

Testimony of
Professor J. Morgan Kousser
California Institute of Technology

Before the
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Legislative Proposals to Strengthen the Voting Rights Act
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Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and distinguished Members, thank you for inviting me to testify before you. For the convenience of readers, I begin these written comments with a relatively short summary.

I. Abstract

Ten years ago, in the wake of the *Northwest Austin* case,¹ I began to create a database of all voting rights “actions” under any federal or state statutes or constitutional provisions – lawsuits, settlements and consent decrees, objections and “more information requests” under Section 5 of the Voting Rights Act (VRA). The database, now documenting 4090 minority victories under federal law and 389 under the California Voting Rights Act from 1957 through 2019, allows evaluations of the adequacy of past and potential coverage schemes if Congress wishes to replace Section 4 of the VRA, which was struck down by a majority of the Supreme Court in *Shelby County v. Holder*.² Further analysis of the database may assist Congress in evaluating the evidence to determine whether there is a continuing need for the protection of the Voting Rights Act in general and for a preclearance regime in particular.

This testimony draws on that database to make four principal points: First, the original coverage scheme of Section 4, as amended in 1970 and 1975, fit the pattern of proven violations of voting rights extraordinarily well. Ninety-two percent of the total “actions” in which minorities were successful concerned state or local jurisdictions within the area of Section 4 coverage.

¹ *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193.

² 570 U.S. 529 (2013).

Second, voting rights violations did not diminish over long periods of time. The 1957 Civil Rights Act was the first federal voting rights law enacted since Reconstruction. The VRA was passed in 1965, and Section 5 was renewed in 1970, 1975, 1982, and 2006. If you split the period from 1957 to 2006 into two sub-periods, using the 1982 renewal as the mid-point, you find that there were 819 actions between 1957 and 1981, but 3059 between 1982 and 2006. That is, 25% of the proven violations of voting rights took place in the first 24 years, but 75% in the 24 years before the 2006 renewal of Section 5. “Actions” continued to be concentrated in covered jurisdictions. In the years before 1982, 97% were; in the years between 1982 and 2006, 92%. If voting rights actions are the proper index, Congress was fully justified in 2006 in renewing Section 5 and keeping its coverage scheme.

Third, the pattern of voting rights actions over time are less the product of the degree of discrimination than of the opportunities of litigation and administrative action made available by congressional and especially, by Supreme Court decisions. The Supreme Court is a uniquely powerful institution that can create its own reality, encouraging the filing and success of lawsuits by minority plaintiffs with such favorable decisions as *Thornburg v. Gingles*³ and discouraging them with such unfavorable decisions as *Shaw v. Reno*⁴ and *Shelby County*. Congress should take the responsive character of the pattern of lawsuits into account in evaluating whether there is a continuing need for preclearance and Section 2.

Fourth, the striking success of minorities in using the state-level California Voting Rights Act to shift from at-large elections to single-member districts reinforces the third point about the pattern of voting rights actions. When a law or court decision facilitates finding racial discrimination, discrimination appears. Voting rights laws and court decisions are not merely windows, through which the discrimination that is there already can be seen, without distortion. They are, instead, lenses that the decisions adjust to allow the observer to perceive discrimination or to occlude her vision. A decline in the number of successful minority voting rights actions after unfavorable decisions by the Supreme Court does not necessarily undermine the case for the continuing need of anti-discrimination laws.

II. Credentials and Brief Description of the Database

Unlike almost all of the witnesses from which this subcommittee has heard, I am not a lawyer. After winning an undergraduate degree from Princeton and graduate degrees from Yale, I have taught history and political science at the California Institute of Technology since 1969. In 1980, I became professor of history and social science there. I have also been a visiting professor at Harvard, Oxford, Claremont Graduate University,

³ 478 U.S. 30 (1986).

⁴ 509 U.S. 630 (1993).

and the Hong Kong University of Science of Technology. I have published or edited four books, including *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* and *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*. Among my 47 articles in books or scholarly journals are 5 published in law reviews, including a 108-page history of Section 5 of the VRA in the *Texas Law Review* in 2008. Among my 27 contributions to reference works are long articles on “Suffrage,” “Race and Politics, 1860-1933,” “Voting Rights,” and “Election Law.” I have also published 86 book reviews.

Since 1979, I have served as an expert witness or consultant in 52 voting rights cases, including 16 under the California Voting Rights Act. Among them have been *Hunter v. Underwood*,⁵ in which the Supreme Court threw out the Alabama criminal disfranchisement provision; *Bolden v. City of Mobile*,⁶ where a district court found intentional discrimination in the adoption of the Mobile City Commission; *U.S. v. Memphis*,⁷ in which a district court ruled the majority vote provision of the city charter intentionally discriminatory, resulting in the election of the first African-American mayor in the history of Memphis; *Garza v. Los Angeles County*,⁸ in which a district court found intentional discrimination in the redrawing of county supervisor districts, a decision which resulted in the election of the first Latinx supervisor in the County since 1874; and numerous cases on redistricting and voter ID laws in Texas, California, and North Carolina.⁹

Although I first conceived the idea of the database in 2004, in the run-up to the renewal of the VRA in 2006, I was too busy to start it before the Supreme Court’s decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*,¹⁰ or to substantially finish it until after the Supreme Court’s decision in *Shelby County v. Holder*.¹¹ Appendix A to this report lists the most important sources of the data. Published cases were read, whether they were originally found in these sources or not. Collection of data is ongoing.

⁵ 471 U.S. 222 (1985).

⁶ 542 F. Supp. 1050 (S.D. Ala. 1982).

⁷ Unpublished (W.D. Tenn. 1991), further proceeding *sub nom. Muhamad v. City of Memphis*, 1995 U.S. Dist. LEXIS 22538 (W.D. Tenn. 1995).

⁸ 756 F. Supp. 1298 (C.D. Cal. 1990).

⁹ *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994); *Cano v. Davis*, 191 F. Supp. 2d 1135 (C.D. Cal. 2002); *Sessions v. Perry*, 298 F. Supp. 2d 451 (2004); *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2012); *Texas v. U.S.*, 887 F. Supp. 2d 133 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); *League of Women Voters v. McCrory*, 2016 WL 1650774 (M.D.N.C., 2016).

¹⁰ 557 U.S. 193 (2008).

¹¹ 570 U.S. 529 (2013).

III. The Supreme Court’s Implicit Invitation to Collect Data on Voting Rights Cases

In 1997, the Supreme Court overturned the Religious Freedom Restoration Act (RFRA) as an overextension of congressional powers on the grounds that it was not a “congruen[t] and proportiona[l]” means to combat the injury it aimed to prevent or remedy.¹² Throughout his majority opinion in *City of Boerne v. Flores*, Justice Anthony Kennedy stressed facts, fully as much as theoretical legal questions.

Justice Kennedy began his examination of whether “RFRA is a proper exercise of Congress’ remedial or preventive power” with the legislative record, extensively citing from hearings in three separate sessions of Congress.¹³ He contrasted the evidence presented to Congress at the time that it was framing RFRA with the facts before Congress when it first considered the VRA. The “record which confronted Congress and the judiciary in the voting rights cases,”¹⁴ the Justice pronounced, was a record of “widespread and persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination.”¹⁵ By comparison, the evidence before Congress when it took up RFRA did not contain even a single episode of “religious bigotry in the past 40 years.”¹⁶

When Justice Kennedy turned to the scope of the remedy of RFRA, he discussed another factual question – whether “there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” Citing the history of racial discrimination that justified the VRA, the justice gave that as an example of evidence that would lead the Court to uphold a law “as responsive to, or designed to prevent, unconstitutional behavior.”¹⁷

As Congress approached the 25-year renewal deadline of Section 5 of the VRA set by the 1982 amendments to the law, the need to satisfy the *Boerne* “congruence and proportionality” standard spurred Section 5 proponents to compile an extensive factual record.¹⁸ Justice Kennedy had cited the previous factual basis as justification of the

¹² *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹³ *Id.*, at 529-30.

¹⁴ *Id.*, at 530.

¹⁵ *Id.*, at 526.

¹⁶ *Id.*, at 530.

¹⁷ *Id.*, at 532.

¹⁸ See, e.g., Richard L. Hasen, “Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after *Tennessee v. Lane*,” 66 *Ohio St. L.J.* 177 (2005); Kristen Clarke, “The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?” 43 *Harvard CR-CL LR* 385 (2008).

constitutionality of the VRA seven times in *Boerne*. Accordingly, Congress compiled a much more extensive record in 2005-06 than it had in all four previous considerations of the Act, amounting to 15,000 pages of hearings and documents.¹⁹ As comprehensive as that record was, it was not consolidated into one report, quantified to determine how “congruent” the geographical scope of Section 4 was with the geographical incidence of voting discrimination. Instead, the plentiful evidence compiled by the American Civil Liberties Union, the Lawyers’ Committee for Civil Rights, University of Michigan Professor Ellen Katz, and many others, was presented piecemeal, mostly as discussions or listings of individual legal cases. Even though this evidence was thoroughly analyzed in congressional reports and the district and appeals court opinions in the *Shelby County* case,²⁰ it is possible that presentation of the evidence in a different form might have been more persuasive to the Supreme Court.

Before the Supreme Court put off a confrontation with Section 5 of the VRA by ruling that Northwest Austin Municipal Utility District No. 1 was eligible to bail out of Section 5 coverage, Chief Justice John Roberts asserted that “The evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. . . . Congress heard warnings from supporters of extending Section 5 that the evidence in the record did not address ‘systematic differences between the covered and the non-covered areas of the United State[,] . . . and, in fact, the evidence that is in the record suggests that there is more similarity than difference.’”²¹ Although the Chief Justice did not review that evidence in his opinion, he did note the district court’s analysis of the “sizable record” amassed by Congress, and he made facts about voting rights in the covered and non-covered areas central to his opinion.

Facts continued to be central in Chief Justice Roberts’s opinion in *Shelby County*. Congress, he said, had failed to “narrow[] the scope of the coverage formula” since 1965,²² and it had neglected to determine “how that discrimination [in covered jurisdictions] compares to discrimination in States unburdened by coverage.”²³ The 1965 coverage formula was outmoded, he continued, because “today’s statistics tell an entirely different story.”²⁴ If not in 2006, then certainly after *Northwest Austin*, the Chief Justice remarked disapprovingly, Congress should have produced an “updated statute.”²⁵ “If

¹⁹ Kousser, “Do The Facts of Voting Rights Support Chief Justice Roberts’s Opinion in *Shelby County*?” *Transatlantica*, I (2015), 2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592829.

²⁰ H. Rept. 109-478 – Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 < <https://www.congress.gov/congressional-report/109th-congress/house-report/478/1?overview=closed>>; *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), 679 F. 3d 848 (C.A.D.C. 2012).

²¹ *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04.

²² *Shelby County v. Holder*, 570 U.S. 529, 549 (2013).

²³ *Id.*, at 552.

²⁴ *Id.*, at 556.

²⁵ *Id.*, at 554.

Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula,” the Chief Justice asserted, and he contended that the relationship of the coverage formula to problems of vote dilution was purely “fortuitous.”²⁶ Not faced with a simple, but comprehensive analysis of the evidence, the Chief Justice was able, by picking and choosing from misleading statistics,²⁷ to contend that the factual underpinnings that previous Supreme Court decisions had judged to satisfy treating different states and localities differently had now been fatally weakened.

²⁶ *Id.*, at 556.

²⁷ As evidence for the confluence of covered and non-covered jurisdictions, the Chief Justice cited two indices -- self-reported voter registration percentages from the U.S. Census and rejection rates for preclearance from 1965-75 and 1995-2005. *Id.*, at 548.. Both are misleading. Political scientists have shown that African-Americans, Latinos, and other disproportionately poorly educated and less wealthy citizens are particularly likely to overstate their registration rates. See, e.g., Robert Bernstein, Anita Chadha, and Robert Montjoy, “Overreporting Voting: Why It Happens and Why It Matters,” 65 *Public Opinion Quarterly* 22, at 25(2001), reporting that “both minorities and white Anglos are less likely to vote but more likely to overreport as the concentration of minorities increases.” Expressing specific skepticism about the Census Bureau’s finding that African-Americans turned out at higher rates than non-Hispanic whites in 2012 in the Deep South, figures that the Chief Justice relied upon, a study for the Pew Foundation pointed out that self-reported turnout was especially exaggerated in the Deep South states. Calculations from an associated table reveal that Census turnout in 2012 was overreported by 5.1 percentage points, on average, in the six Deep South states that were covered by Section 5 in 1965, compared to 1.8 percentage points in the country as a whole. In 2004, the figures had been 3.8 percentage points in the Deep South states and 1.7 percentage points in the nation. See Paul Taylor and Mark Hugo Lopez, “Skepticism about a landmark Census finding,” available at < <http://www.pewresearch.org/fact-tank/2013/05/15/skepticism-about-a-landmark-census-finding/> May 15, 2013>. In North Carolina, where actual turnout is available by race, I found in research that I did for *N.C.State Conf. of the NAACP v. McCrory*, 2016 WL 1650774 (M.D.N.C., Apr. 25, 2016) that the Census self-reports in 2012 overestimated non-Hispanic white turnout by 1.6 percentage points, but overestimated black turnout by 11.7 percentage points.

The comparison between the percentage of Department of Justice objections to changes in election laws that had to be precleared under Section 5 of the Voting Rights Act from 1965 to 1975 with the percentage from 1995 to 2005 is misleading for three reasons. First, very few of the numerous changes in election laws that took place in the South were submitted for preclearance in the first few years of the law’s existence. See Kousser, “The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2006,” 86 *Texas LR* 667 (2008), at 684. The Justice Department did not even draft a guideline about Section 5 until 1970. During the first four years of the existence of the Act, there were only 251 submissions to the Department of Justice and only one objection. See *Allen v. State Board of Elections* 393 U.S. 544, 550, n. 5. By 1995, approximately 20,000 submissions were made every year. So the denominators in the two comparison decades were very different. Second, as the Chief Justice noted, *Shelby County*, at 550, Section 5 itself inhibited discriminatory changes, making the comparison further evidence of the effectiveness, not the superfluity, of the legal provision. Third, experience both at the national and state and local levels had made the Section 5 process one of bureaucratic regularity by 1995. Extensive litigation and clerical experience had clarified exactly what each bureaucratic player had to do to comply with the law or to discover infractions. The chief justice’s discussion treats Section 5 as high constitutional politics when on a more practical level, it had become largely a rather simple bureaucratic routine.

IV. How Congruent Is Section 4 with the Geographical Pattern of Voting Rights Actions?

“Congruence” is a term that reminds one of plane geometry: two shapes are congruent if you can twist or flip or resize them so that one fits perfectly on top of the other. Congruence gave *City of Boerne* a mathematical flavor and invited protagonists and antagonists of renewing Section 5 of the VRA in 2006 to contend over whether the pattern of VRA actions fit the Section 4 coverage scheme. Table 1 captures this notion in the simplest fashion. It shows that by any measure, the coverage scheme was congruent with the overall number of voting rights actions, either over the whole period from 1957 through 2019 or when that period is divided into three sub-periods – 1957 through the 1982 renewal, 1982 through the 2006 renewal, and since 2006.

Table 1: The Temporal and Geographical Pattern of Successful Voting Rights Actions, 1957-2019

Topic	Years	Total # of Actions	# in Covered Jurisdictions	% in Covered Jurisdictions
Total # of actions	1957-2019	4090	3771	92.2
	1957-81	819	798	97.4
	1982-2006	3059	2825	92.4
	2007-19	187	130	69.5
	1957-65	84	83	98.8

The first row shows that 3771 of the 4090 total actions for the whole period (92.2%) concerned areas that were covered under Section 4. That is the single most important fact in this testimony, and it is overwhelming. Probably few laws or policies designed by any institution, public or private, more precisely match “the injury to be prevented or remedied and the means adopted to that end.”²⁸ If we break the 49-year period from the first modern federal voting rights law in 1957 at the 1982 renewal of the VRA, we find the same general relationship in both eras. Although the percentage of actions emanating from covered jurisdictions declines from 97.4% to 92.4%, the concentration is still extremely disproportionate, and the numbers of actions more than triples from the first to the second sub-period. Contrary to the Chief Justice’s statement

²⁸ *City of Boerne v. Flores*, 521 U.S. 507, 520.

in *Shelby County*, looking at these numbers, if Congress had started from scratch in 2006, it could hardly have developed a more accurate coverage scheme than it did.

While it is true that the number of actions declined after 1994 and especially after 2000, as I will discuss later, more than two-thirds of the actions after 2006 were still concentrated in covered jurisdictions. And the decline can be exaggerated, as the fourth and fifth rows of Table 1 make clear. If we compare the number of actions after 2006 with the number between 1957 and the passage of the VRA in 1965, a period in which, according to the Chief Justice, voting discrimination was “pervasive . . . flagrant . . . widespread . . . rampant,”²⁹ we find more cases per annum in the later than in the earlier years (15.5 cases per year for 2007-19 vs. 10.5 per year for 1957-65).

But might there be other explanations for the nearly perfect fit of the Section 4 coverage scheme? Table 2 considers two other possible explanations for the congruence. Since Section 4 defined the coverage area, any cases or objections or more information requests³⁰ that are included in the number of actions had to have originated in covered jurisdictions. What if we exclude actions relating to Section 5 or more information requests? Part A of Table 2 considers that possibility. If we include cases that were settled or were the subject of consent decrees that were favorable to minorities,³¹ we find that five out of six successful actions originated in covered jurisdictions. The first row considers only Section 2 cases; the second adds those based on other sections of the VRA or on constitutional amendments. Since litigation can be brought under those provisions against jurisdictions throughout the country, the pattern in this table makes it even clearer that voting discrimination has been centered in those areas covered under Section 4. This is especially true because some Section 2 cases in covered jurisdictions didn’t have to be filed, because Section 5 had already either deterred discrimination or been settled by objections under Section 5. The 82% concentration of Section 2 cases in covered jurisdictions therefore is no doubt an underestimate of the concentration of discrimination there.

Part B of Table 2 considers the possibility that the jurisdictional scheme merely tracked minority percentages -- that cases were filed where minorities lived. It divides counties into those in which non-Hispanic whites constituted more than 80% of the citizen voting age population (CVAP) and those in which the group was less than 80% of the CVAP. Eighty percent is chosen because a county in which minority groups

²⁹ *Shelby County v. Holder*, 570 U.S. 529, 554 (2013).

³⁰ I included only those requests by the Department of Justice for more information about preclearance submissions that resulted in a withdrawal of the submission or a substantial change to make it more favorable for minorities.

³¹ 851 of the 1291 Section 2 minority victories were the result of settlements or consent decrees. 488 of those cases were from Alabama and Texas, where local jurisdictions must have settled knowing that a trial would have been very likely to find racially polarized voting, a history of discrimination, and all of the other factors necessary for a minority plaintiff to win a Section 2 case. That is, it seems unlikely that settlements simply represented efforts by non-discriminatory jurisdictions to avoid the time and expense of defending against frivolous lawsuits. Altogether, 753 of the 851 settlements (88.5%) came from covered jurisdictions.

constituted more than 20% of the CVAP would probably contain some city or school district in the county in which a minority group could form a majority in a single-member district. These counties are then further divided into those in covered jurisdictions and those in non-covered jurisdictions.

The results are striking. In whiter counties, those in which non-Hispanic whites exceeded 80% of the CVAP, the proportion of counties with at least one successful voting rights action was six times as high in the covered counties as in the non-covered counties (36% to 6.2%) And the raw numbers of actions in the two sets of whiter counties were similarly disproportionate. 6.4 times as many actions originated in covered as in non-covered heavily white counties (283, compared to 44). The contrast is even more striking in the less-white counties, where there were 6.8 times as many successful actions in covered as in non-covered counties (80.0% vs. 11.9%), and 11.7 times as many total actions (3236 vs. 276) in covered as in non-covered jurisdictions. Obviously something besides the racial percentages in each set of counties must account for the stark difference. Perhaps the effects of the long history of discrimination in voting have persisted well past the Jim Crow era.³² This contrast sheds a different light on the Chief Justice's pronouncement in *Shelby County* that "history did not end in 1965."³³

³² For a recent work tracing current southern political attitudes to their historical roots, see Avidit Acharya, Matthew Blackwell, and Maya Sen, *Deep Roots: How Slavery Still Shapes Southern Politics* (Princeton, N.J.: Princeton University Press, 2018).

³³ *Shelby County v. Holder*, 570 U.S. 529, 552 (2013).

Table 2: Other Possible Explanations of the Congruence of the Pre-Shelby Congruence of the Coverage Scheme and Voting Rights Actions

A. Cases Not Involving Section 5

Topic	Years	Total # of Actions	# in Covered Jurisdictions	% in Covered Jurisdictions
# actions under Section 2	1965-2019	1291	1066	82.6
# actions under Section 2, Sections 203 or 208, 14th or 15th amendments	1965-2019	1605	1312	81.7

B. Counties with Different Proportions of Minorities*

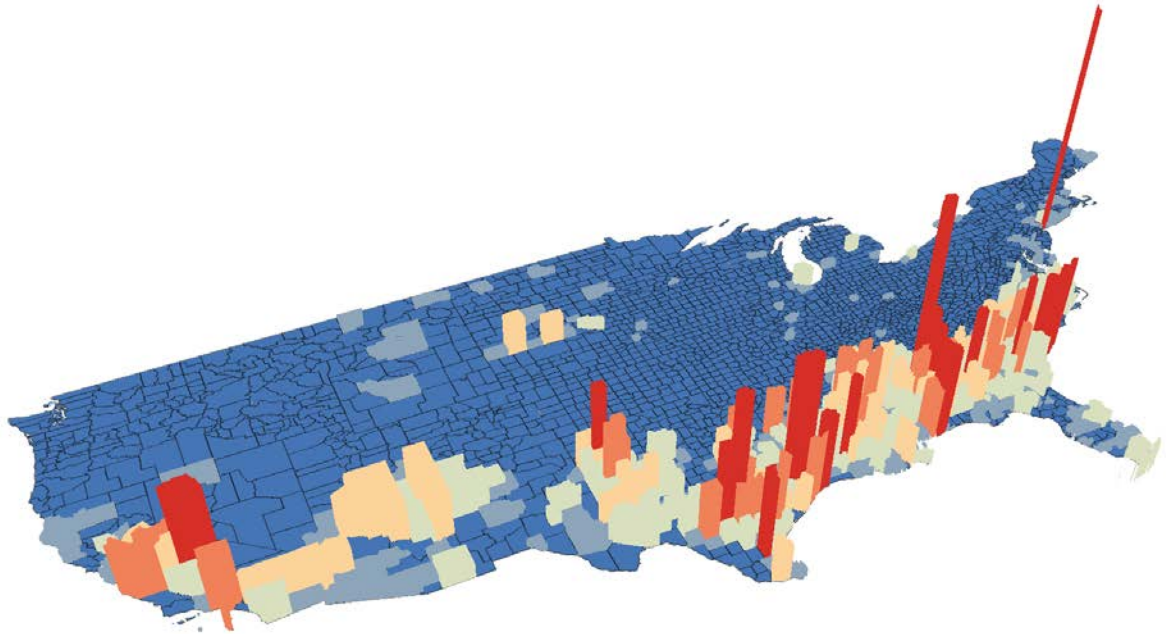
% Non-Hispanic White CVAP, 2010	Covered Counties		Non-Covered Counties	
	% Counties with Minority Successes	# Minority Successes	% Counties with Minority Successes	# Minority Successes
>80% Non-Hispanic White	36.0	283	6.2	44
< = 80% Non-Hispanic White	80.9	3236	11.9	276

- from a slightly older version of this database

Another, more dramatic way to present the contrast between covered and non-covered counties is through maps. In another paper based on a slightly older version of this database, I included seven maps exploring various facets of the data.³⁴ Here, I limit myself to one. I have counted the number of voting rights actions in each of the 3143 counties or county-equivalents in the U.S. and arrayed the totals for each county on a quasi-three-dimensional map. The height of the projections above each county is proportional to the number of voting rights actions in each. In 2393 of them, there were no voting rights actions at all. The skyscrapers, indicating multiple actions, are almost all in covered jurisdictions – the Deep South, covered in the original 1965 Act, and Texas and Arizona, added in 1975. The map makes the same point as the earlier tables: the coverage scheme that Congress continued in 2006 fit the pattern of proven voting rights actions extraordinarily well.

³⁴ Kousser, “Do The Facts of Voting Rights Support Chief Justice Roberts’s Opinion in *Shelby County*?” *Transatlantica*, I (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592829. The map included here is taken from that paper. The only substantial differences between this map and one that would be drawn using the updated data would be that 39 more cases would be added (22 from formerly covered jurisdictions and 17 from non-covered jurisdictions) and that the map would not include cases from the California Voting Rights Act. These differences would have almost no effect on the visual appearance of the map.

Map 1: Voting Rights Events by County, 1957-2014



Legend

- 21-63
- 13-20
- 8-12
- 3-7
- 1-2
- 0

V. The Pattern of Cases Over Time Was Driven Less by the Amount of Discrimination than by the Decisions of the Supreme Court

Figure 1 plots the number of voting rights actions against time, with years in which there were especially significant decisions by Congress or the Supreme Court noted along the horizontal axis. Cases and other actions coming from covered jurisdictions are in blue, and the much smaller number of actions from non-covered jurisdictions are in red at the top of the graph. The graph makes the point, by now familiar, that over 90% of the actions took place in covered jurisdictions. Unlike the map, which was based only on county-level data, this graph contains state-level actions, as well. But the 354 state-level actions are vastly outnumbered by the 3736 at the county or lower level. Nearly all voting rights politics is local.

I have also inserted notations of the most significant Supreme Court decisions and congressional acts. The 1969 case of *Allen v. Board of Elections*³⁵ made two things clear – that private parties could sue to enforce Section 5 of the VRA and that changes in election structures, such as laws that switched local jurisdictions from single-member district to at-large elections, had to be precleared before they could go into effect in covered jurisdictions. That is, the VRA did not apply merely to restrictions on individual voting, such as literacy tests. Local and state elective bodies responded to *Allen* by markedly increasing the number of submissions to the Department of Justice, and the Justice Department responded by turning more of the submissions down, refusing to preclear them. The line in the graph rises dramatically.

By contrast, *Beer v. U.S.*³⁶ in 1976 made it more difficult to win a Section 5 case or for the Department of Justice to object to a submission for preclearance, because it ruled that the only illegal discriminatory effects were those that caused a retrogression in minority voting rights. If African-Americans could win only one city council seat in New Orleans, Justice Potter Stewart held, then a plan which preserved that number of seats did not violate Section 5, even though it was easy to draw a second black-majority council seat, and the almost all-white council had rejected proposals to do so. At a time when African-Americans in the Deep South were only beginning to win seats on local government boards or in state legislatures, the *Beer* retrogression standard significantly hampered progress in integrating local government. The line on the graph drops after *Beer*.

Section 2 of the VRA had rarely been used before 1980. When the Supreme Court ruled in *City of Mobile v. Bolden*³⁷ that to be considered a constitutional exercise of

³⁵ 393 U.S. 544 (1969).

³⁶ 425 U.S. 130 (1976).

³⁷ 446 U.S. 55 (1980).

congressional power under the 15th amendment, Section 2 had to require proof of a racially discriminatory intent, proponents of equal voting rights sprang into action. Because Congress had extended Section 5 for seven years in 1975, it had to consider renewing the provision by 1982. Proponents of renewal convinced an overwhelming bipartisan majority of Congress not only to renew Section 5, but also to clarify the congressional understanding that Section 2 would be violated if a state or local action had either a discriminatory intent or a discriminatory effect. Armed with a clearer congressional mandate and a checklist of “Senate factors”³⁸ that allowed them to organize evidence of discrimination into neat packages, voting rights lawyers began to file and win many more Section 2 cases. The line in Figure 1 streaked upward.

When in 1986 Justice William J. Brennan, Jr. ruled the 1982 amendments to Section 2 constitutional and seemed to simplify the proof needed to satisfy that provision,³⁹ successful voting rights actions increased again, especially after the redistricting of 1991-92. But after Justice Brennan and Justice Thurgood Marshall retired from the Court, a new majority clamped down on interpretations of the constitution that had led to the largest increase in the number of minorities elected to Congress and the state legislatures since the First Reconstruction.⁴⁰ In *Shaw v. Reno*,⁴¹ *Miller v. Johnson*,⁴² and their progeny, the conservative majority ruled that legislative districts whose boundaries or composition reflected a “predominant” racial motive needed especially persuasive justification and might be unconstitutional. Lower federal court judges, voting rights lawyers, and Department of Justice officials took the Court’s ruling as a signal that the Court had become much less sympathetic to contentions of discrimination against minority voters. The number of Section 2 cases and Section 5 objections fell as if off a steep cliff.

The wholesale redistricting required by state and federal constitutions in 2001-02 gave lots of opportunities for voting rights cases and Section 5 objections, even within the confines of the *Shaw* regime. But such decisions as *Reno v. Bossier Parish School Board*,⁴³ which ruled that the intent prong of Section 5 of the VRA required proof of “retrogressive intent,” even though the text of the law did not insert “retrogressive” before “intent,” helped to chill voting rights activity further. Notably, there was no spike in voting rights actions after the 2011 redistricting, as there had been after every other redistricting since 1965.

Figure 1 is the first of three sets of data that makes a simple point that should be apparent to lay readers, as well as to lawyers. If the Supreme Court makes it easier to

³⁸ S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), at 28-29.

³⁹ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴⁰ On the increase in the number of elected black officials in the South, see Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1999), 19.

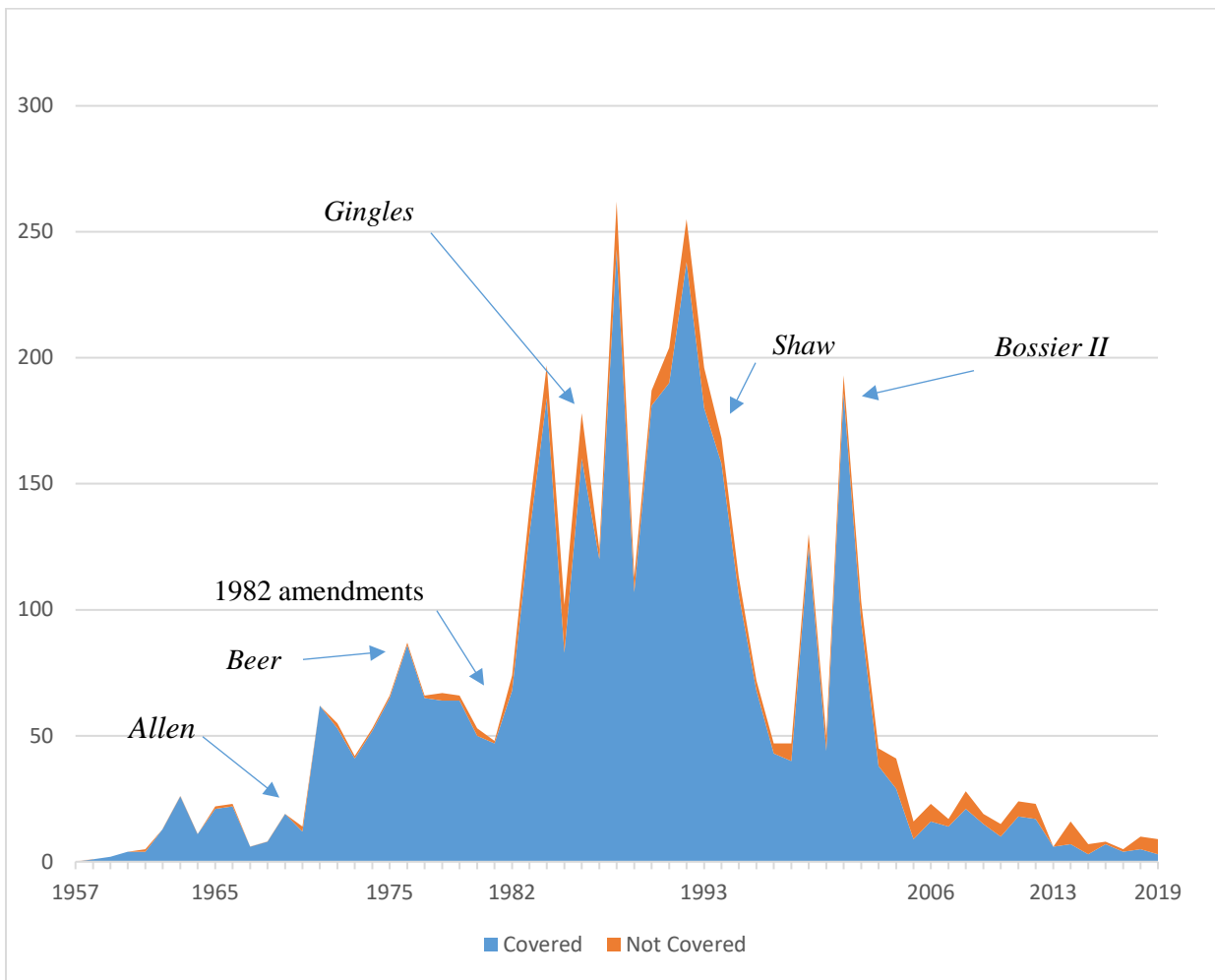
⁴¹ 509 U.S. 630 (1993).

⁴² 515 U.S. 900 (1995).

⁴³ 528 U.S. 320 (2000).

win voting rights cases or for the Department of Justice to find voting discrimination and offer objections under Section 5, the observed number of instances of discrimination against minority voters will rise. If, on the other hand, the Supreme Court makes it more difficult to uncover discrimination, the number of cases and objections will fall. In considering any revisions of the VRA, Congress should take this simple truism into account. The data that I have gathered raises the truism from the realm of theory or speculation to that of firmly demonstrated fact.

Figure 1: Successful Voting Rights Actions by Year



A second set of data to demonstrate the power of Supreme Court decisions to shape outcomes in voting rights actions is contained in Table 3. Suppose that *Allen* had been decided differently, that the Court had ruled that only changes in laws or actions that hampered individual voting, not changes in election structures, were subject to preclearance. Then unless Congress had changed the law or the Court had reconsidered its decision, no vote “dilution” measures would have been objected to, and no lawsuits requiring dilution measures to be submitted would have been won. How many fewer voting rights actions would there have been? Table 3 answers the question. There were 1483 Section 5 actions between 1965 and 2013 (when *Shelby County* effectively neutered Section 5) in which minorities were victorious. If *Allen* had not ruled as it did, none of the 999 Section 5 objections or cases that involved vote dilution would have been won, and there would have been only 484 Section 5 objections or cases. *Allen* therefore resulted in a 206.4% (999/484) increase in the number of Section 5 actions.

Similarly, if Congress had not overturned *Bolden*, there would have been no Section 2 cases filed after 1982, because there would have been no incentive to do so. One would have had to prove intent under the fifteenth or perhaps the fourteenth amendment anyway, so there would have been no benefit in filing under Section 2 of the VRA. There were 1143 successful Section 2 cases from 1982 to 2006, the date of the next scheduled renewal of Section 5, so under these assumptions, there would have been 61.3% fewer total actions under all provisions during that period (1143/1865) if *Bolden* had remained in force.

These two hypotheticals, given plausibility by the extensive data, provide further evidence of the shaping force of Supreme Court decisions. They offer further reason for Congress not to conclude that declines in the number of voting rights actions prove that there is no further need for federal laws against minority voting discrimination.

Table 3: Other Evidence of the Influence of Supreme Court Decisions on the Number of Voting Rights Actions

Topic		Years	Total Number of Actions	% Increased Actions Due to Decisions
Section 5		1965-2013	1483	
	If <i>Allen</i> had not been decided	1965-2013	484	206.4
All Events		1982-2006	3008	
	If <i>Bolden</i> had not been overturned	1982-2006	1865	61.3

VI. The California Voting Rights Act Offers Even More Evidence that There Is a Continuing Need for Federal Protection of Minority Voting Rights

Because California has an extremely diverse population, a single non-white ethnic group sometimes cannot comprise a majority of the CVAP in any potential sub-district in a particular local jurisdiction. This sometimes made it difficult to attack discrimination using Section 2, especially after a decision by the Ninth Circuit Court of Appeals in *Romero v. City of Pomona*.⁴⁴ To make it possible to integrate the Latinx and Asian-American populations, as well as African-Americans, into leadership positions in local jurisdictions that were then mostly elected in at-large contests, voting rights lawyer Joaquin Avila drafted the California Voting Rights Act (CVRA). This law, the first state voting rights law, was adopted by the state legislature in 2002. Applying only to at-large elections, it waives the “first *Gingles* prong” by not requiring plaintiffs to prove that they can draw a compact district in which a single minority comprises a majority of the CVAP

⁴⁴ 883 F. 2d 1418 (9th Cir. 1989). *Romero* ruled that federal courts could not entertain a Section 2 case against an at-large election scheme unless plaintiffs could first show that a sub-district containing a majority of the CVAP of a single minority could be drawn in that jurisdiction.

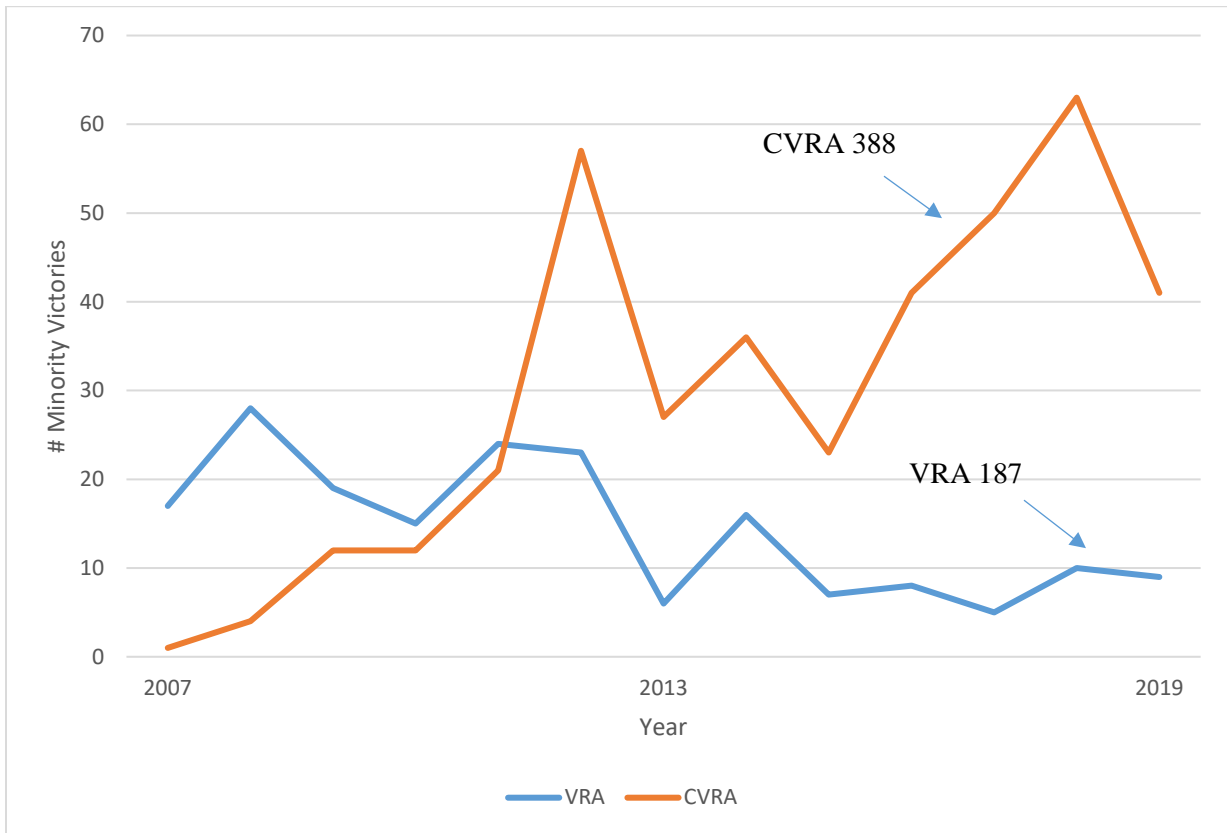
before beginning a case. Even though intent and the “Senate factors” are probative under the CVRA, they are not necessary. All that must be shown is that voting is racially polarized and that minorities usually lose. A challenge to the constitutionality of the law took several years to resolve, finally being denied a writ of certiorari by the U.S. Supreme Court in 2007.⁴⁵ In 2016, the law was amended to allow local jurisdictions to minimize the costs of litigation by resolving to shift away from at-large elections through a mandated procedure of votes by the government body, public meetings, and transparent adoption of particular districting or other plans.⁴⁶ Only four cases have gone to full trials, and in all, the plaintiffs have won. Yet the law has revolutionized local government structure in the nation’s largest state. At least 389 local school boards, city councils, community college boards, hospital or water districts have at least begun the process of ending at-large elections. Evidence gathered for cases which have not gone to trial, as well as those which have gone to trial, has shown that a great many very recent elections in California have been racially polarized.

Figure 2 demonstrates that the CVRA has made it possible to find and remedy discrimination in voting rights just as the VRA has withered as a tool for combatting voting discrimination. During the period from 2007 through the present, more than twice as many jurisdictions have changed election structures or laws as a result of the CVRA than as a result of the VRA. This third major strand of evidence suggests that Congress should not be dissuaded from passing a new, amended VRA by the recent decline in the number of successful VRA cases. The VRA has been hobbled by adverse Supreme Court decisions, just as it was earlier strengthened by favorable ones. And the experience of the CVRA suggests that reopening the lens through appropriate revisions of the VRA would allow existing, continuing voting discrimination to come into focus once again.

⁴⁵ *Sanchez v. City of Modesto*, 145 Cal.App.4th 660 (2006), cert. denied 552 U.S. 974 (2007).

⁴⁶ AB 350, which amended Section 10010 of the Elections Code, is available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB350>.

**Figure 2: The CVRA Proves That You Can See
Discrimination If You Have the Proper Lens:
CVRA and VRA Actions, 2007-2019**



Appendix A: Sources of Voting Rights “Events”

I. Cases Brought by the United States Department of Justice

Brief of the United States in *South Carolina v. Katzenbach*, pp. 44-45, n. 33 (cases, 1957-65).

Voting Rights Act, House Hearings, 1965, Tables B2(a), B3(a), B4(a).

Voting Rights Act, House Hearings, 1975, Serial No. 1, Part 1, pp. 198-216 (cases, 1965-75).

Voting Rights Act, Senate Hearings, 1982, Vol. I, pp. 1803-05, 1828-29, 1837-41, 1849 (1975- 82 cases).

“Attachments to the Statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcommittee on the Constitution of the Senate Judiciary Committee on Amending the Voting Rights Act, March 1, 1982. Unpublished 12-page memo.

“Voting Section Cases in Which the United States’ Participation Began Since October 1, 1976” (unpublished 27-page memo in Department of Justice, dated Jan. 17, 2008).

“Section 5 Declaratory Judgment Actions” (unpublished 12-page memo in Department of Justice, dated Oct. 18, 2005).

“All Section 4 Bailout Cases Filed under the Current Bailout Standard through October 17, 2005. Unpublished, undated 2-page memo.

“Table 1: Voting Rights Cases Brought on Behalf of American Indians and/or Interpreting the Voting Rights Act re Indian Interests” (unpublished, undated, 8-page memo in Department of Justice)

II. Cases Brought by Public Interest Groups and Individuals or Settlements Brought About by Such Cases

ACLU, "Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination Against Minorities." (1982)

"Vote: The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union." available at. <<http://www.aclu.org/voting-rights/case-extending-and-amending-voting-rights-act/>>.

ACLU "Promises to Keep: The Impact of the Voting Rights Act in 2006." "ACLU Voting Rights Project Litigation Docket: Sept. 2006-Sept. 2007."

"ACLU Voting Rights Project Litigation Docket: Jan. 2007-Dec. 2007," available at: <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2007>.

"ACLU Voting Rights Project Annual Report: January 1, 2008-December 31, 2008," available at: <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2008>.

"ACLU Voting Rights Project Annual Report, January 1, 2009-December 31, 2009," available at: < <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2009>>.

"ACLU Voting Rights Project Annual Report: January 1, 2010-December 31, 2010," available at: <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2010>.

"Voting Rights in Indian Country: A Special Report of the Voting Rights Project of the American Civil Liberties Union" (September 2009).

"Joaquin G. Avila Voting Rights Cases" (unpublished 15-page memo dated March 2009), courtesy of Joaquin Avila.

James U. Blacksher, List of "*Dillard v. Crenshaw County*" Cases, courtesy of James U. Blacksher, Aug. 3, 2009.

James Blacksher, Edward Still, Jon M. Greenbaum, Nick Quinton, Cullen Brown and Royal Dumas, "Voting Rights in Alabama: 1982-2006," *Review of Law and Social Justice*, 17 (2008), 249-81.

Chandler Davidson and Bernard Grofman, eds., *Quiet Revolution in the South* (Princeton: Princeton Univ. Press, 1994). Cases not explicitly referred to in book are available at:

[https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6646?author\[0\]=Davidson%2C+Chandler&paging.startRow=1](https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6646?author[0]=Davidson%2C+Chandler&paging.startRow=1).

Anita Earls, Case Lists for North Carolina, 1982- . Unpublished 38-page memo, courtesy of Anita Earls.

“Significant Cases” of Jose Garza. Unpublished, undated, 2-page memo, courtesy of Jose Garza.

Stanislaus Anthony Halpin, Jr., “The Anti-Gerrymander: The Impact of Section 5 of the Voting Rights Act of 1965 Upon Louisiana Parish Redistricting,” (Ph.D. thesis, George Washington University, 1978).

Ellen Katz database on Section 2 cases, described in Ellen Katz, with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt, “Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative, University of Michigan Law School,” 39 *Univ. of Mich. J. of Law Reform* 643 (2006), courtesy of Ellen Katz.

George Korbel, “Litigation in Texas Relating to A. Statewide Redistricting B. Section 2 litigation against Texas cities and school districts C. Section 5 Objections to Statewide Redistricting D. Section 5 Objections to Statutes relating to the Election Process in Texas #. Litigation filed after the 2011 redistricting on submission to this Court.” Unpublished 13-page memo, courtesy of George Korbel.

Brian K. Landsberg, *Free at last to vote: the Alabama origins of the 1965 Voting Rights Act*. Lawrence, Kansas: University Press of Kansas, 2007).

Leadership Conference on Civil and Human Rights, “Voting Rights in the States,” (2006), available at <http://www.civilrights.org/voting-rights/vra/states.html>.

Justin Levitt, Database on Preclearance and More Information Requests, 2011, courtesy of Justin Levitt.

Justin Levitt, “Questions for the Record from Senator Charles E. Grassley ‘From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act’, Senate Judiciary Committee, July 17, 2013.” Unpublished 30-page memo,

courtesy of Justin Levitt.

National Commission on the Voting Rights Act, “List of Successful Section 2 and Section 5 Enforcement Actions in Selected Jurisdictions,” courtesy of Jon Greenbaum.

National Commission on the Voting Rights Act, “Voting Landscape: A State-by-State Overview” (2014), available at:
file:///C:/Users/Morgan/AppData/Local/Temp/NCVR_LitigationByStateFinal_080614.pdf.

Peyton McCrary, “The Struggle for Minority Representation in Florida, 1960-1990,” *Florida Historical Quarterly*, 86 (2007), 93-111, Appendix, “Cases That Resulted in Elimination of At- Large Elections (Brought by David M. Lipman).”

Peyton McCrary, “Declaration of Peyton McCrary in *Shelby County v. Holder*.” Unpublished 29-page declaration, 2010.

“Mexican American Legal Defense and Educational Fund Litigation Timeline, 1968-2002” (unpublished 9-page memo), courtesy of Nancy Ramirez.

“MALDEF Master List 2008, Political Access Program” (unpublished 4-page memo), courtesy of Nancy Ramirez.

“Cases Litigated by Rolando L. Rios & Associates, PLLC” (unpublished, undated 17-page memo), courtesy of Rolando L. Rios.

III. Section Five Administrative Actions by the United States Department of Justice

U.S. Department of Justice, Section 5 Objection List, 1965-2009, available at
http://www.justice.gov/crt/voting/sec_5/obj_activ.php.

Computer file on “more information requests” from Luis Fraga, which served as the

basis for Luis Ricardo Fraga and Maria Lizet Ocampo, “More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act,” in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power* (Berkeley, CA: Berkeley Public Policy Press, 2007), 47-82. The more information requests that are included here are those that Fraga and Ocampo considered “MIR-Induced Outcomes,” i.e., those that were withdrawn, superseded, or to which the jurisdiction did not respond. See Fraga and Ocampo, Table 3.2, pp. 59-62.

U.S. Dep’t of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php>; U.S. Dep’t of Justice, Archive of Notices of preclearance activity under the Voting Rights Act of 1965, as amended, <http://www.justice.gov/crt/about/vot/notices/votarch.php>. Only those more information requests that resulted in withdrawn submissions, 2006-13, are included. Courtesy of Justin Levitt.

IV. California Voting Rights Act Lawsuits and Changes Brought About by Threats of Lawsuits or Preemptive Action to Avoid Lawsuits

California Board of Education Website

<http://www.cde.ca.gov/search/searchresults.asp?cx=001779225245372747843:gpfwm5rhxiw&output=xml_no_dtd&filter=1&num=20&start=0&q=at-large%20elections. (Search for waivers under CVRA).

California State Community College Board Website

<http://californiacommunitycolleges.cccco.edu/ChancellorsOffice/BoardofGovernors.aspx>. (Search for waivers under CVRA).

“Drawing The Lines: Like it or loathe it, California’s Voting Rights Act is a force to be reckoned with,” *California Schools* (Spring 2012), 40-47. Available at: http://www.csba.org/Newsroom/CASchoolsMagazine/2012/~media/Images/NewsMedia/Publications/CASchoolsMagazine/2012/CaliforniaSchools_spring2012.aspx

Leadership Conference on Civil Rights, “LCCR Voting Rights Database Master List, CVRA Challenges, Settlements & Voluntary Changes (2006-2013), courtesy of Joanna Cuevas Ingram.

National Center for Education Statistics, Dataset ACS 2007-2011 Profile, California, All Districts (for demographic data on California school districts).

Appendix B: How the Dataset Was Compiled

Since of the case lists, only Prof. Ellen Katz's was in the form of a database file, my first undergraduate research assistant, Adam Adler, and I created a new Excel form which eventually grew to contain a much larger number and range of categories than Prof. Katz had coded. It began with Katz's dataset and was expanded to include the lists from the Department of Justice and from the American Civil Liberties Union and Leadership Conference of Civil Rights lists and reports. Gradually, cases drawn from the other lists in Appendix A were added, as well as the Section 5 objections from the Department of Justice website and the list of "More Information Requests" from a dataset kindly provided by Prof. Luis Fraga and Maria L. Ocampo.

Each case or other event was traced to a specific county, and all counties in the U.S. were entered into the dataset, whether they contained events or not, and given a standard GIS indicator so that they could be coordinated with maps. Information on the ethnic composition of the population, voting age population, and, when available, citizen voting-age population, both for 2000, 2010 and for the date at which a case was concluded or an objection or MIR was made, were matched with each event.

Since there were so many diverse lists, many overlapping, a considerable effort was made to avoid duplication by identifying each event with a specific name, civil action number, and/or case citation. This was often very difficult, since some lists gave only case names, others only case numbers, and others, only published case citations, and since many case names were the same (for example, *U.S. v. Texas*). Sometimes, it was a matter of judgment whether two cases with the same name should be represented as one case or two. Where citations to published cases were available, an effort was made to read them so that any more information that was available in them could be extracted. For example, attorneys in some of the cases on Prof. Katz's list had raised constitutional issues, in addition to Section 2 issues, but she had not coded the constitutional issues, because she was focused only on Section 2.

An effort was made to categorize the issues involved in each case and objection (if there was more than one issue, the event was NOT counted more than once), as well as the legal bases for each case. Cases below the state level were categorized by the form of the local jurisdiction (city government, county government, education agency). Attempts were made to identify the attorneys involved in each case by the organization that they represented (U.S. government, ACLU, Mexican American Legal Defense and Education Fund, etc.). Where possible, the ethnicity of the challenging or defending minority plaintiff was noted. Sometimes, this was referred to in the text of cases; sometimes, it was apparent from the case location (if Mr. Jones sued a school board in

Mississippi, there was a very low likelihood that he was Latino, Asian-American, or Native American), or from the plaintiff's last name. Where there were multiple plaintiffs with names of apparently different ethnicity, all of the relevant ethnicities were coded.

Especially for the period before 1982 and after 2006, the footnotes and textual citations to cases were searched for and linked to in order to expand the number of cases at times when the available lists were inadequate. Footnotes and tables in monographs and articles on the VRA were scoured for more case names and descriptions. For CVRA cases, lists from the state board of education and state community college board were supplemented by evidence from newspaper articles and such irregular sources as the websites of consultants who specialize in advising school districts on CVRA matters.

Finally, a rather fruitless effort was made to discover other cases that resulted in consent decrees or other settlements by examining subject categories in PACER and reading the case files of cases linked to "voting" and similar topics.

