The Flexibility of Section 5 and the Politics of Disaster in Post-Katrina New Orleans

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Jalila Jefferson-Bullock*

I. INTRODUCTION

On August 29, 2005, Hurricane Katrina ravaged the Gulf Coast of Louisiana, drowning the City of New Orleans and threatening to eternally unbalance New Orleans' political landscape. Rising floodwaters and emergency mass evacuations displaced nearly 375,000 New Orleanians, approximately 272,000 of whom were African American.1 The year before Katrina’s onslaught, Orleans Parish had both the highest number and the second highest concentration of African-American voters in Louisiana.2 By July 2008, sixty percent of New Orleans’s population had been regained.3 Astonishingly, despite being appallingly disproportionately displaced, African Americans have heroically redeemed near-pre-Katrina population status, now constituting sixty percent of New Orleans’ population.4

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Although the overall population demographic of New Orleans has virtually returned to pre-Katrina levels, the percentage of African Americans registered to vote and participating in elections in Orleans Parish post-Katrina fails to complement New Orleans’ population restoration. Before Katrina, African Americans controlled a majority vote in New Orleans. This is no longer the case. Active voter registration percentages and numbers of voters participating in elections are now lower among African-American voters. These altered voting patterns first became most obvious in the 2008 elections following the reinstatement of Louisiana’s annual canvass.

The reinstatement of the annual canvass, the mechanism for purging

60.1% of the population of New Orleans as of 2011); see also HENRY J. KAISER FAMILY FOUND., NEW ORLEANS THREE YEARS AFTER THE STORM: THE SECOND KAISER POST-KATRINA SURVEY 7 (2008), available at http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7789.pdf.

5. GOODY CLANCY, ARCHITECTURE PLANNING PRESERVATION, PLAN FOR THE 21ST CENTURY: NEW ORLEANS 2030, VOL. 3 STRATEGIES AND ACTIONS 2.3 (2010).


8. See Post Election Statistics – Statewide: 11/02/2004, supra note 2 (showing that in 2004, 62.78% of the registered voters in Orleans Parish were African American, and represented 61.94% of the total voters, indicating that 60.7% of registered African Americans voted); Post Election Statistics – Statewide: 04/22/2006, LA. SECRETARY ST. (May 03, 2006), http://electionstatistics.sos.la.gov/Data/Post_Election_Statistics/Statewide/2006_0422_sta.txt [hereinafter Post Election Statistics – Statewide: 04/22/2006] (showing that in 2006, 63.08% of registered voters in Orleans Parish were African American, and represented 53.17% of the total voters, indicating that only 31.1% of registered African Americans voted); Post Election Statistics – Statewide: 10/20/2007, LA. SECRETARY ST. (Nov. 05, 2007), http://electionstatistics.sos.la.gov/Data/Post_Election_Statistics/Statewide/2007_1020_sta_pdf [hereinafter Post Election Statistics – Statewide: 10/20/2007] (showing that in 2007, 63.23% of the registered voters in Orleans Parish were African American, and represented 50.6% of the total voters, indicating that 21.98% of registered African Americans voted); Post Election Statistics – Statewide: 11/04/2008, LA. SECRETARY ST. (Dec. 17, 2008), http://electionstatistics.sos.la.gov/Data/Post-Election_Statistics/Statewide/2008_1104_sta.pdf [hereinafter Post Election Statistics – Statewide: 11/04/2008] (showing that in 2008, 62.48% of registered voters in Orleans Parish were African American, and represented 60.48% of the total voters, indicating that 51.1% of registered African Americans voted); Post Election Statistics – Statewide: 02/06/2010, LA. SECRETARY ST. (Feb. 17, 2010), http://electionstatistics.sos.la.gov/Data/Post_Election_Statistics/Statewide/2010_0206_sta_pdf [hereinafter Post Election Statistics – Statewide: 02/06/2010] (showing that in 2010, 61.8% of registered voters in Orleans Parish were African American, and represented 53.21% of the total voters, indicating that 28.16% of registered African Americans voted); Post Election Statistics – Statewide: 10/22/2011, LA. SECRETARY ST. (Nov. 03, 2011), http://electionstatistics.sos.la.gov/Data/Post-Election_Statistics/Statewide/2011_1022_sta_pdf [hereinafter Post Election Statistics – Statewide: 10/22/2011] (showing that in 2011, 59.4% of registered voters in Orleans Parish were African American, and represented 55.5% of the total voters, indicating that 22.45% of registered African Americans voted).

9. See supra note 8.

10. See supra note 8.
Louisiana’s voting rolls every year, is largely responsible for keeping African-American voter registration and participation below pre-Katrina levels. In the immediate aftermath of Hurricane Katrina, in the interests of justice, the annual canvass was suspended. In suspending the canvass, the Legislature reasoned that emergency conditions proscribed its just application. Two short years later, the Louisiana Secretary of State ignored the distressing reality that incredible remnants of Katrina’s wrath still remained and, without warning, reinstituted that same canvass to the detriment of thousands of displaced African-American voters. Unfortunately, the major justification for suspending the canvass in November 2005—the mass displacement of voters—persisted in 2007.

Despite federal courts’ previous broad interpretations of voting “change” in Section 5 jurisprudence, the court reviewing the decision to reinstitute the canvass found that the reinstatement was not a voting “change” and therefore was not subject to further Section 5 review. As a result, countless African-American voters in New Orleans were both physically and forcibly civically displaced. This unjust outcome is evidence that Section 5

11. H.R. Con. Res. 2, 2005 Leg., 1st Extraordinary Sess. (La. 2005). Due to the displacement of residents, disruption of the mail service and the massive number (327,000) of change-of-address forms filed by evacuees in the wake of Hurricanes Katrina and Rita, the Legislature suspended the annual canvass of the voting rolls in November 2005. Id. In the months following Katrina, qualified voters were scattered across the country and changed addresses often as they moved from one temporary living facility to the next. Marc Kaufmann, 1 Million People Can’t Go Home for Months, WASH. POST, Sept. 6, 2005, http://www.washingtonpost.com/wpdyn/content/article/2005/09/05/AR2005090501629.html. The Legislature determined that the canvass could not be conducted under the aforementioned emergency conditions. H.R. Con. Res. 2, 2005 Leg., 1st Extraordinary Sess. (La. 2005). HCR 2 passed unanimously in both the House and Senate. 2005 First Extraordinary Session: HCR2, LA. ST. LEGISLATURE, http://www.legis.la.gov/Legis/Billlnfo.aspx?i=103575 (last visited Apr. 3, 2013) (follow “Votes” hyperlink).


13. See infra Part III; see also HENRY J. KAISER FAMILY FOUND., supra note 4, at 3.

14. See infra Part III; see also HENRY J. KAISER FAMILY FOUND., supra note 4, at 7.

15. NAACP v. Hampton Cnty. Election Comm’n, 470 U.S. 166 (1985) (broadly defining voting “change” and finding a change under Section 5).


17. This Article focuses on the voting disparities between African-American and white voters.
is not agile and flexible enough to provide a quick remedy—or a remedy at all—for the mass disenfranchisement that can result in the wake of natural disasters.

Overall, Section 5 preclearance has been an effective weapon in defeating various discriminatory voting changes advanced by Louisiana’s state and local governments. However, Section 5 fell short of protecting African-American voters from a retrogressive voting change—the reinstitution of the annual canvass—after Katrina. As a result, African-American voting strength was severely diluted in New Orleans. Seven years after Katrina, African-American voters continue to suffer the consequences of this attenuation and are increasingly unable to elect their candidates of choice.

While Katrina represents one isolated event, hurricanes are hitting the Gulf Coast with greater ferocity and increased frequency. The coastal states of Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, Virginia, Florida, and North Carolina are covered by Section 5 of the Voting Rights Act. These states are significant because they house more than half of the nation’s African-American voting population. A second disaster akin to Katrina could easily rip through one of these states, force a massive displacement of its residents, and thereby upset the balance of voting opportunities between African-American and white voters. Katrina and other hurricanes have taught Southern coastal states that evacuation is

in New Orleans because the majority of New Orleans voters identify with one of these racial groups. However, the number of voters identifying as “other,” while growing, is still quite small. Compare Registration Statistics - Parish, LA. SECRETARY ST. (Apr. 1, 2013), http://www.sos.la.gov/tabid/757/Default.aspx (showing that 18,362 individuals reported as “other” in April 2013), with Registration Statistics - Parish, LA. SECRETARY ST. (Jan. 1, 2012), http://www.sos.la.gov/tabid/757/Default.aspx (showing that 17,337 individuals reported as “other” in January 2012).


19. See infra Part IV.

20. See supra notes 8, 12.

21. See supra note 12.


essential to survival. Nightmares of hurricanes past combined with this learned-through-experience drive to evacuate make mass evacuations more likely. Each hurricane season, a genuine threat exists that a forced mass migration akin to the one caused by Katrina could occur in other covered states. Should this occur, the identical problems plaguing African-American voters in New Orleans could be repeated in other jurisdictions. Further, hurricanes are not the only type of natural disaster during which forced migration could occur. Any significant natural calamity, including tornadoes and earthquakes, could compel minority voter displacement in other jurisdictions covered by Section 5.

Additionally, covered jurisdictions continue to attempt to disenfranchise minority voters by manipulating voting practices and procedures. For example, the Secretary currently faces litigation in the Eastern District of Louisiana alleging violations of the National Voter Registration Act (NVRA). Similar lawsuits have been filed in other covered jurisdictions. Following Louisiana’s model, covered jurisdictions may easily use a mass evacuation as an opportunity to further disenfranchise minority voters. Modern blatant discrimination in voting practices and procedures, coupled with the genuine threat of disaster-related mass displacement, renders the question of Section 5 flexibility increasingly significant.

This Article argues that Section 5, in its current form, is not agile enough to preserve the rights of protected voters in instances of mass disaster or catastrophe when forced mass migration occurs. Following this Introduction, Part II of this Article offers a brief synopsis of the historical relevance of Section 5 in covered jurisdictions. Part III discusses the politicizing of disasters, chronicles how political circumstances have

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27. See Colbert & Sumpter, supra note 25.

28. See id.


changed following Hurricane Katrina, and reviews the Louisiana Legislature’s decision to suspend the canvass immediately following the hurricane to protect the rights of displaced voters. Part IV asserts that sudden reinstitution of the canvass was a voting “change” that should have been objected to under Section 5 and examines how the Code of Federal Regulations (CFR) and the Supreme Court have defined retrogressive voting practices and procedures. It argues that the reviewing court and the Department of Justice should have deemed the reinstitution of the canvass a voting change and affirmatively disallowed it. Part V reviews these concerns in the political context and claims that Section 5 is not flexible enough to protect against broad based disenfranchisement of African Americans forced to migrate or evacuate in the face of natural disasters or other demographic-altering calamities. Part V further proposes a way to ensure that voters have access to adequate processes to seek remedies and recommends altering the retrogression standard in order to account for the large-scale displacement of voters in the wake of natural disasters.

II. A BRIEF OVERVIEW OF SECTION 5

This Part briefly examines the historical underpinnings of Section 5 of the 1965 Voting Rights Act. Section 5 mandates federal preclearance of changes in voting laws in states with a history of racial discrimination in voting practices and procedures. Congress enacted it to protect the Fifteenth Amendment’s fundamental guarantee of the right to vote free from racial discrimination. States required to comply with Section 5, or “covered states,” are those that have a history and ongoing pattern of voting discrimination. The pattern of racial discrimination in voting must not only be continuous, but systemic and widespread, occurring at all levels of government. Additionally, Section 5 contains a formula for determining

34. 42 U.S.C. § 1973c. Covered jurisdictions must submit any proposed voting changes to the United States District Court for the District of Columbia or to the United States Attorney General for preclearance. The Attorney General then has sixty days to object to the change. If no objection is filed within sixty days, the jurisdiction can implement its change. The Attorney General objects, the jurisdiction may seek preclearance from a three-judge panel of the District Court for the District of Columbia, which will make a determination without deference to the Department of Justice’s findings. States or political subdivisions must follow this preclearance procedure for voting changes if they used any test or device as a condition for voter registration on November 1, 1964, and if either less than 50% of age-eligible persons living there were registered to vote on that date or less than 50% of such persons voted in the Presidential election of that year. Section 4 of the Voting Rights Act, U.S. DEP’T JUST., http://www.justice.gov/crt/about/vot/misc/sec_4.php#formula (last visited May 3, 2013).
which states qualify for coverage under its mandated basic levels of compliance.\(^{36}\) This formula takes into account turnout figures in the 1964, 1968, and 1972 presidential elections and the presence of prohibitive devices, such as literacy tests, to identify jurisdictions with the most egregious histories of systemic and entrenched racism.

Section 5 of the Voting Rights Act replaced the federal courts’ prior practice of deciding procedural voting discrimination claims on a case-by-case basis.\(^{37}\) It provided better enforcement mechanisms where courts decided that such discrimination had occurred.\(^{38}\) Unlike the federal courts’ previous ad-hoc determinations, Section 5 established a basic level of compliance to which covered states and their political subdivisions must adhere.\(^{39}\) Due to its long history of racial discrimination in voting procedures and practices, Louisiana and its political subdivisions are covered by Section 5 preclearance requirements.\(^{40}\)

Prior to the passage of the Voting Rights Act of 1965, Louisiana employed various procedural hurdles to discourage and prohibit African Americans from participating in the political process.\(^{41}\) These nefarious hurdles included literacy and understanding tests, poll taxes, and the grandfather clause.\(^{42}\) After the passage of Section 5, Louisiana stubbornly continued to devise creative schemes to suppress African-American voting strength.\(^{43}\) Some of the most glaring examples of these methods took place

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36. See id.

37. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (noting that “ingenious” defiance of court orders by the covered jurisdictions prompted Congress to conclude that case-by-case litigation was no longer sufficient).

38. Id.


42. Id.

43. Id. For example, just three years after the passage of the Voting Rights Act, Louisiana enacted state laws that allowed parish councils and school boards to switch to at-large elections, thereby suppressing African-American voting strength in majority African-American districts. Id. at 112. In 1991, Louisiana sought to use another creative plan to “pack” African-American voters, by placing African-American voters in a few districts in order to dilute their overall strength. Voinovich v. Quilter, 507 U.S. 146, 153 (1993). Further, in St. Bernard Citizens for Better Government v. St. Bernard Parish School Board, plaintiffs brought a challenge to a parish redistricting plan that attempted to abolish four school board district seats and replace two of the remaining seven single-member district seats with two at-large seats. St. Bernard Citizens for Better Gov't v. St. Bernard Parish Sch. Bd., CIV.A. 02-2209, 2002 WL 2022589, at *1 (E.D. La. Aug. 26, 2002). The effect of such a change would have been the overall dilution of minority voting power through the abolition
in the African-American voting stronghold of the state—Orleans Parish. Historically, Louisiana’s state and local governments have enacted a considerable amount of racially discriminatory voting legislation, thereby justifying Louisiana’s continued inclusion as a covered jurisdiction under Section 5 of the 1965 Voting Rights Act.

III. THE POLITICIZING OF DISASTER

This Part chronicles the multitude of challenges inherent in administering elections in New Orleans after Hurricane Katrina. In doing so, it examines both lawmakers’ attempts to resolve those dilemmas and Louisiana’s white citizens’ attempts to benefit from them. It also identifies the latest and most disquieting effort to disenfranchise African-American voters by purging them from the voting rolls.

A. A Portrait of Pre-Katrina New Orleans’ Voting Demographic

Prior to Hurricane Katrina, the percentage of African-American voters in Orleans Parish had risen to sixty-four percent. Between 1960 and 2000, the white population of New Orleans shrunk exponentially. This white flight phenomenon rendered it increasingly difficult in racially-polarized New Orleans for white candidates to be elected to citywide offices.

44. See infra Part III.

45. Until 1868, only white men were allowed to vote in Louisiana. See Engstrom et al., supra note 41, at 105. The grandfather clause was introduced in Louisiana in 1898, limiting the vote to educated property holders whose fathers or grandfathers were registered to vote in 1867. Id.; Paul A. Kunkel, Modifications in Louisiana Negro Legal Status Under Louisiana Constitutions 1812-1957, 44 J. NEGRO HIST. 1, 18 (1959). In an effort to maintain exclusively white voting power, Louisiana also employed understanding clauses, instituted poll taxes, held all-white democratic primaries, purged rolls, and prohibited elected officials from helping illiterates vote until the passage of the Voting Rights Act in 1965. See Engstrom et al., supra note 41, at 105.


48. See supra note 47.
example, in 2002, the City of New Orleans elected its fourth consecutive African-American mayor, who served from 2002 to 2010. Additionally, African Americans were elected to every open citywide judgeship in 2002, 2003, and 2004. Despite opposition by noteworthy white candidates, African Americans won races for the citywide elected offices of District Attorney, Clerk of Criminal District Court, and Criminal Sheriff in 2002, 2003, and 2004, respectively. The collateral consequences of Katrina, however, severely diluted the prodigious power that African Americans held over the franchise.

The mass displacement of New Orleans' citizenry was one of the most distressing consequences of Katrina's physical devastation. Over fifty failures in the levees and flood walls that were believed to protect New Orleans submerged eighty percent of the city under tens of billions of gallons of saltwater. As a result, property was decimated and death, for


51. See supra note 50.


53. See supra Part II; Neuman & Schmitt, supra note 52.

54. Michael Grunwald & Susan B. Glasser, Experts Say Faulty Levees Caused Much of
many, was certain.55 People climbed into their attics, scrambled onto roofs, and prayed that they would not be swallowed up by the rising, dirty water.56 Those that who able swam and walked through chest and neck-deep water to the shelters of last resort, the Louisiana Superdome and the New Orleans Convention Center.57 Several days after the levees breached, mass evacuations began.58 New Orleanians were scattered to forty-five of the fifty states and were not given government help to return.59 As a result, Hurricane Katrina displaced more than one million Southern Louisianans.60 The great majority of these displaced New Orleanians were African American.61

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60. See Marc Kaufmann, 1 Million People Can’t Go Home for Months, WASH. POST, Sep. 6, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501629.html. In September and October 2005, the Federal Emergency Management Agency (FEMA) approved 265,000 applications for “temporary housing” and 12,000 trailers for displaced individuals. GABE ET AL., supra note 1, at 14.

While impermanent, this period of mass displacement was far from brief. Professor William Quigley, a prolific authority on Katrina-related discrimination, argues that race and poverty disproportionately impacted African-American Katrina survivors' sustained displacement. According to Professor Quigley:

In 2006, Texas reported that over 250,000 displaced people remained in the state—41% of the displaced households reported income of less than $500 per month. 81% of the displaced were black, 59% were jobless, most had at least one child at home, and many had serious health issues. Houston alone was home to 150,000 of the displaced. Another 100,000 people displaced by Katrina were in Georgia, and more than 80,000 in metro-Atlanta—most of whom also needed long-term housing and mental health services.

He further contends that the flood damage is evidence of a "legacy of racial discrimination and poverty[.]" First, higher-income and overwhelmingly white residents historically occupied the higher ground in New Orleans. Poor people and African Americans generally lived in the lower-lying, more flood-prone neighborhoods—for example, thirty-eight of the city's forty-seven extreme-poverty census tracts flooded. Those hit hardest by the flood were disproportionately non-white—the flooded areas were eighty percent non-white. Second, an overwhelming majority of the poor in New Orleans—eighty-four percent—were African American. Third, at the time of the flood, African-American renters made up the majority of the city. With rents skyrocketing due to the scarcity of rental housing, many African-American renters were priced out of the market. Professor Quigley aptly surmises that due to the prolonged displacement of African-American evacuees, "[v]oting wrongs trumped voting rights" in post-Katrina election politics, jurisprudence, and policy.

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62. See supra Part III.
64. Id. at 55–56 (citations omitted).
65. Id. at 60.
66. Id. at 60–61 (citations omitted).
67. Id. at 50.
B. The Challenges Facing Elections in Post-Katrina New Orleans

In response to these catastrophe-induced changes in population and in anticipation of a severe dilution in minority voting strength, African-American legislators began crafting a package of legislation aimed at protecting displaced African-American voters’ rights. At the same time, some white officials and citizens began planting the seeds of resistance. Members of the Louisiana Legislative Black Caucus crafted a legislative package, which passed during the 2005 and 2006 1st Extraordinary Sessions of the Louisiana Legislature.

The 2005 and 2006 Extraordinary Sessions of the Louisiana Legislature were specifically called to address post-Hurricane Katrina and Hurricane Rita matters, including voting rights. Acts 2, 3, and 4 of the 2006 Extraordinary Session tackled the quagmire of issues facing displaced voters by creating processes that offered these displaced voters opportunities to vote in the first election post-Katrina despite their displacement. Act 2 addressed the narrow problem facing displaced voters who had registered to vote by mail pre-Katrina. Act 2 allowed these displaced voters the option to vote by absentee mail ballot without first voting in person at the polls or Office of the Registrar. Act 3 addressed a more pressing issue facing

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73. See § 18:115; See also La. H.B. 12.

74. Salatheia Bryant, Voter Registration Drive Targets Katrina Refugees, HOUS. CHRON. March 4, 2006, http://www.chron.com/news/hurricanes/article/Voter-registration-drive-targets-Katrina-refugees-1856237.php. Prior to 2005, many community and civic groups annually canvassed their respective communities and implemented door-to-door voter registration drives. Id. The process included assisting new registrants in filling out registration cards and submitting them to the Office of the Registrar via mail. Id. As a result, many voters, largely African Americans, registered
displaced voters—it created temporary satellite voting locations throughout the state to be operated through the early voting period preceding election day. Finally, Act 4 permitted displaced residents increased time to request and return absentee mail ballots and allowed absentee fax ballots as late as election day. Additionally, in the First Extraordinary Session of 2005, the Legislature suspended the annual canvass of the voting rolls, the mechanism used to purge Louisiana voting rolls each spring. Together, the voting changes approved in the 2005 and 2006 Extraordinary Sessions comprised a helpful, though limited, restoration of voting rights that had almost been destroyed by mass displacement.

C. The Purging of the Rolls

Louisiana law mandates that registered voters who have changed their residential address without notifying the Louisiana Department of State must be purged from the voting rolls. This process is known as the canvass of the voting rolls. Annually, the Department of State ensures that Louisiana voting rolls are current by verifying voters’ address changes with the United to vote by mail. Id. The Louisiana Election Code, however, required persons who registered by mail to make their first vote in person, either on election day or during the early voting period. § 18:115(F). Unfortunately, displaced citizens who had recently registered by mail could not possibly show up in person to cast that first vote. See supra Part II.

75. Act 3 required the availability of early satellite voting at the Office of the Registrar in any Louisiana parish with a population of 100,000 for eligible voters in a municipal election, conducted pursuant to an approved emergency plan. § 18:401.4; see La. S.B. 22.


States Postal Service.79 If a voter’s address has changed, she is immediately sent an address confirmation card. Should the voter fail to respond to the address confirmation card, she is placed on the inactive voters list,80 where she may remain for a maximum period of two congressional voting cycles, or just over four years.81 Upon the expiration of the four-year period, the voter’s name is purged from the voting rolls and her registration is cancelled.82 The annual canvass is one of two processes that the Secretary may use to challenge and cancel voters’ registrations.83

During the First Extraordinary Session of 2005,84 in the interests of justice, the Louisiana Legislature wisely passed House Concurrent Resolution 2, temporarily suspending the annual canvass.85 The Resolution stated that it was impracticable to enforce the provisions of the canvass equitably without disenfranchising a disproportionate number of Louisiana citizens.86 Along with Acts 2, 3, and 4, House Concurrent Resolution 2 was one of few legislative instruments that preserved displaced citizens’ access to the franchise.87 House Concurrent Resolution 2 rightly overcame Section 5 scrutiny.88

The resolution’s protection, however, was short-lived. Without warning, the Secretary reinstituted the canvass of the voting rolls in July 2007, using it to challenge and ultimately cancel89 the registrations of tens of thousands of displaced African-American voters from New Orleans. Accordingly, local and national civil rights leaders and voting rights advocates expressed outrage at this sudden challenge and cancellation of displaced registrants.90 In response, the Secretary declared that the targeted

79. Id.
80. Id. § 18:193(A).
81. See id. § 18:193(E).
82. Id.
83. Id. § 18:193 (describing the use of “address confirmation card[s]” for voters suspected of moving and the “immediate notification” process for suspected voter fraud).
84. The First Extraordinary Session of 2005 was specifically called to address Katrina-related emergency issues, including voting rights of displaced residents. See BLANCO, supra note 71.
86. Id. House Concurrent Resolutions clearly declared that mail service was irreparably disrupted and that citizens were forced to file forwarding orders and change of address forms en masse. Id.
87. See supra Part III.A.
88. See supra Part III.A.
90. Id.
voters’ registrations would have been cancelled years before but for the storm.\(^91\)

In actuality, the challenge and cancellation process that the Secretary devised was both exploitive and illegal. The Secretary’s actions were wholly insensitive to the Katrina victims’ storm-created vulnerabilities, specifically their enduring displacement.\(^92\) Although African Americans were the most populous demographic in Orleans Parish before Katrina, they were also the least prosperous and the most impoverished, and therefore, the least capable of quickly returning and rebuilding.\(^93\) Before Katrina, the majority of African Americans in New Orleans earned less than $16,000 per year and worked for low wages in the city’s economic engine—the tourism industry.\(^94\) With no pecuniary resources or adequate government support, African-American families are still attempting to accrue funds and secure housing in order to return home.\(^95\)

Professor Quigley argues that the long-term “displacement of African Americans was due to a lack of resources and blatant discrimination[,]”\(^96\) fueled by a movement to transform New Orleans into a “smaller, older, whiter and more affluent city.”\(^97\) In *Katrina Voting Wrongs: Aftermath of...*
Hurricane and Weak Enforcement Dilute African-American Voting Rights in New Orleans, he expounds:

In the earliest months after Katrina, however, most of the estimated 60,000 to 100,000 people who returned to New Orleans were white and middle class. One African American elected representative described the situation in Fall 2006 as follows: “The minority became the majority, and the majority became the minority. That changed the whole outlook of the political scene.”

By his actions, the Secretary inappropriately purged qualified voters, ignoring the glaring reality that many displaced Louisianans, faultlessly, were not yet able to reoccupy the properties they once resided in. Unscrupulously, the Secretary took advantage of the continued crisis of displaced voters.

More disquieting, however, was the legal maneuvering utilized to purge displaced voters from the voting rolls. Shockingly, the Secretary penalized displaced voters by improperly charging them with voter fraud. The purge affected voters who had simply changed their address after evacuating and who should have been placed on the inactive voter list for two federal election cycles before being purged from the rolls. Instead, the Secretary’s office cross-referenced displaced citizens’ change of address information with the United States Postal System and made a systematic decision to challenge their registration more expeditiously under the section of the canvass statute proscribing voter fraud.

In Louisiana, voter registration may be challenged and subsequently cancelled using one of two distinct processes. Registration may be cancelled as a consequence of the annual canvass if a voter changes addresses, fails to respond to an address confirmation card, is placed on the inactive voter list, and neglects to remedy their inactive status for two federal election cycles. Under a more expedited system, voter registration may also be challenged and subsequently cancelled if the Registrar of Voters

98. Quigley, Katrina Voting Wrongs, supra note 63, at 60 (citing Levy, supra note 93).

99. Id.

100. Surely, the Secretary was aware of displaced voters’ sustained inability to participate in elections and maintain their active voting status in 2007. Id. at 73 (asserting that “dramatically fewer African Americans than whites did not and could not return to New Orleans,” and that this was not a secret, it was documented). Current Secretary of State, Jay Dardenne was also a State Senator from 1992–2006 and served in the Legislature during Katrina. Lieutenant Governor John ‘Jay’ Leigh Dardenne, Jr.’s Biography, PROJECT VOTE SMART, https://votesmart.org/candidate/biography/4479/jay-dardenne-jr (last visited May 7, 2013).


102. Id. § 18:193.

103. Id. §§ 18:193(A)–(F).
alleges voter fraud.\textsuperscript{104} If the Registrar of Voters “has reason to believe” that a voter has been “illegally or fraudulently” registered or “has deliberately given an incorrect address,” he shall immediately notify the voter by mail.\textsuperscript{105} The voter fraud provision only applies if a registrant is believed to no longer be a qualified voter “for a reason other than a change of residence or address.”\textsuperscript{106} In cases of deliberate voter fraud, the Registrar of Voters shall send the voter a letter stating the alleged voting irregularity and informing the voter that he or she must appear in person at the Office of the Registrar “within twenty-one days after the date on which the notice was mailed to show cause why his name should not be removed.”\textsuperscript{107} This letter is commonly referred to as the twenty-one-day notice letter. When a voter fails to respond, the Secretary cancels that voter’s registration immediately.\textsuperscript{108} This 2007 purge scheme was illegal because it improperly challenged and cancelled voters whose residences changed by using the expedited removal process reserved for voter fraud, instead of the four-year process appropriate for address changes.\textsuperscript{109}

In fact, the Secretary identified potentially challengeable registrants because they had changed addresses due to displacement. In administering the illegal purge, he cross-checked the names and addresses of Louisiana voters with those of neighboring states hosting high numbers of Katrina evacuees.\textsuperscript{110} Under the authority of the challenge and cancellation statute controlling fraud, he sent notices to those voters to physically appear in their Office of the Registrar to prove their qualifications to vote.\textsuperscript{111} Instead of following the traditional canvass procedure of waiting two federal election cycles before purging voters with address discrepancies from the rolls, the Secretary prematurely purged any voter whose address had changed, and who failed to physically appear within a month’s time.\textsuperscript{112} Sadly, there was absolutely no evidence that targeted displaced voters had committed voter fraud.

\textsuperscript{104} Id. § 18:193(G).

\textsuperscript{105} Id.

\textsuperscript{106} See id.


\textsuperscript{108} Id.

\textsuperscript{109} Id. § 18:193. This section is reserved for “illegal” or “fraudulent” behavior. Id.

\textsuperscript{110} Stephen Maloney, Voter Purge Drops 20,000 from Louisiana Rolls, NEW ORLEANS CITY BUSINESS, Aug. 27, 2007.

\textsuperscript{111} Press Release, Sec’y of State Jay Dardenne, La. Dep’t of State, Secretary Dardenne: Voters Registered in Multiple States Should Notify Registrar of Voters to Avoid Being Cancelled (June 15, 2007) [hereinafter Press Release Jay Dardenne].

\textsuperscript{112} See supra notes 109–111.
Under the guise of fairness, the Secretary extended the time period for physically appearing at the Office of the Registrar from twenty-one days to thirty days, and issued thirty-day notice letters to identified “fraudulent” voters. This nine-day extension was not beneficial in helping displaced voters maintain their active voting status. It was persuasive, however, in convincing the court that no Section 5-reviewable voting change had been unlawfully implemented. In extending the time period to physically appear, the Secretary ostensibly gave displaced voters additional notice and response time. Truthfully, it robbed displaced voters of four years to clarify their voting status and cure any deficiencies. If the Secretary insisted on exploiting displaced voters’ vulnerabilities by unfairly reinstituting a purge in 2007, he should have done so using the change of address provision. That provision would have given displaced voters ample notice of their jeopardized voting status. While there was no legitimate policy reason for the Secretary to reinstitute the canvass in 2007, the Secretary could have made the reinstitution more equitable by only challenging displaced voters’ registrations under the change of address provision. Section 5 is not equipped to successfully respond to this type of flawed reasoning.

The Secretary’s purging of voter registration rolls had a significant negative effect on African-American voters in Orleans Parish, and as a result, African-American Katrina survivors have become civically displaced. The Secretary purged over 21,000 voters from the voting rolls in July of 2007. A disproportionate percentage of those purged were African Americans from Orleans Parish. In 2008, the Secretary purged an

113. See Press Release Jay Dardenne, supra note 111 (discussing the thirty-day and twenty-one-day notices).


116. Id. at *2.


118. See id. § 18:193(A)–(E).

119. Id.

120. Id.

121. See Scott, supra note 89.


124. See id.
additional 18,175 voters.125 This compares with only 3681 voters purged in 2006 and 1079 purged in 2003.126

The right to vote equalizes United States citizens.127 While the floodwaters have long since receded and the streets of New Orleans are dry, the political effects of Katrina linger.128 Large numbers of citizens have returned, but they remain disconnected from the political process.129 According to Louisiana law, these citizens’ registrations will remain cancelled until they can affirmatively prove, through a long and arduous process, that they are not registered to vote in another jurisdiction.130 The Voting Rights Act sought to protect African-American voters from this precise type of discriminatory voting practice.131 Astonishingly, the reinstitution of the annual canvass was not considered a voting change for the purpose of Section 5 review.132

IV. WAS THE REINSTITUTION OF THE ANNUAL CANVASS A “CHANGE” IN VOTING PRACTICES AND PROCEDURES POST-KATRINA?

Immediately following the reinstitution of the annual canvass, the NAACP Legal Defense Fund filed suit in the Eastern District of Louisiana challenging its legality.133 In that case, Segue v. State, Plaintiffs compared the reinstitution of the canvass to an illegal “voter registration cancellation procedure” that the Department of Justice had not properly pre-cleared.134 Plaintiffs specifically challenged the Secretary’s use of a thirty-day pre-notice letter, which the Secretary sent to all registrants whom the Secretary

125. Id.
126. See id.
128. See Levy, supra note 93.
129. See id.
130. LA. REV. STAT. ANN. § 18:193(H) (2012). “If the registrar determines that a voter’s registration has been cancelled through error of the registrar, the registrar shall reinstate the voter’s registration as though the cancellation had never occurred . . . .” Id. This was not the case. See id. To be reinstated, displaced voters had to prove that they were not registered elsewhere. Id. This documentation was not available to individuals who had never registered elsewhere. See infra Part IV.
133. See id. at *1.
134. Id.
deemed registered to vote in other states, as an illegal voting change.135

The thirty-day pre-notice letter feigned to afford displaced voters additional time to respond to the Registrar of Voters' request for verification of voter eligibility.136 According to the Secretary, the thirty-day pre-notice letter was intended to extend the time period for response beyond the twenty-one-day period enumerated in the statute.137 However, the law limits the use the twenty-one-day notice procedure solely to cases wherein the Secretary alleges voter fraud.138 The Secretary should have applied the more lenient procedures that apply to inactive voters to displaced voters.139

In Segue, in response to the Plaintiffs' claim that the reinstitution of the canvass warranted Section 5 review, the court erroneously stated that the Plaintiffs' Section 5 claim was "wholly insubstantial and completely without merit."140 Although the court ultimately concluded that it lacked jurisdiction, the court stated in dictum that the thirty-day pre-notice letter extended the prior, precleared twenty-one-day notice and therefore afforded displaced voters more protection.141 The court gave no indication that it understood that circumstances had changed significantly between the original enacting of the canvass and the reinstitution of the canvass or that hurricane-created exigent circumstances remained between the suspension of the canvass two years prior and the reinstitution of the canvass in 2007.142 The court completely disregarded the reality that the State Legislature suspended the canvass in response to a situation that had not yet been cured—the displacement of throngs of Southern Louisianians.143

The district court's refusal to appreciate the negative impacts of the Secretary's change in law is discouraging with regard to the courts' future ability to enforce Section 5 protections.144 The addition of the thirty-day pre-notice letter served as a red herring and distracted the court from the

135. Id.
136. Id. at *2.
137. Id. at *5.
139. Id. § 18:193(A)-(E).
141. Id. at *6.
142. See id. at *5. On a separate issue, the court decided that one of the Plaintiffs did not have standing to bring the lawsuit and that even if she did, Louisiana law provided for the purge and the Department of Justice already been pre-cleared it. Id.
144. Segue, 2007 WL 2900207, at *5 (discussing the merits of Section 5 in dictum).
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illegality of the Secretary’s actions. Together, the Secretary’s use of the fraud provision to challenge voter registration and the artificially beneficial thirty-day pre-notice letter constituted a Section 5 voting change. The reviewing court failed to address the fact that the Secretary of State cleverly hid a significant voting change in a previously pre-cleared voting law.

A. What Is a Voting Change?

Supreme Court jurisprudence broadly defines “change” for the purpose of Section 5 review and has previously recognized a wide array of actions as Section 5-reviewable. This range of actions includes changes involving the manner of voting, candidacy requirements and qualifications for holding office, changes in the composition of the electorate that may vote for candidates for a given office, and the creation or abolition of an elective office.

In Riley v. Kennedy, the Court clarified the formula for determining Section 5-reviewable voting “changes.” In deciding whether a voting practice constitutes a change, the practice must be compared with the covered jurisdiction’s “baseline.” The Court defines the jurisdiction’s baseline as the most recent practice that was both pre-cleared and in “force or effect” before the current practice. The reviewing entity must then

145. See id. (discussing the merits of Section 5 in dictum).
147. See id.
148. Perkins v. Matthews, 400 U.S. 379 (1971) (holding that a change in the location of polling places is a Section 5-reviewable voting change).
149. Hampton Cnty. Election Comm’n, 470 U.S. 166 (finding that a change in candidate filing deadline is a voting change under Section 5); Dougherty Cnty. Bd. of Educ. v. White, 439 U.S. 32 (1978) (holding that a rule requiring board of education members to take unpaid leave of absence while campaigning for office is a voting change that is subject to Section 5 review); Hadnott v. Amos, 394 U.S. 358 (1969) (finding that a change in candidate filing deadline is a voting change under Section 5).
150. Perkins, 400 U.S. at 388, 394 (finding that changing in the boundary lines of voting districts qualifies as a Section 5-reviewable voting change and that a change from a ward system to an at-large election is a voting change under Section 5); see also City of Richmond v. United States, 422 U.S. 358 (1975).
151. McCain v. Lybrand, 465 U.S. 236 (1984) (finding that when an official position changes from being appointed to being elected, that is a change under Section 5); Lockhart v. United States, 460 U.S. 125 (1983) (finding that an increase in the number of city councilors is a voting change under Section 5).
153. Id.
154. Id. (citing Young v. Fordice, 520 U.S. 273, 282 (1997)).
examine whether the practice or procedure is different enough from the baseline to qualify as a change.\textsuperscript{155} If the practice or procedure is markedly different from the baseline, it is subject to a federal government pre-clearance examination before it goes into effect.\textsuperscript{156}

In its \textit{Riley} analysis, the Court offered a helpful historical account of Section 5 "voting change" jurisprudence and gave an analysis of the precedents that address the Section 5 term of art "in force or effect."\textsuperscript{157} For example, in \textit{Perkins v. Matthews}, the Court examined what practice had been "in force or effect" on Mississippi's 1964 coverage date.\textsuperscript{158} In \textit{Perkins}, the actual voting practice directly contravened state law.\textsuperscript{159} The pertinent election law, passed in 1962, required at-large elections for city aldermen, however, the City of Canton elected aldermen by wards in both 1961 and 1965.\textsuperscript{160} In 1969, the city decided to follow the letter of the law rather than its previous practice and elect aldermen in at-large elections.\textsuperscript{161} The Supreme Court held that the city's attempt to adhere to the law and move to at-large elections required Section 5 pre-clearance because election by ward was "the procedure in fact 'in force or effect' on the coverage date."\textsuperscript{162} This meant that by beginning to follow the letter of the law the city affected a change for the purpose of further Section 5 scrutiny.

Likewise, in \textit{City of Lockhart v. United States}, the City of Lockhart used a number-post system to elect its council for over fifty years, even though the validity of the system under state law was unclear. As in \textit{Perkins}, the Court held that the number-post system was "in force or effect" and that the proper comparison was between the new system and the number-post system, regardless of whether the number-post system violated state law.\textsuperscript{163} Any change from the number-post system required Section 5 review.\textsuperscript{164}

In \textit{Riley}, the Court ultimately decided that a Section 5-reviewable

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\textsuperscript{155} \textit{Id.} at 421; \textit{Young}, 520 U.S. at 281.
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\textsuperscript{156} Presley v. Etowah Cnty. Comm’n, 502 U.S. 491, 495 (1992) (defining whether a new voting practice or procedure is "different" enough to require preclearance).
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\textsuperscript{157} \textit{Riley}, 553 U.S. at 422.
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\textsuperscript{158} See \textit{id.} (citing \textit{Perkins v. Matthews}, 400 U.S. 379 (1971)) (noting that absent any change since the jurisdiction’s coverage date, the “baseline” is the practice “in force or effect” when the jurisdiction became covered under the Voting Rights Act).
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\textsuperscript{159} \textit{Id.}
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\textsuperscript{164} \textit{Id.}
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change does not exist when a jurisdiction returns to a previously pre-cleared voting practice if the new procedure was never actually in "force or effect." In Riley, the Court considered whether Alabama was required to obtain new preclearance in order to reinstate an election practice that had prevailed before the enactment of a law that the Alabama Supreme Court struck down before it went into effect. The Court held that the struck-down law was never "in force or effect" and reversion to the old, pre-cleared law was, therefore, not a reviewable voting change. Under the Perkins and City of Lockhart standards, the reinstatement of the Secretary's illegal version of the annual canvass is a Section 5-reviewable voting change. Under both the Perkins and City of Lockhart standards, the practice that is used at the time of the change is the practice that is in "force or effect." Clearly, the baseline or most recent practice both pre-cleared and "in force or effect" before the alleged change was the suspension of the canvass. The suspension of the canvass is markedly different from the newer, illegal canvass; therefore the reinstitution of the canvass should be deemed a reviewable Section 5 change.

In Segue, the reinstated annual canvass does not correspond to the facts upon which the Riley Court ruled, and therefore, the Riley holding does not apply. In Riley, the Court found that there was no voting change because the 1985 law was invalidated before it could take effect. The practice "in force or effect" never changed—it was the old law. By contrast, in Segue, the suspension of the canvass was both pre-cleared and enacted in 2005. The canvass was suspended for two complete years before its reinstitution in

165. See id. at 428.

166. Id.

167. In 1985, the Alabama legislature passed a law providing that any vacancy on the Mobile County Commission be filled by special election. Id. at 406. Before passage of the 1985 legislation, vacancies were filled by gubernatorial appointment. Id. This new law was properly reviewed and pre-cleared. Id. The 1985 law was challenged and held to violate the state's constitution. Id. Years later, in 2004, the Alabama legislature passed a law providing for gubernatorial appointments to fill county commission vacancies. Id. Suit was filed alleging that the return to a previously pre-cleared practice should have been subject to Section 5 review. Id. The Court disagreed, noting that reversion to the State's prior practice did not rank as a 'change' requiring preclearance. The Court reasoned that 1985 law was never in "force or effect" because it had been struck down. See id. at 406.

168. See id. at 422.


171. Id.

2007\text{\textsuperscript{173}} and was clearly the practice "in force or effect."\text{\textsuperscript{174}} Unlike the \textit{Riley} Court, the \textit{Segue} court should have found the Secretary's reinstitution of the annual canvass a Section 5-reviewable voting "change."

Additionally, in \textit{Segue}, the court erroneously reasoned that the thirty-day pre-notice letter was a \textit{beneficial} extension of the twenty-one day notice and therefore not a substantive voting change. This reasoning is severely flawed.\text{\textsuperscript{175}} First, the thirty-day pre-notice letter was used in an illegal manner.\text{\textsuperscript{176}} The Secretary targeted displaced voters by using procedures specifically reserved for voter fraud.\text{\textsuperscript{177}} There is no indication that any of the tens of thousands of displaced voters challenged under this provision acted fraudulently and were no longer "qualified to be registered for a reason other than a change of residence or address," or had "deliberately given an incorrect address."\text{\textsuperscript{178}} The thirty-day pre-notice letter was not a benign extension of the twenty-day notice letter because the statutory provision provides notice letter procedures only in cases of voter fraud.\text{\textsuperscript{179}} Instead, it was an unquestionably novel change in voting practice that should have automatically triggered Section 5 review.\text{\textsuperscript{180}} The Secretary exceeded his authority and misapplied the law.\text{\textsuperscript{181}} He acted as a legislator and made the autonomous decision to treat displaced voters as fraudulent registrants.

In \textit{Segue}, the district court disregarded the Supreme Court's broad formulation of "voting change," instead concluding that Section 5 review is unnecessary every time a state official deviates from state procedures.\text{\textsuperscript{182}} Wholly discounting the intent of Section 5, the court further noted that voters actually received more protection with the thirty-day letter.\text{\textsuperscript{183}} Section 5 strips covered jurisdictions of autonomy in deciding which voting changes

\text{\textsuperscript{173}} \text{La. H.R. Con. Res. 2.}
\text{\textsuperscript{174}} \text{Segue, 2007 WL 2900207, at *4; Riley, 533 U.S. at 428.}
\text{\textsuperscript{175}} \text{\textit{Id.} at *5 (providing reasoning in dictum).}
\text{\textsuperscript{176}} \text{\textit{See} LA. REV. STAT. ANN. § 18:193(G)(1) (2012).}
\text{\textsuperscript{177}} \text{\textit{See id.}}
\text{\textsuperscript{178}} \text{\textit{See id.}}
\text{\textsuperscript{179}} \text{\textit{See id.}}
\text{\textsuperscript{180}} \text{Covered jurisdictions must pre-clear all voting changes with the federal government because some of these states had a history of enacting "new and slightly different requirements" that had discriminatory effects. Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969).}
\text{\textsuperscript{181}} \text{\textit{La. Const.} art. 4, § 7 (enumerating the powers and duties of the Louisiana Secretary of State); \textit{La. Const.} art 2 § 2 ("Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.").}
\text{\textsuperscript{183}} \text{\textit{Id.}; see 42 U.S.C. § 1973c (2006).}
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must be submitted for preclearance.184 The Supreme Court has clarified that any change in voting practice or procedure in covered jurisdictions may have the potential for covert discrimination against minorities and should be subject to federal government preclearance regardless of perceived beneficial impact.185 The reinstatement constituted a reversion to an old policy that had the potential to dilute minority voting strength.186

The district court’s flawed reasoning in Segue highlights a larger Section 5 issue. The court could not appreciate that the reversion to a previously pre-cleared policy was, in fact, a voting change because voters’ circumstances had so drastically changed in the aftermath of Hurricane Katrina.187 The court wholly ignored the underlying differences between pre- and post-Katrina New Orleans.188 Katrina victims simply were not physically able to respond to a mandate to physically appear to prove their qualifications to vote.189 Even if the Secretary had properly challenged displaced voters under the voter fraud provision, requiring voters to personally appear while displaced was a voting change in itself.190 Section 5 does not contemplate this difference.191 The reinstatement of the canvass should have been deemed a reviewable change.

B. What Is Retrogression?

Covered jurisdictions must submit proposed voting changes to the United States Attorney General or seek a declaratory judgment from the United States District Court for the District of Columbia before proposed voting changes become law.192 The reviewing entity must determine that the submitted change neither has the purpose nor the effect of “denying or abridging the right to vote on account of race, color, or membership in a language minority group.”193 The reviewing entity will interpose an objection to a submitted change if it finds that the voting change has a

186. See id.
188. Id.
189. See Levy, supra note 93.
190. Id.
192. Id.
discriminatory purpose or effect on protected groups.\textsuperscript{194} Likewise, the reviewing entity will interpose an objection to the change if the Attorney General is unable to make a determination regarding discriminatory purpose or effect.\textsuperscript{195} If the Attorney General objects to the change, the jurisdiction may seek preclearance from a three-judge panel of the District Court for the District of Columbia, which will make a determination without deference to the Department of Justice findings.\textsuperscript{196} An appeal from the district court's decision goes directly to the Supreme Court.\textsuperscript{197}

Reviewing entities apply the CFR and Supreme Court jurisprudence when determining whether a new voting practice or procedure is retrogressive.\textsuperscript{198} According to the CFR, "[a] change affecting voting is considered to have a discriminatory effect or purpose under section 5 if it will lead to retrogression in the position of members of a racial . . . group . . . with respect to their opportunity to exercise the electoral franchise effectively."\textsuperscript{199} Retrogression is defined as making members of a group worse off than they had been before the change.\textsuperscript{200} According to the CFR, when the Attorney General determines whether a voting procedure creates retrogression in voting rights, he will consider the following factors:

(a) The extent to which reasonable and legitimate justification for the change exists;

(b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

(c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;

(d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change . . . .\textsuperscript{201}

\textsuperscript{194} ld.

\textsuperscript{195} ld.


\textsuperscript{197} See id.

\textsuperscript{198} 28 C.F.R. §§ 51.55--56 (2012).

\textsuperscript{199} Id. § 51.54(b).

\textsuperscript{200} Id.

\textsuperscript{201} Id. § 51.57. The Attorney General will make comparisons based upon the conditions existing at the time of submission. Id. Also,

[where at the time of submission of a change for section 5 review there exists no other lawful standard, practice, or procedure for use as a benchmark . . . the Attorney General's
The Supreme Court has further clarified the retrogression standard and requires that the reviewing entity compare the proposed voting practice to the existing voting practice. If the proposed change is worse with respect to a minority voting group’s ability to exercise their right to vote and influence the election, it is retrogressive. In determining retrogression, the reviewing entities will consider whether the change is free of discriminatory purpose and retrogressive effect “in light of, and with, particular attention” paid to the requirements of the Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution and other constitutional and statutory provisions aimed at safeguarding the right to vote free from racial discrimination. Supreme Court and other federal court decisions guide reviewing entities’ inquiry into retrogressive effect.

In Holder v. Hall, the Supreme Court explained that in determining whether a proposed voting change has a retrogressive effect, the proposed change must be analyzed against the present law. In Holder, the Court held that “the baseline for comparison is present by definition; it is the existing status.” It further stated that, “[w]hile there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur.”

The Supreme Court’s retrogression standard is best explained in Beer v. United States. In Beer, the City of New Orleans proposed a reapportionment plan for its councilmanic districts. The plan created a new majority-

\[\text{Id. § 51.54(c)(4).} \]


203. \text{Id.}

204. 28 C.F.R. § 51.55 (2012).

205. \text{Id. § 51.56.}

206. Holder v. Hall, 512 U.S. 874 (1994). In Holder v. Hall, members of the NAACP and various other civil rights groups brought a Section 2 vote dilution claim arguing that a multimember county commission worked to dilute the voting strength of African-American voters. \text{Id. at 877.} The United States District Court for the Middle District of Georgia rejected the claims. \text{Id. at 878.} The United States Court of Appeals for the Eleventh Circuit reversed and remanded. \text{Id. at 879.} On cert, the Supreme Court reversed and remanded agreeing that a Section 2 claim could not be maintained because the size of a governing body is not subject to vote dilution claims under Section 2. \text{Id. at 885.}

207. \text{Id. at 883.}

208. \text{Id. at 883–84.}

In response, the City of New Orleans filed an action against the government under Section 5, which the United States District Court for the District of Columbia dismissed. The City appealed, and the Supreme Court held that the plan did not violate Section 5 because it enhanced the position of racial minorities with respect to their effective exercise of the right to vote by creating a majority African-American City Council district. The plan did not violate Section 5 because it did not place African-American voters in a worse position than they were in before the change. In *Beer*, the Supreme Court held that the retrogression standard under Section 5 can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] ... whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting.

The reviewing entity will interpose an objection to the change if it diminishes the ability of minority voters to affect the franchise or if they are unable to determine whether the change is discriminatory in purpose and retrogressive in effect. If the voting change augments or does not affect minority and language groups' voting rights, it is not deemed retrogressive.

Under both the *Holder* and *Beer* standards, the reinstitution of the annual canvass is retrogressive. The *Holder* Court clarified that retrogression is determined by comparing the proposed practice to the existing legal practice. The comparison is between present law and proposed change. In the case of displaced Katrina victims, the existing legal status was the suspension of the canvass in the interests of justice. The reversion to the canvass made it more difficult to access the ballot box than it was prior to the storm by disproportionately and illegally cancelling registrations.
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Sadly, the Segue court never even took the time to make this comparison. To the detriment of tens of thousands of displaced voters, the court erroneously determined that there was no voting change.

The Beer standard asks whether the proposed change places minorities in a worse position than they were in before the change. The reinstitution of the newly-minted annual canvass placed minority voters in a much worse position than they were in before the change. Before the change, there was no annual canvass and displaced voters were able to vote according to residence without being immediately purged due to address discrepancies. Further, before the change, voters were not required to bear the expense of travel across state lines to prove their voting qualifications. Likewise, before the change, voters were not burdened with the task of presenting themselves to the Registrar in person to petition for their rights to be reinstated. Also, before the change, displaced voters were still active, registered Louisiana voters, regardless of frequent relocations or inability to return home and rebuild. Quite simply, after the change, many displaced voters were disqualified from participating in elections. Surely, being robbed of the fundamental right to vote places minority voters in a worse position than they were in before the change.

The Segue court abandoned its responsibility to closely scrutinize Louisiana’s proposed voting changes post-Katrina. Given Louisiana’s long and recent history of racial discrimination in voting practices and procedures, the court should have requested federal review by a three-judge panel. If the court had more closely inspected the voting changes, it would have found evidence of the discriminatory effect of the voting change. Quite simply, the court shirked its duty to safeguard the rights of minority voters.

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221. See supra Part IV.
222. For voting purposes, displaced citizens are residents. L. REV. STAT. ANN. § 18:101 (2012). Under Louisiana law, residency rests not on physical presence, but on whether a person "intends" to reside in a place indefinitely. Id. Displaced people were still returning home in 2007. See supra Part IV.
223. See supra Part IV.
224. See supra Part IV.
225. See supra Part IV.
226. See supra Part IV.
227. See supra notes 40–43 and accompanying text.
229. Registrar Drops More Than 21,000, supra note 122.
V. SECTION 5 LACKS FLEXIBILITY

The court is not wholly culpable for the disenfranchisement that displaced voters suffered. While federal officials regrettably failed to appropriately apply the regression standard, it is also true that current Section 5 standards are not flexible enough to adapt to protect voters in the aftermath of natural disaster. The CFR’s and Supreme Court’s definition of "retrogression" is inadequate when proposed voting changes are offered post-calamity. The retrogression standard itself is problematic because it assumes that principal underlying conditions have not shifted pre- and post-proposed voting change. As a result, it makes it more likely that erroneous retrogression decisions will be made when natural disasters have occurred. Katrina caused mass displacement and altered the demographic composition of the city, rendering it impossible to reasonably compare the proposed change to the existing practice without taking these circumstances into account.

Perhaps unintentionally, Professors John Jeffries and Daryl Levinson argue for considering Section 5 retrogression in context. They rationalize that the Section 5 retrogression test is logical because its ultimate substantive goal of expanding minority voting strength is clear. They agree, however, that the test should and does determine "whether a given law will be judged constitutional [based] on the state of affairs that existed before the change." Further, Professors Jeffries and Levinson write that “[r]atcheting change in one direction is a coherent legal strategy if and only if one knows which way to go.” Just application of the retrogression standard assumes, then, that the baseline or benchmark for comparison is static. In emergent calamitous circumstances, the baseline is dynamic, rendering a just application of the retrogression standard unfeasible.

The reviewing entity must examine a voting change in context to determine whether the reversion is retrogressive. In the case of Hurricane Katrina, it was virtually impossible to reasonably compare the proposed change to the existing legal practice without taking into account how fundamental circumstances had radically changed. The most obvious change

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231. See Levy, supra note 93.
233. Id.
234. Id. at 1212.
235. Id. at 1215.
236. Id.
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is that of population shift. Because thousands of New Orleans voters were temporarily displaced from New Orleans after Katrina, it is illogical to compare any proposed voting change mandating physical presence post-Katrina to the existing practice pre-Katrina without accounting for this difference. Other essential changes that must be considered in any post-disaster retrogression analysis include lack of familiar poll workers, reduced polling locations, inaccessibility to candidates and elected officials, and inability to properly notice voting changes. After a disaster any of these conditions might exist in Section 5 covered states, and if they do, these factors will likely lead to retrogression among minority voters. The district court’s and Department of Justice’s unwillingness or inability to consider altered circumstances pre- and post-Katrina led to approval of discriminatory voting changes. The retrogression standard was simply not flexible enough to address the collateral consequences of Katrina, an unfortunate situation that may likely be repeated.

The retrogression standard does not contemplate the difficulty inherent in ascertaining retrogression after a disaster. On its face, the reversion to the canvass appears to be a benign reversion to an old practice that does not affect minority voters’ access to the franchise. The effect of the reinstated canvass, however, is retrogressive. The cancellation of the registrations of displaced voters resulted in both a substantial decline in the numbers of African-American officials elected to office and in the number

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238. See supra note 237.

239. Levy, supra note 93 (discussing the possible logistical difficulties in holding an election so soon after the hurricane).

240. See supra note 237.

241. See supra Part IV. According to Professor Quigley, approximately

300 of the 442 polling places in New Orleans were damaged or leveled in the aftermath of Katrina and as much as 80% of the population of the city, including most of the black voter majority and most of the 2,300 voting commissioners, had not returned weeks after the storm.

Quigley, *Katrina Voting Wrongs*, supra note 63, at 59 (citation omitted). See also Levy, supra note 93 (discussing possible logistical difficulties inherent in holding an election after the hurricane). These figures are particularly noteworthy in contemplating changes circumstances post-disaster.


of African-American active voters participating in elections in Orleans Parish.\textsuperscript{246} Worse, given the myriad indignities that Katrina victims suffered, for many African Americans, the cancellation of their right to vote extinguished their final connection to home.\textsuperscript{247}

This Article does not suggest a complete rewriting of the retrogression standard. Instead, it suggests that in determining retrogression, reviewing entities should contemplate mass displacement of minority voters due to catastrophe. The CFR must establish guidelines with clear factors indicating what reviewing entities should consider when examining retrogressive voting changes in the aftermath of natural disasters in covered jurisdictions. Specific guidelines currently exist regarding redistricting voting changes, voting changes dealing with annexations, and changes in electoral systems.\textsuperscript{248} A guideline concerning natural disasters could easily be added to the CFR.\textsuperscript{249}

The CFR must be amended, and the new guideline should state that:

a. In instances of disaster, when a voting practice is suspended and subsequently reinstated, the reinstitution should be deemed a voting change; and

b. The Attorney General or the District Court must examine the voting change in context to determine whether or not the reversion to the old law is retrogressive; and

c. The Attorney General and District Court must examine the voting change's discriminatory effect in context in order to determine retrogression.

Had the above guideline been in effect in 2007, the reinstitution of the canvass would have been deemed retrogressive.

VI. CONCLUSION

Hurricane Katrina taught the nation a series of lessons about preparedness, poverty, levee breaches, and compassion. Those of us who served in government during that terrible time learned about justice and the ease with which basic civil rights can be manipulated and denied.\textsuperscript{250} For a

\textsuperscript{246} See supra notes 8, 120–124 and accompanying text.

\textsuperscript{247} See Levy, supra note 93.

\textsuperscript{248} See, e.g., 28 C.F.R. § 51.59 (2008); id. § 51.60.

\textsuperscript{249} Id. § 51.59; id. § 51.60. See also Administrative Procedure Act, 5 U.S.C. § 553 (2006) (providing the agency rulemaking guidelines that the Department of Justice would follow when amending the procedures governing the administration of Section 5 of the Voting Rights Act).

\textsuperscript{250} See Levy, supra note 93; supra Part IV.
powerful few, the aftermath of Hurricane Katrina was an opportunity to erase African-American political power in the City of New Orleans.\textsuperscript{251} In many ways, they were successful.\textsuperscript{252} Since Katrina, white officials hold citywide elected positions at a rate higher than in the past twenty-five years.\textsuperscript{253} For the first time in fifteen years, there are two white City Council-At-Large members, and the City Council is majority white.\textsuperscript{254} For the first time since 1977, the city has elected a white mayor.\textsuperscript{255} Today, it is impossible for an African American to win a citywide seat without significant white political support.\textsuperscript{256} New Orleans has regressed nearly thirty years.

This "political regression" is due, in part, to the denial of the fundamental right to vote to masses of displaced New Orleanians in the critical time period immediately following Hurricane Katrina.\textsuperscript{257} Sadly, the safeguards set in place by the federal government to protect against such disenfranchisement are just as broken and inadequate as the levees.\textsuperscript{258} Section 5 is simply not agile enough to provide a quick remedy, or a remedy at all, for broad disenfranchisement of African Americans forced to migrate or evacuate in the face of natural disasters or similar calamities. Because hurricanes continue to bombard the Gulf Coast of the United States,\textsuperscript{259} changes must be made to Section 5 to give greater guidance to the reviewing entity when it is faced with the aftermath of a natural disaster. These amendments must be made permanent in the CFR to bolster assurance that all citizens will have equal access to the ballot box, no matter the circumstances.


\textsuperscript{252} See supra notes 46–52 and accompanying text.


\textsuperscript{256} See supra notes 46–52 and notes 253–255 accompanying text.

\textsuperscript{257} See supra Part IV.

\textsuperscript{258} See supra Part IV.

While a case may be made regarding the continued utility of Section 5 in some covered jurisdictions, it is clear that the local evils Section 5 seeks to remedy still exist in Louisiana. Despite a high rate of return to the state, African-American Katrina survivors still maintain low voter participation numbers due to an illegal canvass that untimely purged them from voting rolls. Voter confusion persists as, due to constant changes in the rebuilding, polling places in African-American precincts are still changed at will. The effort to reduce minority voting strength may not be as obvious as in 1965, but it still persists in Louisiana. Louisiana’s African-American citizens continue to desperately need Section 5 voting protections.

The real question is whether Section 5, in its current form, is agile enough to capture local needs and address contemporary voting discrimination concerns in response to catastrophe. Section 5 does not explicitly address the problems that arise when protected groups are force to relocate to other jurisdictions in the United States. While it has not outlived its usefulness, it has not adapted to changing circumstances either.

260. Scott, supra note 89.
261. See Levy, supra note 93.
262. See supra Part IV.