

This potential for criticism, in the background since the signing of the original VRA, has been brought to the fore as partisan debates over the VRA's meaning were transferred over to the operation of section 5 on the ground. The volume of criticism, however, is a function of the polarization of our politics and the perceived stakes of the DOJ's interpretive and enforcement decisions. At the same time, the specter of the Supreme Court's invalidation of section 5 naturally affects which battles DOJ believes are worth picking in the preclearance process.

The VRA contemplates and vests substantial discretion in the DOJ. Because the very notion of what it means to protect minority voting power is contested, we should not be surprised to see position-taking on the question (or even the failure to do so) leading to criticism from all

sides. However, the hope undergirding the system is that the rules will be applied consistently according to reasons that do not depend on the identity of the decisionmaker or the object of enforcement. If that is becoming impossible, then the system needs to be reformed to ensure that the legitimate civil rights aims of the statute do not become prisoner to the administration-specific criticisms arising out of enforcement in a particular political context.